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March 1, 2017

Scott S. Harris
Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20503

RE: *Gloucester County School Board* v. *G.G. ex rel. Grimm*, No. 16-273
Effect of February 22, 2017 Dear Colleague Letter

Dear Mr. Harris:

The Gloucester County School Board submits this letter addressing how the case should proceed in light of the Dear Colleague Letter ("Letter") issued by the Department of Education and Department of Justice on February 22, 2017. That letter "withdraw[s] and rescind[s]" two documents issued during the previous administration—namely, the January 7, 2015 letter from a Department of Education official named James A. Ferg-Cadima, and the joint May 13, 2016 Dear Colleague Letter—both of which took the position that Title IX and its implementing regulations "require access to sex-segregated facilities based on gender identity." Letter, at 1. The first of those withdrawn documents was the basis for the Fourth Circuit's decision under review here. See Pet. App. 25a (concluding Ferg-Cadima letter "is entitled to *Auer* deference and is to be accorded controlling weight in this case") (citing *Auer* v. *Robbins*, 519 U.S. 452 (1997)).

In the School Board's view, the withdrawal of those documents should not prevent the Court from hearing argument and resolving the questions presented.

That is particularly evident as to the *second* question, which addresses whether, properly interpreted, Title IX and its regulations require access to sex-separated facilities based on gender identity. See Pet. at i, 33-37; Pet. Br. at 24. As the School Board's brief anticipated, the withdrawal of the Ferg-Cadima letter would still preserve "the question of whether the underlying interpretation [of Title IX and 34 C.F.R. § 106.33] was correct." Pet. Br. at 25. The brief urged the Court to resolve that "distinct question," because "the meaning of Title IX and section 106.33 on this issue is plain and may be resolved as a matter of straightforward interpretation, instead of remanding for needless additional litigation in the lower courts." *Id*; see also, *e.g.*, *Grosso* v. *United States*, 390 U.S. 62, 71–72 (1968) (concluding that "the entire case should now be finally disposed of at this level" in keeping with "considerations of sound judicial administration, in order to obviate further and entirely unnecessary proceedings below"). Indeed, the Court's grant of

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certiorari on the second question contemplates that the case may be resolved solely on that basis.

The School Board continues to ask the Court to resolve that issue. Moreover, the reasons given for rescinding the letter only reinforce the School Board's points. As the Departments observe, the Ferg-Cadima letter "do[es] not … contain extensive legal analysis or explain how [its] position is consistent with the express language of Title IX." Letter, at 1; *compare* Pet. Br. at 25 (explaining the letter's interpretation "is unambiguously precluded by the text, history, and structure of Title IX and its implementing regulation"). Furthermore, the Departments suggest that the letter failed to afford "due regard to the primary role of the States and local school districts in establishing educational policy." Letter, at 1; *compare* Pet. Br. at 20 (stating the Ferg-Cadima interpretation "would upend the ingrained practices of nearly every school in the Nation on a matter of basic privacy and dignity").

Additionally, the School Board believes the Court could still decide the *first* question—whether *Auer* applies to an informal, unpublished opinion letter. Pet. at i. The fact that a new administration could unilaterally rescind the Ferg-Cadima letter underscores why it should not have received "controlling" deference in the first place. See Pet. Br. at 54 (explaining the letter did not merit *Auer* deference "because the Department ignored the formal procedures required to act with the force of law"). The panel's erroneous decision to defer remains controlling in the Fourth Circuit, binds future panels to defer to similarly informal agency letters, and therefore still deserves correction.

The School Board intends to submit its reply brief consistent with the requirements of Rules 24.4 and 25.3. But in light of the case's unusual posture, the School Board respectfully suggests the Court do the following before proceeding.

First, the Court should ask the United States Solicitor General to file a brief expressing the views of the United States. It would be unusual for the Court to address questions of the sort presented here without first hearing from the Solicitor General. See, *e.g.*, STEPHEN M. SHAPIRO *ET AL.*, SUPREME COURT PRACTICE 6.41, pp. 519-20 (10th ed. 2013) (noting invitations to the Solicitor General are typically "extended in cases that present difficult questions of law in litigation to which the United States is not a party") (internal quotations omitted). Moreover, the United States supported the withdrawn guidance in the lower courts, see Resp. Br. App. 40a-67a, but the letter withdrawing that guidance suggests the United States now may have changed its position. Of course, if the Solicitor General submits a brief, both parties should have an opportunity to respond. See SUP. CT. PRACTICE, *supra*, at 6.41, p. 520 (noting any party "adversely affected" by Solicitor General's brief "is normally given a short but reasonable period of time" to respond).

Second, the Court should postpone oral argument until the additional briefing is complete. Argument is scheduled for March 28, 2017, but the additional briefing cannot reasonably be completed before then, especially when a new Solicitor General has not yet been nominated and the Acting Solicitor General is recused. See Feb. 22, 2017 Ltr. From Deputy Solicitor General Edwin S. Kneedler to Hon. Scott Harris, at * (noting "[t]he Acting Solicitor General is recused from this case"); see also SUP. CT. PRACTICE, *supra*, at 6.41, p. 519-20 (observing Solicitor General's office typically takes "many more than 30 days to file [a requested] brief," given need for, *inter alia*, "extensive consultation with interested departments and agencies"). Argument should be postponed until at least the April sitting.

Finally, if the Court chooses not to resolve either question presented in light of the withdrawn documents, the Court should vacate the decisions below and remand for further proceedings. See 28 U.S.C. § 2106; see also, *e.g.*, *Slekis* v. *Thomas*, 525 U.S. 1098 (1999) (vacating court of appeals' judgment and remanding "for further consideration in light of the interpretive guidance issued by the Health Care Financing Administration"); *Douglas* v. *Indep. Living Ctr. of S. Calif., Inc.*, 565 U.S. 606, 613, 616 (2012) (vacating court of appeals' judgment and remanding given agency's "revers[al] [of] course" following argument). The withdrawal of the Ferg-Cadima letter eliminates the basis for the Fourth Circuit's original decision and for the subsequent preliminary injunction. Pet. Br. at 17-18. It would be inappropriate to leave the School Board bound by those decisions now that the previous administration's guidance documents have been withdrawn.

That said, the School Board believes the better course is for the Court to proceed with argument and a decision on the merits, after receiving the current views of the United States on the questions presented—especially the proper interpretation of Title IX. Resolution by this Court of that issue will save the parties—as well as public and private parties involved in similar disputes throughout the Nation—enormous litigation costs as well as needless and divisive political controversy.

Respectfully submitted,

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cc: Joshua A. Block
Counsel of Record for Respondent