ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

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 showers, locker rooms, and restrooms 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 demonstrates that: (1) Federal law allows schools to have sex-specific showers, locker rooms, and restrooms, (2) Allowing students to access facilities dedicated to the opposite sex violates the fundamental rights of the vast majority of students and parents, and (3) Schools have broad discretion to regulate the use of school showers, locker rooms, and restrooms.

Importantly, on February 24, 2017, the U.S. Departments of Education and Justice issued a Dear Colleague letter that rescinded prior guidance that wrongly told schools to allow students to use showers and restrooms consistent with their gender identity or risk losing federal funding. The current guidance instead defers to the "primary role of the states and local school districts in establishing educational policy." *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx.

In an effort to assist school districts in adopting constitutionally sound policy that protects the privacy and dignity of all students, ADF has drafted a model Student Physical Privacy Policy that can be adopted or used as a resource either when drafting policies, or when handling specific situations, impacting this important area. That model policy is attached at the conclusion of this letter.

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 repeatedly 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 *Texas v. United States*, 201 F. Supp. 3d 810, 832–33 (N.D. Tex. 2016), the court held that "It cannot be disputed that the plain meaning of the term sex as used in [Title IX's regulations] when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth." As a rule, Title IX, "permit[s] educational institutions to provide separate housing to male and female students" in order "to protect students' personal privacy." *Id*. at 833.

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).

It is clear that the regulations implementing Title IX, along with the majority of caselaw interpreting Title IX, explicitly permit school districts to regulate access to showers, locker rooms, and restroom based upon students' biological sex without violating Title IX.

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 showers, locker rooms, and restrooms, school districts should do so to avoid violating the rights of students. Students have the right to bodily privacy. As one court explained, females "using a women's restroom expect[] a certain degree of privacy from …members of the opposite sex." *State v. Lawson*, 340 P.3d 979, 982 (Wash. Ct. App. 2014). Similarly, teenagers are "embarrass[ed] . . . when a member of the opposite sex intrudes upon them in the lavatory." *St. John's Home for Children v. W. Va. Human Rights Comm'n*, 375 S.E.2d 769, 771 (W. Va. 1988). Allowing opposite-sex persons to view adolescents in intimate situations, such as showering, risks their "permanent emotional impairment" under the mere "guise of equality." *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

These privacy rights are why a girls' locker room has always been "a place that by definition is to be used exclusively by girls and where males are not allowed." *People v. Grunau*, No. H015871, 2009 WL 5149857, at *3 (Cal. Ct. App. Dec. 29, 2009). As the Kentucky Supreme Court observed, "there is no mixing of the sexes" in school locker rooms and restrooms. *Hendricks v. Commw.*, 865 S.W.2d 332, 336 (Ky. 1993); *see also McLain v. Bd. of Educ. of Georgetown Cmty. Unit Sch. Dist. No. 3 of Vermilion Cty.*, 384 N.E.2d 540, 542 (Ill. App. Ct. 1978) (refusing to place male teacher as overseer of school girls' locker room).

And the right is reciprocal: what holds true for placing a male in girls' private facilities is no less true for placing a female in boys' private facilities.

Forcing students into vulnerable interactions with opposite-sex students in secluded restrooms and locker rooms would violate this basic right to privacy. *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 showers, locker rooms, and restrooms 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.

The most important point is this: schools have broad discretion to handle these delicate matters, and the federal government supports the authority of school districts to craft local policies to address student privacy. 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.

CONCLUSION

Allowing students to use opposite-sex showers, locker rooms, and restrooms 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 showers, locker rooms, and restrooms 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.