Angélica Infante-Green
Commissioner

State of Rhode Island
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
Shepard Building
255 Westminster Street
Providence, Rhode Island 02903-3400

February 25, 2025

By electronic and
First Class mail

Gregory P. Piccirilli, Esq.
The Law Centre
R.I. Center for Freedom & Prosperity
P.O. Box 10069
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Re: Regulations Governing Protections for Students' Rights to be Free from Discrimination on the Basis of Sex, Gender, Sexual Orientation, Gender Identity, or Gender Expression, 200-RICR-30-10-1

Dear Attorney Piccirilli:

In your February 13, 2025 petition to Commissioner Infante-Green, which you sent on behalf of the Rhode Island Center for Freedom & Prosperity, you made a request pursuant to Board of Education Regulations 200-RICR- 20-35-2.4 that the Commissioner and the Board of Education repeal the above Regulations (the "LBGTQ+ Regs.") promulgated by the Commissioner. R.I. Gen. Laws § 42-35-6 provides that an agency receiving such a request must, within thirty (30) days, either:

(1) Deny the petition in a record and state its reasons for the denial; or
(2) Initiate rulemaking.

Id.

You advise that the petition was made "in light of recent developments in federal law," which included:

(1) The Executive Order issued by President Trump on January 20 entitled "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government";

(2) Federal caselaw which you claim invalidate the Final Rule issued by the U.S. Department of Education entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33474 (Apr. 29, 2024) (the "Biden Title IX Regs."); and

(3) The "Dear Colleague" letter to K-12 schools and institutions issued by the U.S. Department of Education on February 4, 2025.

As to the referenced Executive Order, the principle of judicial review established in *Marbury v. Madison*[1] makes clear that only courts have the power to strike down laws they find to be unconstitutional, and contrary to the cited Executive Order, the U.S. Supreme Court has made clear that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."[2] Thus, not surprisingly, the cited Executive Order and related Executive Orders issued by President Trump are under legal challenge in federal courts throughout the country.[3]

As to your reliance on the federal caselaw addressing the Biden Title IX Regs, all of the cases you cite are at the preliminary injunction stage, and the one Supreme Court case cited – *United States Dep't of Educ. v. Louisiana*, 603 U.S. 866 (2024) – merely denied a motion for a stay pending appeal. *See id*. at 868. Yet, contrary to your reading of these cases, it is axiomatic that the purpose of a preliminary injunction "'is merely to preserve the relative positions of the parties until a trial on the merits can be held.'" *Starbucks Corp. v. McKinney*, 606 U.S. 339, (2024) (quoting *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)).

Moreover, the federal District Court for the District of New Hampshire specifically rejected the argument that "the Supreme Court has already held that *Bostock* is inapplicable to Title IX." *See Tirrell v. Edelblut*, 2024 WL 4132435 (D.N.H., September 10, 2024) at *15. In addition, while preliminarily enjoining the enforcement of a New Hampshire law prohibiting transgender girls from participating in girls' sports, the Court in *Tirrell* made clear that:

> [w]hile *Bostock* concerned Title VII, its analysis of the logical relationship between sex discrimination and transgender discrimination extends to other contexts. The First Circuit has "recognized that the analytical framework for proving discriminatory

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[1] 5 U.S. 137 (1803) (Marshall, C.J.).

[2] *See Bostock v. Clayton County, Georgia*,140 S.Ct. 1731, 1747 (2020); *see also United States v. Virginia*, 518 U.S. 515 (1996) ("when state actors draw distinctions using sex or gender, the constitutional mandate call[s] for a heightened standard of review . . . because sex or gender generally provides no sensible ground for differential treatment").

[3] As of the date of this writing, there are some seventy-five (75) such legal challenges pending, as per the litigation tracker maintained by *Just Security* (available at https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/). *See, e.g*., *Nat'l Association of Diversity Officers in Higher Ed. v. Trump*, Case No. 1:25-cv-00333-ABA (D. Md. 2025)) (preliminarily enjoining enforcement of President Trump's DEI Orders); *State of New York, et al. v. Donald Trump, et* al., 2025 WL 480770 (D.R.I., 2025) (McConnell, C.J.) (temporarily restraining enforcement of February 14, 2025, letter from the U.S. Department of Education's Acting Assistant Secretary for Civil Rights); *National Council of Nonprofits, et al. v. Office of Management and Budget*, *et al.,* 2025 WL 368852 (D.D.C., February 3, 2025) (Alikhan, J.) (holding that the Appropriations Clause of the Constitution gives Congress exclusive power over federal spending, citing U.S. Const. art. 1, § 9, cl. 7.).

> treatment under Title VII is equally applicable to constitutional ... claims." *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 896 (1st Cir. 1988) (quotation, brackets, and ellipsis omitted).[4]

The LBGTQ+ Regulations have the force and effect of law[5] and provide that each local education agency must adopt a policy providing "a safe, supportive and non-discriminatory school environment" for transgender and gender non-conforming students that "is consistent with state and national best practices, guidance, and model policies,"[6] which is entirely consistent with existing state law. Indeed, aside from any interpretation of Title IX or Equal Protection, in 2001 Rhode Island became just the second state in the nation to include transgender people in its nondiscrimination law, which is applicable to "places of public accommodation" and prohibits discrimination against any person "on account of race or color, religion, country of ancestral origin, disability, age, sex, sexual orientation, gender identity or expression."[7] Moreover, under Rhode Island law, "places of public accommodation" include "rest rooms,"[8] and thus include bathrooms in public schools.[9]

Finally, the enforcement actions threatened in your letter and the February 4 "Dear Colleague" letter from the U.S. Department of Education are based upon a misreading of presidential authority. As was made clear by Chief Judge John J. McConnell, Jr. of the United States District Court for the District of Rhode Island in his recent decision temporarily restraining the directive from the Office of Management and Budget suspending payment of federal funds on any agency activities "that may be implicated" by the Executive Orders:

> [t]he Executive's statement that the Executive Branch has a duty 'to align Federal spending and action with the will of the American people *as expressed through Presidential priorities*,' (ECF No. 48-1 at 11) (emphasis added) is a constitutionally flawed statement. The Executive Branch has a duty to align federal spending and

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[4] *Id*. at *9.
[5] *See In re Advisory Opinion to the Governor*, 732 A.2d 55, 75 (R.I. 1999), citing, *inter alia*, *Lerner v. Gill*, 463 A.2d 1352, 1358 (R.I.1983) ("Regulations that are duly promulgated by an administrative agency . . . pursuant to a specific grant of legal authority to do so, are legislative rules that carry the force and effect of law and thus enjoy a presumption of validity.").
[6] 200-RICR-30-10-1.3.A.
[7] R.I. Gen. Laws § 11-24-2.
[8] R.I. Gen. Laws § 11-24-3(5).
[9] *See also* R.I. Gen. Laws § 28-5.1-7 ("[e]very state agency shall render service to the citizens of this state without discrimination based on various categories, including "sex, sexual orientation, gender identity or expression . . ."); and R.I. Gen. Laws § 42-72-15 ("Children's Bill of Rights" providing that "No child shall be discriminated against on the basis of . . . gender, sexual orientation, or gender identity or expression . . .").

action with the will of the people ***as expressed through congressional appropriations***, not through 'Presidential priorities.'[10]

For all the above reasons, your organization's petition is hereby denied for the reasons stated above.

Very truly yours,

Anthony F. Cottone,
For the Commissioner and as
RIDE's Chief Legal Counsel

Copy by email: Council Chair Patricia DiCenso
Commissioner Angélica Infante-Green
Deputy Commissioner Lisa Odom-Villella
Chief of Staff Krystafer Redden

[10] *See State of New York v. Donald Trump*, note 3, *supra*, slip op. at *54. Indeed, the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C.A. § 681, *et seq*., makes clear that if the President proposes to withhold or delay the obligation or expenditure of budget authority for a specific, limited period of time, the President must submit a formal "special message" to Congress explaining the amount he is planning to defer, the reason, the time period of deferral (which must remain within the current fiscal year), and all of the relevant facts and circumstances of the proposal, *id.* at § 682(1), (3), and policy disagreements are not a proper basis for deferral. *Id*. at § 684(b).