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Reply to: Florida

April 20, 2018

VIA U.S. Mail and E-Mail

John-Paul Chaisson-Cárdenas,
Iowa 4-H Youth Development Program Leader
Iowa State University
State 4-H Youth Development
Extension 4-H Youth Bldg
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RE: 4-H Extension USDA-NIFA transgender "Guidance"

Dear Mr. Chaisson-Cárdenas:

By way of brief introduction, Liberty Counsel is a litigation, education, and public policy organization with an emphasis on First Amendment liberties. We have offices in Florida, Virginia, and Washington, D.C., and hundreds of affiliated attorneys across the nation.

Liberty Counsel writes on behalf of Iowa 4-H Extension employees, as well as 4-H volunteers, parents and youth participants, whose employment and participation in the 4-H program is threatened by the attached document entitled "4-H Guidance for Inclusion of Individuals of All Gender Identities, Gender Expressions, Sexual Orientations, and Sexes" ("Guidance"). The United States Department of Agriculture ("USDA") National Institute of Food and Agriculture ("NIFA") hosted the document on its website in March 2018, but removed it before the end of that month.

Our adult clients relate to Liberty Counsel that they are involved in the 4-H program because they love working with youth, and desire to assist in positive youth development. They would never discriminate against a youth identifying as the opposite sex, or otherwise as LGBT. However, the Guidance ignores existing affirmative obligations of USDA and the 4-H Extension to accommodate the constitutional privacy and religious free exercise rights of 4-H employees, volunteers, and the vast majority of 4-H youth; and to refrain from discriminating against them on the basis of their statutorily-protected biological "sex."

As you should be aware, the U.S. Departments of Education ("DOE"), Justice ("DOJ"), Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), and various agency officials have been enjoined from asserting that Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their "gender identity" rather than their biological sex. *Texas v. United States*, 201 F. Supp. 3d 810, 815–16 (N.D. Tex. 2016), *order clarified*, No. 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016), and *appeal dismissed*, No. 16-11534, 2017 WL 7000562 (5th Cir. Mar. 3, 2017). The injunction applies nationwide. Nevertheless, the Guidance and verbal directives from Extension administrators based thereon take similar positions regarding such access.

The Guidance is discriminatory, unconstitutional, and without legal authority. It makes a number of unscientific and false claims regarding issues of sexuality, and takes a radical political position on human sexuality. It misstates the law regarding protected classes, and falsely adds "sexual orientation" and "gender identity or expression" or "transgender" status to those classes affirmatively recognized by federal and state law, and by fiat, elevates them above statutorily protected classes of biological "sex" and "religion."

The document is the basis for instruction from the Iowa 4-H Extension to our clients, to the effect that:

1. 4-H employees, volunteers, and other youth must treat individuals consistent with a false, subjectively claimed "gender identity," even if the youth's program records or identification documents show her or she is actually and objectively the opposite biological sex.

2. "4-H, including all paid and volunteer personnel, as well as youth members, will use [false] pronouns and names consistent with" a claimed opposite-sex identity.

3. Despite Title IX's implementing regulations permitting 4-H to provide separate restrooms, locker rooms, shower facilities, housing, and athletic teams, and single-sex classes based on biological sex, youth claiming an opposite-sex identity must be allowed into the facilities, housing and programs of the opposite sex.

4. Failure to address "transgender" youth by false gender pronouns; failure to allow "transgender" youth full access to restrooms, lockers, and showers of the opposite sex; and failure to assign "transgender" youth to sleeping quarters of the opposite sex, without informing opposite sex youth or their parents, will be treated as "harassment" and "discrimination.".

It is not "discrimination" for 4-H program participants to continue using correct (as opposed to false) gender pronouns. Government may not force others to call a person something he or she is not, nor to force others to assent to a lie, in matters of conscience,

religious belief, and biology. If "there is any fixed star in our constitutional constellation, it is that **no official**, high or petty, **can prescribe what shall be orthodox in** politics, nationalism, **religion, or other matters of opinion or force citizens to confess by word or act their faith therein**." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). (Emphasis added).

It is not "discrimination" to maintain longstanding sex-appropriate accommodations for males and females, based on legitimate, unchangeable biological differences between the two sexes. It is not "discrimination" to respect safety and privacy rights based on biological sex; nor is it "discrimination" to respect parental rights to control the associations of their minor children; and maintain safeguards against child sexual abuse or voyeurism, whether by adults or other youth.

The Supreme Court has acknowledged the lawfulness of sex-based standards that flow from legitimate biological differences between the sexes. These sex-based standards ensure fairness, equity, and safety; satisfy reasonable expectations of a constitutional right to privacy; reflect common practice in society; and promote core values of dignity and respect between boys and girls.

Anatomical differences between males and females, and the reasonable expectations of privacy that flow from those differences (not "discrimination") account for laws and policies that require or permit separate housing, bathroom, and shower facilities for males and females, and the use of correct gender pronouns. Even Supreme Court Justice Ruth Bader Ginsburg has stated, "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy."[1]

The right to bodily privacy has long been recognized elsewhere in U.S. law. *See, e.g., Doe v. Luzerne County*, 660 F.3d 169, 177 (3d Cir. 2011) (holding that bodily exposure may meet "the lofty constitutional standard" and constitute a violation of one's reasonable expectation of privacy); *Brannum v. Overton County School Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (holding that a student's "constitutionally protected right to privacy encompasses the right not to be videotaped while dressing and undressing in school athletic locker rooms"); *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) ("there is a right to privacy in one's unclothed or partially unclothed body"); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body."). Violations of the right to bodily privacy are most acute when one's body is exposed to a member of the opposite sex. *See Doe*, 660 F.3d at 177 (considering whether "Doe's body parts were exposed to members of the opposite sex" in deciding whether her reasonable expectation of privacy was violated); *Brannum*, 516 F.3d at 494 ("the constitutional right to privacy... includes the right to shield one's body from exposure to viewing by the opposite sex"); *York*, 324 F.2d at 455 (highlighting that the exposed plaintiff was female and the viewing defendant male); *Poe*, 282 F.3d at 138 (citing with approval the Ninth Circuit's emphasis on the different genders of

[1] https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/09/prominent-feminist-bans-on-sex-discrimination-emphatically-do-not-require-unisex-restrooms/

defendant and plaintiff in *York*).

Because sex-based accommodations are based on legitimate biological differences between males and females, it follows that a person's physical biology must dictate which accommodations are appropriate in the 4-H program. Accommodations for biological females logically should be reserved for biological females, not biological males, and vice versa. 4-H has long adhered to this straightforward and logical demarcation.

Assuming, *arguendo,* that biological sex can be "changed" or "reassigned" (which it cannot – there are more than 6,500 unique differences between males and females at the DNA level), the Guidance does not just apply only to those "transgender" individuals who have altered their external biological characteristics to fully match that of their desired sex. Under this Guidance, youth need not undergo "sex reassignment surgery," or even cross-sex hormone therapy, in order to be recognized as, and thus entitled to, the accommodations and treatment associated with the opposite gender. A male who identifies as "female" could remain a biological male in every respect, and still must be treated in all respects as a "female."

The subjectivity, variability and fluidity of "gender transition" undermines the legitimate purposes that justify different, biologically based, male-female accommodations. For example, by allowing a biological male who retains male anatomy to use female housing, bathroom, and shower facilities, it undermines the reasonable expectations of safety, privacy and dignity of female 4-H youth participants. To the extent the Guidance forbids an adult leader from obtaining parental consent from girls forced into rooming and showering arrangements with males, it undermines parental rights. Particularly at summer camp, camping events, or on overnight trips, 4-H youth of the same biological sex are placed in extremely close proximity to one another when sleeping, undressing, showering, and using the bathroom. Because of reasonable expectations of privacy, 4-H has long maintained separate housing, bathroom, and shower facilities for boys and girls.

To the extent that the Guidance and verbal direction to Liberty Counsel's 4-H clients ignore sincerely-held religious beliefs about the immutable nature of biological sex, sex-based pronouns, youth modesty, and youth safety; and requires the use of false gender pronouns, the Guidance ignores President Trump's Executive Order 13798, which states that **"[i]t shall be the policy of the executive branch to vigorously enforce Federal law's robust protections for religious freedom."** Exec. Order 13798, § 1 (May 4, 2017).

EO 13798 further states that in order to "aid in the consistent application of the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb et seq., and other federal-law protections for religious liberty, the Office of Legal Policy shall coordinate with the Civil Rights Division to **review every Department rulemaking and every agency action submitted by the Office of Management and Budget for review by this Department for consistency with the interpretive guidance**. In particular, the Office of Legal Policy, in consultation with the Civil Rights Division, **shall consider whether such rules might impose a substantial burden on the exercise of religion and whether the imposition of**

that burden would be consistent with the requirements of RFRA. The Department shall not concur in the issuance of any rule that appears to conflict with federal laws governing religious liberty, as set forth in the interpretive guidance." (Emphasis added).

The twenty-point "Memorandum on Federal Law Protections for Religious Liberty" released in conjunction with EO 13798 states:

> Religious liberty is not merely a right to personal religious beliefs or even to worship in a sacred place. It also encompasses religious observance and practice. Except in the narrowest circumstances, **no one should be forced to choose between living out his or her faith and complying with the law**. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting, and programming. (Page 1). (Emphasis added).

Moreover, the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion" just as surely as it protects against "outright prohibitions" on religious exercise. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. _, _ (2017) (slip op. at 11) (internal quotation marks omitted). "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.* (*quoting Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

Government bears a heavy burden to justify a substantial burden on the exercise of religion. "[O]nly those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 718 (1981) (*quoting Yoder*, 406 U.S. at 215).

Even if the government can identify a compelling interest, the government must also show that **denial of an accommodation is the least restrictive means of serving that compelling governmental interest.** This standard is "exceptionally demanding." *Burwell v. Hobby Lobby Stores, Inc*, 134 S. Ct. 2752, 2780 (2014). It requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which may include, in certain circumstances, expenditure of additional funds, modification of existing exemptions, or creation of a new program. *Id.* at 2781.

Title VII's reasonable accommodation requirement for religious belief is not hortatory. As an initial matter, it requires an employer to consider what adjustment or modification to its policies would effectively address the employee's concern, for "[a]n ineffective modification or adjustment will not accommodate" a person's religious observance or practice, within the ordinary meaning of that word. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 400 (2002) (considering the ordinary meaning in the context of an ADA claim). See also *E.E. 0. C. v. Abercrombie & Fitch Stores, Inc*., 135 S. Ct. 2028, 2034 (2015) ("Title VII does not demand mere neutrality with regard to religious practices – that they may be treated no worse than other practices. Rather, it gives them favored treatment.").

Therefore, Liberty Counsel hereby requests written confirmation by May 21, 2018 from the Iowa 4-H Extension and USDA-NIFA as follows:

1. All non-statutory "protected classes" have been removed from Extension nondiscrimination policies to avoid confusion.

2. Where statutorily protected classes of "religion" and "sex" conflict with non-statutory terms like "sexual orientation" and "gender identity or expression," the former will prevail over the latter.

3. The March 2018 "4-H Guidance for Inclusion of Individuals of All Gender Identities, Gender Expressions, Sexual Orientations, and Sexes" is not 4-H Extension policy.

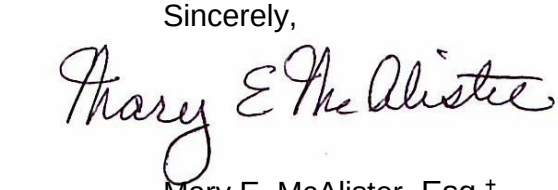
4. All participants in 4-H programs will be provided accommodations and participation in 4-H programs consistent only with biological sex.

5. No 4-H employee, volunteer, parent or youth will be required to use false gender pronouns or terminology as a condition of employment or 4-H participation.

6. "Transgender" youth and adults will be accommodated with participation in all 4-H programs and accommodations consistent with their actual biological sex, and may request (but not demand) false gender pronoun usage by others.

If I do not receive the requested responses, Liberty Counsel will take additional action to prevent irreparable harm to the rights of our clients. Thank you for your prompt attention to this matter.

Sincerely,



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