



May 6, 2015
VIA U.S.MAIL AND E-MAIL

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Fairfax County School Board
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Re: Fairfax County Public Schools' Policy on Gender Identity

Dear Members of the Fairfax County School Board:

We write on behalf of a group of concerned parents and students concerning the Fairfax County School Board's consideration of a gender identity policy that could 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 Fairfax County Public Schools (FCPS) 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 Federal Law Requires FCPS 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 biological 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 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 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’s conclusion? “The simple answer is no.” *Id.* Regarding the student’s Title IX claims, the court ruled 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. Federal caselaw thus permits FCPS to disallow students from accessing opposite-sex restrooms and locker rooms for privacy and safety reasons without violating 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.¹ First, the guidance document does not mention access to restrooms nor change Title IX’s 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 Department’s significant guidance document therefore does not bear the force of law. Finally, in *Johnston*, the court found there was no transgender or sex discrimination by denying the student’s request to use the restroom of his choice:

[T]he University permitted him, without harassment or discrimination, to dress like a man, act like a man, change his name to reflect his male gender, and enroll in classes designated for males. Plaintiff’s sole contention of discrimination is that UPJ forbade him from using University bathrooms and locker rooms consistent with his male gender identity rather than his female birth sex. This allegation simply does not constitute a claim for sex stereotyping.

Johnston, 2015 WL 1497753, at *17.

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.”); *see also 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, FCPS has no federal legal duty to open 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.

Granting Students Access to Opposite-Sex Changing Areas Could Subject FCPS to Tort Liability for Violating Students’ and Parents’ Rights

Not only may FCPS prevent students from accessing opposite-sex restrooms

¹ Nor is the executive order signed by President Obama in July 2014 applicable to FCPS’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 FCPS.

and locker rooms, but FCPS 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.

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 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”). FCPS, 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”).

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 urinal. Furthermore, in the addition to the minimal privacy that many school restrooms provide, the risk of exposure is much greater with young children who lack the coordination or practice to maintain their privacy. Such revelations of anatomical differences 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 FCPS 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 of their faith from sharing restrooms and locker rooms with members of the opposite sex. FCPS’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”).

FCPS Should Not Sacrifice Students’ and Parents’ Rights.

Protecting every student’s privacy and safety is important. FCPS neglects these interest if it allows students to access to restroom and locker room facilities dedicated to the opposite sex. 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 needs of transgender students’ can easily be accommodated in other ways and FCPS 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' rights 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, FCPS should reject policies that force students to share restrooms and locker rooms with members of the opposite sex. We advise FCPS 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 school districts from legal liability. If a school district adopts the attached policy and that policy is challenged in court, Alliance Defending Freedom will defend it free of charge. 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,



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

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 the biological condition of being male or female as determined at birth based on physical differences, or, when necessary, at the chromosomal level.

III. POLICY

A. Use of School Facilities

Notwithstanding any other Board Policy, student restrooms, locker rooms, and showers that are designated for one sex shall only be used by members of that sex.

In any other school facilities or settings where a student may be in a state of undress in the presence of other students (*i.e.*, changing costumes during school theatrical productions, etc.), school personnel shall provide separate, private areas designated for use by students based on their sex.

B. Accommodation of Sex Non-Conforming Students

Students that exclusively and consistently assert at school that their gender is different from their sex shall be provided with the best available accommodation that meets their needs, but in no event shall that be access to the school restroom, locker room, or shower of the opposite sex. Such accommodations may include, but are not limited to: access to a single-stall restroom; access to a uni-sex restroom; or controlled use of a faculty restroom, locker room, or shower.