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**Re: Schools Are Not Legally Permitted Under HB 2 to Allow Students to Use Opposite-Sex Restrooms, Showers, and Changing Rooms**

Dear Board of Directors and Superintendent L'Homme:

We were recently notified by concerned parents and students that Durham Public Schools is considering a gender identity policy at tonight's meeting that could allow students to use the showers, locker rooms, and restroom of the opposite biological sex. 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. KeepNCsafe is a North Carolina coalition that advocates for laws and policies that protect the constitutional right to bodily privacy, especially for students while attend schools and universities across the state.

The information that follows demonstrates that: (1) The proposed policy would violate North Carolina law if it is used to allow students to access the restrooms of the opposite sex, (2) Federal law allows schools to have sex-specific restrooms, showers, and changing areas, (3) Allowing students to access facilities dedicated to the opposite sex violates the fundamental rights of the vast majority of students and parents, and (4) Schools have broad discretion to regulate the use of school restrooms, showers, and changing areas. In an effort to assist school districts, ADF has drafted a model Student Physical Privacy Policy that can be used as a resource either when drafting policies, or when handling specific situations, impacting this important area. That model policy is attached.

## **North Carolina Law Protects Student Privacy by Prohibiting Students From Using the Restrooms and Locker Rooms of the Opposite Sex**

As you are aware, on March 23, 2016, North Carolina enacted the Public Facilities Privacy and Security Act. This common sense law requires schools to designate their communal restrooms and locker rooms for the exclusive use of either biological males or females, while simultaneously offering an accommodation to any student uncomfortable using communal restrooms. The Act was passed in response to a newly enacted ordinance in Charlotte that operated nearly identically to your proposed policy: it provided special protections based upon gender identity, thus paving the way for individuals to gain access to the private facilities of the opposite sex.

Given the Board's resolution calling on lawmakers to repeal the Act, it is apparent that the Board's proposed policy is designed to blatantly disregard the democratic decision of the legislature by allowing your students to use the restrooms and locker rooms of the opposite sex. Simply put, this proposed policy would directly violate the Act, would strip students of their constitutional right to bodily privacy, and would disregard the express wishes of North Carolina citizens as expressed through the actions of their elected representatives.

## **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, both federal and state courts have almost uniformly rejected arguments suggesting that Title IX requires schools to give students access to opposite-sex restrooms and changing areas. Rather, these courts have 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 [i.e., his biological sex, instead of his gender *identity*, which is what Kastl alleged was the college's motivation for its

policy].” *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.*, 97 F. Supp. 3d 657, 661 (W.D. Pa. 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 672-73.

Likewise, in *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 477 S.W.3d 185, 187 (Mo. Ct. App. 2015), the Missouri Court of Appeals dismissed the appeal of a female student who sued under Title IX and state law to gain access to the male restrooms. The court noted that the trial court below ruled that the female student has “no existing, clear, unconditional legal right which allows [her] to access restrooms or locker rooms consistent with [her male] gender identity.” *Id.* Several other courts have reached the same conclusion. *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994) (“We think that it is clear that Title IX and its regulations do not require gender-integrated classes in prisons. Institutions may have separate toilet, shower and locker room facilities. And institutions may ‘provide separate housing on the basis of sex.’”); *Doe v. Clark Cty. Sch. Dist.*, No. 2:06-CV-1074-JCM-RJJ, 2008 WL 4372872, at \*4 (D. Nev. Sept. 17, 2008) (dismissing transgender student’s Title IX complaint for lack of standing, but noting in dicta that Title IX does not require letting students use the restroom that corresponds with their gender identity).

So, the regulations implementing Title IX, along with the vast majority of caselaw interpreting Title IX, explicitly permit school districts to regulate access to restroom and locker room facilities based upon students’ biological 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,”<sup>1</sup> does not change this analysis. First, the guidance document itself does not mention access to restrooms. More importantly, it would not matter even if it had mentioned restrooms. 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). In other words, the Department of Education’s guidance letter cannot unilaterally

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<sup>1</sup> U.S. Dept. of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), available at [www.ed.gov/ocr/docs/qa-201404-title-ix.pdf](http://www.ed.gov/ocr/docs/qa-201404-title-ix.pdf).

change Title IX’s implementing regulations, which allow schools to have sex-specific facilities. The Department’s significant guidance document therefore does not bear the force of law.<sup>2</sup>

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 similar in their goal to eradicate discrimination based on sex, 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, 1222-25 (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*, 97 F. Supp. 3d at 676 (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 legal duty under the widely accepted interpretation<sup>3</sup> of Title IX to open sex-specific restrooms and locker rooms to opposite-sex students. Rather, federal law allows schools to have sex-specific facilities. 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

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<sup>2</sup> The Department’s attempt to enforce its guidance document against certain school districts is a violation of the Administrative Procedures Act, which requires an agency to go through a formal rulemaking process before it implements and enforces binding rules.

<sup>3</sup> Of all the courts to address this, we are only aware of one outlier—the United States Court of Appeals for the Fourth Circuit, which has authority over Maryland, North Carolina, South Carolina, Virginia, and West Virginia. That court granted deference to the U.S. Department of Education’s spurious position that Title IX and its regulations do not allow schools to separate locker rooms and restrooms on the basis of biological sex when transgender students are involved. However, the court cabined its own opinion, arguing that its position was correct in that *specific* case where there was “no constitutional challenge to the regulation or agency interpretation.” *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467, at \*8 (4th Cir. Apr. 19, 2016). In a powerful dissent, Judge Niemeyer made clear the aberrational nature of the court’s decision, noting that the court reached its decision “without any supporting case law” and that its holding “tramples the relevant statutory and regulatory language [of Title IX] and disregards the privacy concerns animating that text.” *Id.* at \*15, 22 (Niemeyer, J., dissenting). For Judge Niemeyer, along with every other court to have addressed the question, “when the School Board assigned restrooms and locker rooms on the basis of biological sex, it was clearly complying precisely with the unambiguous language of Title IX and its regulations.” *Id.* at \*22 (Niemeyer, J., dissenting). Because the Fourth Circuit disregarded the unambiguous language of Title IX and its regulations regarding restrooms, as well as the many other courts’ interpretation of those texts, we believe that this decision is due to be reversed, as Judge Niemeyer suggests.

restrooms and locker rooms, school districts should do so to avoid violating the rights of students. Students have the fundamental right to bodily privacy. That right is violated when students—including 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 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. School districts, quite simply, must ensure that students entrusted to their 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 being exposed to anatomical differences. It would, for example, be quite obvious to male students that female students do not use the urinals. And students are exposed to one another's naked or nearly naked bodies when changing clothing in locker rooms, or when using communal showers. Such exposure to anatomical differences between the sexes should not be forced by schools upon students. Further, such exposure creates the possibility for other potentially inappropriate discoveries and has the potential to raise questions in the minds of students that many 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 Competing Interests**

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.<sup>4</sup>

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 in this letter;
- (2) adopt a policy that provides an accommodation for students who, for any reason, desire greater privacy when using the restroom or similar facility; or
- (3) 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. The majority of courts have held that Title IX does not mandate such access, and the sole outlier, the *Gloucester* decision, is simply wrong. It goes against the great weight of other courts' decisions, as well as the unambiguous text of Title IX and the regulations, all of which allow schools to maintain sex-separated restrooms, locker rooms, and showers.

### **As a Practical Matter, a Public School Will Not Lose Federal Funding For Non-Compliance with Title IX**

School boards often hear that their schools will lose federal funding if they refuse to let a transgender student use the bathroom of his or her choice. This is not accurate as a practical matter. To start with, no school has ever lost funding in the 40 years since Title IX was enacted.<sup>5</sup> Additionally, if the Department of Education threatens a school's funding, that school is entitled to a hearing before an administrative law judge and review by a federal court. If a school fights and ultimately loses, the school is still given 30 days to comply and keep their funding. 20 U.S.C. § 1682; 28 C.F.R. § 42.111.

The loss of federal funding is, thus, an extremely remote possibility for at least two reasons. First, as discussed above, Title IX does not require a school to open its restrooms to students of the opposite sex. So, as the majority of federal and state courts have held, the Department of Education's basis for threatening schools with loss of funding is meritless. Second, schools continue receiving their federal funding even while they take a principled stand and fight for their students' rights

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<sup>4</sup> See Gary Gates, *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 April 27, 2016) (estimating that only 0.3% of adults in the United States identify as transgender).

<sup>5</sup> See [www.msnbc.com/msnbc/campus-sexual-assault-conference-dartmouth-college](http://www.msnbc.com/msnbc/campus-sexual-assault-conference-dartmouth-college); [www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit\\_n\\_5585654.html](http://www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit_n_5585654.html).

in court. And they are given plenty of time to comply if the court issues an adverse decision. Given this, schools have nothing to lose and everything to gain from defending policies, like the one below, that protect all students' interests in this delicate area.

## 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 obvious that a school district allowing such activity would clearly expose itself to tort liability. Consequently, school districts should reject policies 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 in this letter or to adopt ADF's model policy or a substantially similar policy. 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. 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 ADF 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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# STUDENT PHYSICAL PRIVACY POLICY

## I. PURPOSE

In recognition of student physical privacy rights and the need to ensure student safety and maintain school discipline, this Policy is enacted to advise school site staff and administration regarding their duties in relation to student use of restrooms, locker rooms, showers, and other school facilities where students may be in a state of undress in the presence of other students.

## II. DEFINITIONS

“Sex” means an individual’s immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth. An individual’s original birth certificate may be relied upon as definitive evidence of the individual’s sex.

## III. POLICY

### A. Use of School Facilities

1. Notwithstanding any other Board Policy, every public school restroom, locker room, and shower room accessible by multiple persons at the same time shall be designated for use by male persons only or female persons only.

2. In all public schools in this District, restrooms, locker rooms, and showers that are designated for one sex shall be used only by members of that sex; and, no person shall enter a restroom, locker room, or shower that is designated for one sex unless he or she is a member of that sex.

3. In any other public school facility or setting where a person may be in a state of undress in the presence of others, school personnel shall provide separate, private areas designated for use by persons based on their sex, and no person shall enter these private areas unless he or she is a member of the designated sex.

4. This section shall not apply to a person who enters a facility designated for the opposite sex:

- a. for custodial or maintenance purposes, when the facility is not occupied by a member of the opposite sex;
- b. to render medical assistance; or
- c. during a natural disaster, emergency, or when necessary to prevent a serious threat to good order or student safety.

5. Nothing in this section shall be construed to prohibit schools from adopting policies necessary to accommodate disabled persons or young children in need of physical assistance when using restrooms, locker rooms and shower rooms.

#### B. Accommodation for Students Desiring Greater Privacy

Students who, for any reason, desire greater privacy when using a facility described in subsection A may submit a request to the principal for access to alternative facilities. The principal shall evaluate these requests on a case-by-case basis and shall, to the extent reasonable, offer options for alternate facilities, which may include, but are not limited to: access to a single-stall restroom; access to a uni-sex restroom; or controlled use of an employee restroom, locker room, or shower. In no event shall the accommodation be access to a facility described in subsection A that is designated for use by members of the opposite sex while students of the opposite sex are present or could be present.