IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA; STATE OF ARKANSAS, ARKANSAS DIVISION OF YOUTH SERVICES; STATE OF KANSAS; ATTORNEY GENERAL BILL SCHUETTE, FOR THE PEOPLE OF THE STATE OF MICHIGAN; STATE OF MONTANA; STATE OF NORTH DAKOTA; STATE OF OHIO; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF WYOMING, CALLAWAY PUBLIC SCHOOL DISTRICT; ARNOLD PUBLIC SCHOOL DISTRICT,

Plaintiffs,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR., in his Official Capacity as United States Secretary of Education; UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her Official Capacity as Attorney General of the United States; VANITA GUPTA, in her Official Capacity as Principal Deputy Assistant Attorney General; UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; JENNY R. YANG, in her Official Capacity as Chair of the United States Equal Employment Opportunity Commission; UNITED STATES DEPARTMENT OF LABOR; THOMAS E. PEREZ, in his Official Capacity as United States Secretary of Labor; DAVID MICHAELS, in his Official Capacity as the Assistant Secretary of Labor for the Occupational Safety and Health Administration,

Defendants

Case No. 4:16-CV-03117

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

The State of Nebraska, two Nebraska public school districts, and nine additional States seek a declaration that various federal agencies have violated the Administrative Procedure Act and numerous other federal laws by rewriting the unambiguous term "sex" under Title VII and Title IX to mean or include "gender identity," thereby seeking to control even local school determinations regarding how best to designate locker room and bathroom assignments. Without engaging in any rulemaking procedures—and in violation of the plain text and longstanding meaning of Titles VII and IX— the Department of Education ("ED") issued a joint letter with the Department of Justice ("DOJ") on May 13, 2016, declaring "significant guidance." The letter confirmed that the federal executive branch has formalized its new definition of the term "sex" and threatened enforcement action against any of the more than 100,000 elementary and secondary schools that receive federal funding if those schools choose to provide students with showers, locker rooms, and restrooms designated by biological sex, consistent with one's genes and anatomy.

Plaintiffs include States from all regions of the country that authorize, support, supervise, or operate school systems and other institutions subject to ED's final agency action and enforcement threat. Plaintiffs stand united behind the constitutional principle that it is the duty of Congress to legislate, while it is the duty of the Executive Branch, including its various federal agencies, to administer and enforce the laws that Congress enacts. Defendants lack authority to amend those laws by executive fiat and to threaten Plaintiffs and their

subdivisions with the loss of billions of dollars in federal education funding if Plaintiffs continue to abide by the laws Congress actually passed.

I. PARTIES

A. Plaintiffs

1. Plaintiff State of Nebraska is subject to Title VII as the employer of thousands of people statewide. The State of Nebraska also oversees and controls several agencies that receive federal funding subject to Title IX. For example, the Nebraska Department of Corrections ("NDOC"), the Nebraska Correctional Youth Facility ("NCYF"), Geneva North High School, and Kearney West High School are operated by the State of Nebraska and receive federal funding subject to Title IX. For federal fiscal year 2015-2016, the Nebraska Department of Correctional Services has received to date $125,107 in federal education funds. For federal fiscal year 2015-2016, Geneva North received $59,584.70 in federal education funds and Kearney West received $143,407.45 in federal education funds. Additionally, for federal fiscal year 2015-2016, the Nebraska Department of Education received $328,604,163 in federal funding for K-12 education, of which $308,534,665 was distributed to local school districts in the State of Nebraska. For the federal fiscal year 2016-2017, the Nebraska Department of Education estimates that it will receive federal funding in the amount of $332,421,410, of which $312,215,578, will be distributed to local school districts.

2. Plaintiff Callaway Public School District ("Callaway PSD") is an independent school district located in Callaway, Custer County, Nebraska. Additional information about Callaway Public School District is designated *infra*.

3. Plaintiff Arnold Public School District ("Arnold PSD") is an independent public school district located in Arnold, Custer County, Nebraska. Additional information about Arnold Public School District is designated *infra*.

4. As Title IX has expressly permitted until now, Nebraska law allows for school districts to adopt policies which maintain separate locker room and restroom facilities for different sexes. Neb. Rev. Stat. § 79-2,124 (Reissue 2014) provides: "The Nebraska Equal Opportunity in Education Act does not prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes."

5. Plaintiff States of Arkansas, Kansas, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota and Wyoming are similarly situated to the State of Nebraska in that one or more of the following circumstances is present: (1) they are employers covered by Title VII, (2) their agencies and departments are subject to Title IX, (3) their agencies and departments receive other federal grant funding that requires, as a condition of the grant, compliance with the Title IX provisions at issue in this lawsuit, and/or (4) they have public educational institutions, school districts, departments, or agencies in their State that are subject to Title IX.

6. For instance, Arkansas' Division of Youth Services also operates residential treatment centers for juveniles adjudicated delinquent, including the Mansfield Juvenile Treatment Center, the Mansfield Juvenile Treatment Center for Girls, and the Arkansas Juvenile Assessment and Treatment Center. Additionally, Arkansas operates several other specialized schools, including the Arkansas School

for Mathematics, Science, and the Arts, the Arkansas School for the Blind and Visually Impaired, and the Arkansas School for the Deaf. Those institutions all receive federal funding subject to Title IX.

7. The State of Wyoming, through its Department of Family Services, directly operates residential treatment centers for juveniles adjudicated delinquent, the Wyoming Boys' School and Wyoming Girls' School. Wyoming also plans for and constructs all K-12 public school facilities through a centralized state agency, the school facilities division of the state construction department. These entities are subject to Title IX.

8. The State of South Carolina received approximately $870 million in federal education funds in federal fiscal year 2015-2016.

9. The State of Kansas received $534.7 million in federal education funds during federal fiscal year 2015-2016, of which $511 million was distributed to local school districts in the State of Kansas. For federal fiscal year 2016-2017, Kansas estimates that the amounts received from the federal government and distributed to local school districts will be approximately the same as in the 2015-2016 federal fiscal year. Kansas also operates two specialized schools, the Kansas School for the Deaf and the Kansas State School for the Blind that receive federal funding subject to Title IX. For federal fiscal year 2015-2016, the Kansas School for the Deaf received $325,826 in federal education funds, and the Kansas State School for the Blind received $517,901 in federal education funds. Kansas estimates that both schools will receive approximately the same amount in federal education funds in the 2016-2017 federal fiscal year. In addition, Kansas's Department of Corrections operates

two juvenile correctional facilities, the Kansas Juvenile Correctional Complex and the Larned Juvenile Correctional Facility. The Larned facility houses only males. Both facilities provide education services including high school diploma and general education development ("GED") programs. Each of these facilities receives federal funding subject to Title IX. The Kansas Constitution delegates to the Kansas State Board of Education the "general supervision of public schools, educational institutions and all the educational interests of the state, except educational functions delegated by law to the state board of regents." Kan. Const. art. 6, § 2(a). On June 14, 2016, the Kansas State Board of Education officially opposed the May 13, 2016 "guidance" issued by ED and DOJ, and unanimously adopted a response, which states in part: "The recent directive from the civil rights offices of the United States Department of Education and the U.S. Department of Justice regarding the treatment of transgender students removes the local control needed to effectively address this sensitive issue. We must continue to provide our schools the flexibility needed to work with their students, families and communities to effectively address the needs of the students they serve." Kansas State Department of Education, Kansas State Board of Education statement in response to "Dear Colleague" letter on Title IX federal guidance, *available at* http://bit.ly/28LzQ1Q.

B. Defendants

10. Defendant ED is an executive agency of the United States and responsible for the administration and enforcement of Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 ("Title IX").

11. Defendant John B. King, Jr., is the United States Secretary of Education. In this capacity, he is responsible for the operation and management of ED. He is sued in his official capacity.

12. Defendant DOJ is an executive agency of the United States and responsible for the enforcement of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, known as Title VII. DOJ also has the authority to bring actions enforcing Title IX. Exec. Order No. 12250, 28 C.F.R. Part 41 app. A (1980).

13. Defendant Loretta A. Lynch is the Attorney General of the United States and head of DOJ. She is sued in her official capacity.

14. Defendant Vanita Gupta is Principal Deputy Assistant Attorney General at DOJ and acting head of the Civil Rights Division of DOJ. She is assigned the responsibility to bring enforcement actions under Title VII and Title IX. 28 C.F.R. §42.412. She is sued in her official capacity.

15. Defendant Equal Employment Opportunity Commission ("EEOC") is a federal agency that administers, interprets, and enforces certain laws, including Title VII. EEOC is, among other things, responsible for investigating employment and hiring discrimination complaints.

16. Defendant Jenny R. Yang is the Chair of the EEOC. In this capacity, she is responsible for the administration and implementation of policy within EEOC, including the investigating of employment and hiring discrimination complaints. She is sued in her official capacity.

17. Defendant United States Department of Labor ("DOL") is the federal agency responsible for supervising the formulation, issuance, and enforcement of

rules, regulations, policies, and forms by the Occupational Safety and Health Administration ("OSHA").

18. Defendant Thomas E. Perez is the United States Secretary of Labor. In this capacity he is authorized to issue, amend, and rescind the rules, regulations, policies, and forms of OSHA. He is sued in his official capacity.

19. Defendant David Michaels is the Assistant Secretary of Labor for OSHA. In this capacity, he is responsible for assuring safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance. He is sued in his official capacity.

II. JURISDICTION AND VENUE

20. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this suit concerns Defendants' *ultra vires* revision of the term "sex" under multiple provisions of the United States Code and the new obligations Defendants are imposing on Plaintiffs under Title VII and Title IX. This Court also has jurisdiction to compel an officer of the United States or any federal agency to perform his or her duty pursuant to 28 U.S.C. § 1361.

21. Venue is proper in the Federal District Court of Nebraska pursuant to 28 U.S.C. § 1391 because the United States, several of its agencies, and several of its officers in their official capacity are Defendants, and because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District; and Plaintiffs Callaway Public School District and Arnold Public School District are both

employers subject to Title VII, and recipients of federal monies subject to Title IX restrictions in Custer County, Nebraska.

22. This Court is authorized to award the requested declaratory relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, and the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201–2202. The Court is authorized to order corrective action under the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 611.

III. STATEMENT OF FACTS

A. State Law

23. Nebraska law allows for school districts to adopt policies which maintain separate locker room and restroom facilities for different sexes. Specifically, Neb. Rev. Stat. § 79-2,124 (Reissue 2014) provides: "The Nebraska Equal Opportunity in Education Act does not prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes." Title IX regulations issued by ED likewise expressly allow recipients of federal funding to "provide separate toilet, locker room, and shower facilities on the basis of sex," provided that the facilities provided for "students of one sex" are "comparable" to the facilities provided for "students of the other sex."

24. Nebraska law provides school districts with the flexibility to fashion policies which weigh the dignity, privacy, and safety concerns of all students, while accommodating the legitimate interests of individuals who self-identify as having a gender that is the opposite of their sex. *See, e.g.*, Neb. Rev. Stat. §§ 79-501 and 79-526(1).

25. Nebraska law also allows employers to provide a bona fide occupational qualification ("BFOQ") on the basis of "sex" (as well as on the basis of "religion," "disability," "marital status," or "national origin" – but *not* "race" or "color") (*See* Neb. Rev. Stat. §§ 48-1104 and 48-1108) including where necessary to avoid litigation, such as for actions based in tortious and constitutional invasions of privacy. Privacy-based BFOQs on the basis of "sex" are rooted in the physiological differences between males and females consistent with their genes and anatomy, not gender identity.

26. The additional Plaintiff states all have similar laws, policies, or practices. Indeed, Arkansas law even provides that there shall be "[s]eparate toilet rooms for males and females" in any "factory, manufacturing establishment, workshop or other place where six (6) or more males and females are employed . . .". Ark. Code § 11-5-112(a).

B. The Meaning of Title VII and Title IX

27. In 1964, Congress enacted Title VII of the Civil Rights Act, making it illegal for employers to invidiously discriminate on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

28. There is almost zero legislative history regarding the meaning of "sex" in Title VII. Representative Howard Smith added the term in a last-minute amendment as part of an attempt *to prevent* the Civil Rights Act from passing. *See* Clay Risen, "The Accidental Feminist: Fifty years ago a Southern segregationist made sure the Civil Rights Act would protect women. No joke.", Slate.com (Feb. 7, 2014), *available at* http://slate.me/1kls7oY.

29. Eight years after enacting Title VII, Congress passed Title IX of the Education Amendments of 1972. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." 20 U.S.C. § 1681.

30. Title IX defines "program or activity" to include "all the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance." *See* 20 U.S.C. §1687(1)(A).

31. Congress added a specific amendment ensuring that regulated entities could maintain separate male and female dormitories. 20 U.S.C. § 1686 ("Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.").

32. The legislative history reveals there were concerns that Title IX would force a school to allow women into intimate facilities designated for men only, and vice versa. After Senator Dominick questioned whether Title IX's sweeping language would forbid female- and male-specific dormitories, Senator Bayh, the bill's sponsor, quelled those concerns:

> Mr. BAYH: I do not read this as requiring integration of dormitories between the sexes, nor do I feel it mandates the [sexual] desegregation of football fields.

> What we are trying to do is provide equal access for women and men to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, *nor that the men's locker room be [sexually] desegregated.*

117 Cong. Rec. 30407 (1971) (emphasis added).

33. Upon final passage, Senator Bayh stated that Title IX grants various federal agencies authority to craft implementing regulations that provide for "differential treatment by sex," but only where "absolutely necessary" – i.e., "where personal privacy must be preserved." *See* 118 Cong. Rec. 5807 (1972).

34. The regulations implementing Title IX provide, in relevant part, that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular…or other education program or activity operated by a recipient which receives Federal financial assistance." 34 C.F.R. § 106.31(a).

35. The implementing regulations also provide that a funding recipient shall not, on the basis of sex: "Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service; … Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner; … Deny any person any such aid, benefit, or service; … Subject any person to separate or different rules of behavior, sanctions, or other treatment; …[or] Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity." 34 C.F.R. § 106.31(b).

36. They further direct that "[a] recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

37. These regulations are "legislative" and, accordingly, were promulgated according to the notice-and-comment requirements of the Administrative Procedure Act. *See* Nondiscrimination on the Basis of Sex in Education Programs, 40 Fed. Reg. 24128, 23131 (June 20, 1974).

38. Nothing in Title IX's text, structure, legislative history, or accompanying regulations addresses gender identity.

39. The term "gender identity" does not appear in the text of Title IX.

40. The term "gender identity" does not appear in the regulations accompanying Title IX.

41. The legislative history of Title IX reveals no intent to include "gender identity" within the meaning of "sex."

42. The concept of "gender identity" is not a new one. Dr. John Money, a long-time psychologist at Johns Hopkins University, pioneered the term during the 1950s and 1960s. In 1955, he began formulating his famous anagram, G-I/R ("gender-identity/role"), and in 1966 he helped found the "Gender Identity Clinic" at Johns Hopkins. *See* University of Minnesota, Program in Human Sexuality, "John Money bio: John William Money, PhD, 1921-2006, *available at* http://www.sexualhealth.umn.edu/education/john-money/bio (last visited Sept. 13, 2016). In 1969 he published his well-known work, "Transsexualism and Sex