



December 1, 2014

Mr. George R. Burak, Chairperson
Mr. Kevin M. Smith, Vice-Chairperson
Mr. Troy M. Andersen, Member
Ms. Kimberly E. Hensley, Member
Ms. Carla B. Hook, Member
Ms. Anita F. Parker, Member
Mr. Charles Records, Member
Gloucester County School Board
6099 T.C. Walker Road
Gloucester, VA 23061

Re: Gloucester County Public Schools' Policy on Gender Identity

Dear Members of the Gloucester County School Board:

We write on behalf of a group of concerned parents and students concerning the Gloucester County School Board's consideration of a gender identity policy that would allow students to use restrooms and locker rooms dedicated to the opposite sex. We write to reaffirm the commonsense proposition that compelling students to share restrooms and locker rooms with members of the opposite sex violates their right to bodily privacy and would not only lead to potential legal liability for the District and its employees, but also violate students' and parents' fundamental constitutional rights.

By way of introduction, Alliance Defending Freedom is an alliance-building legal organization that advocates for the right of people to freely live out their faith. We are committed to ensuring that religious students are free to exercise their First Amendment rights to speak, associate, and learn on an equal basis with other members of the public school community.

No State or Federal Law Requires the District 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. No court has ever interpreted Title IX as requiring schools to give students access to opposite-sex restrooms and changing areas.

In fact, the United States Court of Appeals for the Ninth Circuit found the opposite in *Kastl v. Maricopa County Community College District*, 325 F. App'x 492, 493 (9th Cir. 2009), a case in which a community college banned Kastl, a transsexual man who was both a student and employee of the college, from using the women's restroom. Kastl sued the college for discrimination under Title IX, Title VII, and the First and Fourteenth Amendments. 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.* Federal caselaw thus permits the District to disallow students from accessing opposite-sex restrooms and locker rooms for privacy and safety reasons without violating Title IX.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."); *Goins v. West Group*, 635 N.W.2d 717, 723 (Minn. 2001) ("[W]e conclude that an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination ..."). Simply put, despite misinformation spread by some, the District has no legal duty to open restrooms and locker rooms to opposite-sex students.² And no "discrimination" results when schools designate such facilities

¹ The U.S. Department of Education's April 2014 guidance 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. In *Kastl*, the Ninth Circuit agreed that "it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women." 325 Fed. App'x at 493. But the Ninth Circuit ruled for the college anyway because its decision was motivated by safety reasons, not Kastl's biological sex. *See id.* at 494. Although we disagree with this interpretation of Title IX, *Kastl* demonstrates that the same result applies regardless.

Nor is the executive order signed by President Obama in July 2014 applicable to the District's restroom and locker room policies. That order simply modified the nondiscrimination rules for federal employees and employees of federal contractors and subcontractors. Students are obviously not employed by the federal government or the District.

² There is no Virginia state or local law requiring the District to grant students access to restrooms and locker rooms designated for the opposite sex. Governor McAuliffe's executive order barring discrimination based on gender identity, for example, applies only to state employees, not local school districts or their students.

based on biological sex to protect minors from having their privacy and other rights violated.

The Proposed Policy Could Subject the District to Tort Liability for Violating Students' and Parents' Rights.

Not only may the District prevent students from accessing opposite-sex restrooms and locker rooms, the District should do so to avoid violating the rights of students and parents. 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).

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 even found that *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 inmates. *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”). The District, quite simply, must ensure that students entrusted to its care may use restrooms and locker rooms without fear of exposure to the opposite sex.

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”). The District’s proposed policy would violate that right.

Interaction between young 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 urinal. Likewise, use of the urinal requires a certain level of exposure to which female students should not be subject. Such revelations give rise to questions that most parents would deem inappropriate for younger students to ponder. Information concerning anatomical differences should be disclosed at home when parents deem appropriate, not ad-hoc in a school restroom. Respecting such parental choices requires the District to prohibit students from accessing restrooms and locker rooms dedicated to the opposite sex.

The United States and Virginia Constitutions also protect students’ free exercise of religion. See *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (explaining that the federal constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any”); *Bowie v. Murphy*, 271 Va. 127, 133 (2006) (“[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience.” (quoting Va. Const., Art. 1, § 16)). Many religious students are precluded by basic modesty principles from sharing restrooms and locker rooms with members of the opposite sex. The District’s proposed policy could seriously endanger religious students’ ability to participate effectively in school physical education and athletic programs. Public schools are forbidden from demonstrating such “a pervasive bias or hostility to religion, which ... undermine[s] the very neutrality the Establishment Clause requires.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995); see also *Mitchell v. Helms*, 530 U.S. 793, 827 (2000) (plurality opinion) (prohibiting the government from exhibiting “special hostility for those who take their religion seriously”).

**The District Should Not Sacrifice the Vast Majority of Students’
and Parents’ Rights to Satisfy an Activist Agenda.**

Identifying the number of transgender people is difficult, but experts have approximated that they represent 0.1-0.5% of the population. 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 Oct. 6, 2014). One recent estimate concluded that 0.3% of adults in the United States identify as transgender—a minuscule percentage. *Id.* at 6. It is simply unfathomable that the District would sacrifice the clearly established First and Fourteenth Amendment freedoms of 99.7% of students and parents to satisfy activist demands that students have access to restroom and locker room facilities dedicated to the opposite sex. The needs of transgender students can easily be accommodated in other ways. And the District should use them rather than compromising others’ rights.

CONCLUSION

Allowing students to use opposite-sex restrooms and locker rooms would seriously endanger students’ privacy and safety, undermine parental authority, violate religious students’ right of conscience, 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—and its teachers—to tort liability. Consequently, the District should reject the proposed gender identity policy and any other policy that forces students to share restrooms and locker rooms with members of the opposite sex. We advise the District to adopt the attached policy regarding students’ use of restrooms and changing areas instead. It not only accommodates transgender students, but also protects other students’ privacy and free exercise rights, and parents’ right to educate their children, as well as insulates the District from legal liability. If a school district adopts the attached policy and that policy is challenged in court, Alliance Defending Freedom will review the facts and, if appropriate, 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,



Jeremy D. Tedesco, Senior Legal Counsel
J. Matthew Sharp, Legal Counsel
Rory T. Gray, Litigation Staff Counsel

Enclosure

cc: Dr. Walter R. Clemons, Superintendent