ALLIANCE DEFENDING FREEDOM

FOR FAITH. FOR JUSTICE.

September 23, 2015

**Re: Schools Are Not Legally Required to Allow Students to Use Opposite-Sex Restrooms, Showers, and Changing Rooms**

Dear Friends:

It is our pleasure to provide you with information pertaining to the legal issues surrounding requests by transgender students to use school restrooms, showers, and changing areas of their choice. By way of introduction, Alliance Defending Freedom is an alliance-building legal organization that advocates for the right of religious students to freely exercise their rights to speak, associate, and learn on an equal basis with other students.

The information that follows will establish that (1) no federal law requires public schools to open sex-specific restrooms, showers, and changing areas to opposite-sex students, (2) providing such access violates the fundamental rights of the vast majority of students and parents, and (3) schools have broad discretion to regulate the use of school restrooms, showers, and changing areas. To assist school districts concerning this issue, ADF has drafted a model Student Physical Privacy Policy that they can adopt or use as a resource either when drafting policies, or when handling specific situations, impacting this important area.

## No Federal Law Requires School Districts to Grant Students Access to Facilities Dedicated to the Opposite Sex.

According to Title IX, "[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. Importantly, the regulations implementing Title IX specifically allow schools to "provide separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. Accordingly, no court has ever interpreted Title IX as requiring schools to give students access to opposite-sex restrooms and changing areas. Rather, courts have consistently found that schools do not discriminate under Title IX when they limit use of sex-specific restrooms to members of the specified sex.

For example, in *Kastl v. Maricopa County Community College District*, 325 F. App'x 492, 493 (9th Cir. 2009), a community college banned Kastl, who was both a student and employee of the college, from using the women's restroom even though Kastl was a transsexual who identified as a woman. Kastl sued the college for

discrimination under Title IX, Title VII, and the First and Fourteenth Amendments. The United States Court of Appeals for the Ninth Circuit ruled in the college's favor because "it banned Kastl from using the women's restroom *for safety reasons*" and "Kastl did not put forward sufficient evidence demonstrating that [the college] was motivated by Kastl's gender." *Id.* at 494 (emphasis added). Kastl's claims were therefore "doomed." *Id.*

In March 2015, a Pennsylvania federal court similarly examined "whether a university, receiving federal funds, engages in unlawful discrimination, in violation of the United States Constitution and federal and state statutes, when it prohibits a transgender male student from using sex-segregated restrooms and locker rooms designated for men on a university campus." *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 2015 WL 1497753, at *1 (W.D. Pa. Mar. 31, 2015). The court concluded that "[t]he simple answer is no." *Id.* It held that "the University's policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination." *Id.* at *11.

Likewise, in September 2015, a federal judge in Virginia dismissed a Title IX discrimination claim brought by a female-to-male transgender student (represented by the ACLU) who sought access to male restrooms at a public high school. *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 4:15-cv-00054-RGD-DEM, slip op. at 1 (E.D. Va. Sept. 17, 2015). The judge also denied preliminary injunctive relief under the Equal Protection Clause. *Id.* The case arose when the Gloucester School Board errantly allowed the student to use the boys' restroom for seven weeks. *Id.* at 4. But in response to the concerns of parents and students and after having received legal counsel, the Board reversed its decision and voted to require all students to use the restrooms corresponding to their biological sex or one of several single-stall private restrooms. *Id.* at 4-5. Focusing on the privacy rights of other students, the court held that "[n]ot only is bodily privacy a constitutional right, the need for privacy is even more pronounced in the state educational system. The students are almost all minors, and public school education is a protective environment." Id. at 22.

Federal caselaw thus explicitly permits school districts to regulate access to restroom and locker room facilities based upon students' sex without violating a transgender student's rights under Title IX.

The U.S. Department of Education's April 2014 significant guidance document, which states that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity," does not change this analysis. First, the guidance document does not mention access to restrooms nor change the controlling Title IX regulations that authorize sex-specific restrooms. Second, federal regulations make clear that significant guidance documents issued by executive agencies are "non-binding [in] nature" and should not be "improperly

treated as legally binding requirements." 72 Fed. Reg. 3432, 3433, 3435 (Jan. 25, 2007). The court in *Gloucester County School Board* noted that the Department of Education lacked authority to unilaterally redefine Title IX. It characterized deferring "to the Department of Education's newfound interpretation" as "nothing less" than allowing "the Department of Education to 'create de facto a new regulation' through the use of a mere letter and guidance document" in violation of the Administrative Procedure Act *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 4:15-cv-00054-RGD-DEM, slip op. at 15. The Department's significant guidance document therefore does not bear the force of law.[1]

Courts' reasoning in Title VII cases, which involve claims of employment discrimination, validate this legal analysis. These cases are instructive because Title IX and Title VII are highly similar and courts have repeatedly interpreted Title VII to permit employers to prohibit employees from using restrooms and locker rooms dedicated to the opposite sex. *See, e.g., Etsitty v. Utah Transit Auth.,* 502 F.3d 1215, 1222-1225 (10th Cir. 2007) ("Because an employer's requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes, UTA's proffered reason of concern over restroom usage is not discriminatory on the basis of sex."); *Johnston*, 2015 WL 1497753, at *13 (reviewing all Title VII cases involving transgendered individuals and concluding that "Title VII does not provide an avenue for a discrimination claim on the basis of transgender status"). Simply put, school districts have no federal legal duty to open sex-specific restrooms and locker rooms to opposite-sex students. And no "discrimination" results from protecting young children from inappropriate exposure to the opposite sex in intimate settings, like restrooms or changing areas.

**Granting Students Access to Opposite-Sex Changing Areas Could Subject Schools to Tort Liability for Violating Students' Rights**

Not only may school districts prevent students from accessing opposite-sex restrooms and locker rooms, school districts should do so to avoid violating the rights of students. Students have the fundamental right to bodily privacy and that right is clearly violated when students—much less kindergarteners as young as five years old—are forced into situations where members of the opposite sex may view their partially or fully unclothed bodies. As the Ninth Circuit has recognized, "[s]hielding one's unclothed figure from the view of strangers, *particularly strangers of the opposite sex*, is impelled by elementary self-respect and personal dignity." *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (emphasis added).

[1] If, as may be the case, the Department begins treating the guidance document as a binding rule applicable to all school districts and enforces the guidance document against school districts, then it is likely that the Department has violated the Administrative Procedures Act, which requires a federal agency to go through a formal rulemaking process before it implements and enforces binding rules.

Forcing students into vulnerable interactions with opposite-sex students in secluded restrooms and locker rooms would violate this basic right. *See, e.g.*, *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (finding that a transgender individual's use of a women's restroom threatened female employees' privacy interests); *Rosario v. United States*, 538 F. Supp. 2d 480, 497-98 (D.P.R. 2008) (finding that a reasonable expectation of privacy exists in a "locker-break room" that includes a bathroom); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122, 1132 (S.D. W. Va. 1982) (holding that a female would violate a male employee's privacy rights by entering a men's restroom while the male was using it). These scenarios create privacy and safety concerns that should be obvious to anyone truly concerned with the welfare of students.

Courts have found that even prisoners have the right to use restrooms and changing areas without regular exposure to viewers of the opposite sex. *See, e.g., Arey v. Robinson*, 819 F. Supp. 478, 487 (D. Md. 1992) (finding that a prison violated prisoners' right to bodily privacy by forcing them to use dormitory and bathroom facilities regularly viewable by guards of the opposite sex); *Miles v. Bell*, 621 F. Supp. 51, 67 (D. Conn. 1985) (recognizing that courts have found a constitutional violation where "guards regularly watch inmates of the opposite sex who are engaged in personal activities, such as undressing, using toilet facilities or showering" (quotation omitted)). Students possess far more robust legal protections and are obviously entitled to greater privacy rights than prisoners. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (noting that students do not "shed their constitutional rights … at the school house gate"). School districts, quite simply, must ensure that students entrusted to its care may use restrooms and locker rooms without fear of exposure to the opposite sex.

Finally, many state constitutions also provide strong protections to religious liberty. Religious students are precluded by basic modesty principles of their faith from sharing restrooms and locker rooms with members of the opposite sex. State courts faced with claims that school districts' actions violate students' right to the free exercise of religion frequently apply the compelling state interest/least restrictive means test. There is no real argument that providing students access to restrooms and locker rooms dedicated to the opposite sex could pass this test. No compelling interest supports this action and there are numerous less restrictive means of furthering any legitimate goals that school districts seek to promote.

**Granting Students Access to Opposite-Sex Changing Areas Could Subject Schools to Tort Liability for Violating Parents' Rights**

Parents also have the fundamental right to control their children's education and upbringing, including the extent of their children's knowledge of the difference between the sexes. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (holding that the Constitution "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *Washington v.*

*Glucksberg*, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights … to direct the education and upbringing of one's children …."); *Santosky v. Kramer,* 455 U.S. 745, 753 (1982) (recognizing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control").

Interaction between males and females in restrooms and locker rooms will necessarily result in students uncovering anatomical differences. It would, for example, be quite obvious to male students that female students do not use the urinals. Such revelations of anatomical differences, and the potential for other inappropriate discoveries, give rise to questions that most parents would deem inappropriate for younger students to ponder. These sensitive matters should be disclosed at home when parents deem appropriate, not ad-hoc in a school restroom. Respecting such parental choices requires school districts to prohibit students from accessing restrooms and locker rooms dedicated to the opposite sex.

## School Districts Have Broad Discretion To Regulate The Use Of Restrooms And Similar Facilities And To Balance Students' And Parents' Competing Interests In This Delicate Context

It is well-settled law that public school districts enjoy broad authority and discretion in operating their schools. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) ("States and local school boards are generally afforded considerable discretion in operating public schools."). It should go without saying that this discretion includes regulating the use of school restrooms and similar facilities.

In this context, protecting every student's privacy and safety is at a premium. Allowing students to access restroom and locker room facilities dedicated to the opposite sex accomplishes neither goal. Not only would such a policy endanger transgender students, it would also sacrifice the clearly established First and Fourteenth Amendment freedoms of 99.7% of their classmates. *See* Gates, Gary, How Many People are Lesbian, Gay, Bisexual and Transgender? (2011), Executive Summary at 5-6, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf (last visited Nov. 25, 2014) (estimating that only 0.3% of adults in the United States identity as transgender).

The most important point is this: schools have broad discretion to handle these delicate matters. They can:

(1) continue to handle these matters as they arise utilizing the advice given;
(2) adopt a policy that provides an accommodation for students who, for any

reason, desire greater privacy when using the restroom or similar facility (*see* Option 1 in ADF's Student Physical Privacy Policy);
(3) adopt a policy that provides an accommodation specifically to students struggling with their gender identity (*see* Option 2 in ADF's Policy); or
(4) adopt a substantially similar policy that is tailored to their specific needs and facilities.

But under no circumstances should schools operate under the mistaken belief that federal law requires them to treat sex as irrelevant to the restroom, shower, or locker room that students may access.

## CONCLUSION

Allowing students to use opposite-sex restrooms and locker rooms would seriously endanger students' privacy and safety, undermine parental authority, violate religious students' free exercise rights, and severely impair an environment conducive to learning. These dangers are so clear-cut that a school district allowing such activity would clearly expose itself to tort liability. Consequently, school districts should reject polices that force students to share restrooms and locker rooms with members of the opposite sex.

Instead, we advise school districts to continue to handle these matters as they arise utilizing the advice given, or to adopt the version of ADF's model policy that best meets their needs. ADF's policy allows schools to accommodate students with unique privacy needs, including transgender students, while also protecting other students' privacy and free exercise rights, and parents' right to educate their children. It also serves to better insulate school districts from legal liability. If a district adopts our model policy and it is challenged in court, Alliance Defending Freedom will review the facts and, if appropriate, offer to defend that district free of charge.

If you should have any questions regarding this matter, please do not hesitate to contact us at 1-800-835-5233. We would be happy to speak with you or your counsel and to offer any assistance we could provide.

Sincerely,

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