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

Dear Members of the NSAA Board of Directors:

It is our understanding that you are currently considering changes to your policies regarding whether to allow transgender students to participate on sports teams of the opposite sex. As you are aware, this implicates not only what happens on the field of play, but also issues of bodily privacy and safety in restrooms and locker rooms. e mistaken impression that federal law requires school districts and governing bodies like NSAA to banish sex-specific facilities and teams.

In fact, just the opposite is true. The information that follows demonstrates 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, (3) schools have broad discretion to regulate the use of school restrooms, showers, and changing areas, (4) requiring NSAA members to banish sex-specific facilities would likely violate the constitutional rights of religious schools, and (5) co-mingling students of the opposite sex on sports teams endangers students' physical safety. In an effort to assist educational entities, Alliance Defending Freedom 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. We have attached that model policy after 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, 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.

So, the regulations implementing Title IX, along with federal caselaw interpreting Title IX, both 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," 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 change Title IX's implementing regulations, which allow schools to have sex-specific facilities. The court in *Gloucester County School Board* noted this fact when 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 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, 1222-1225 (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,

[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.

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. 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 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 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 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 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: educational entities 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 and educational entities like NSAA 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.

Religious Schools And Students Have A Fundamental Right To Live In Accordance With Their Faith

It is our understanding that NSAA has a significant number of private school members, many of which are religious schools. Both the United States and Nebraska Constitutions protect the fundamental right of religious schools and religious students to conduct themselves in accordance with their faith. Recognizing that "[a]ll persons have a natural and indefeasible right to worship

Almighty God according to the dictates of their own consciences," Article I, Section 4 of the Nebraska Constitution states that it is "the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction." The protection for religious organizations extends not only to how they worship but also to the academic and religious instruction given to students in accordance with their faith. Indeed, the Nebraska Supreme Court has warned against overreaching regulation of private instruction. Apart from regulations that "insure that [students] understand the nature of the government under which they live, and are competent to take part in it, … education should be left to the fullest freedom of the individual." *Nebraska Dist. of Evangelical Lutheran Synod of Missouri, Ohio, & other States v. McKelvie*, 104 Neb. 93, 175 N.W. 531, 534 (1919).

It is unlikely that a court would uphold any policy that interferes with religious freedom. Most, if not all, religious schools regard facilitating the denial and rejection of one's God-given sex to be a grave sin. And many religious students are precluded by basic modesty principles from sharing locker or hotel rooms with members of the opposite sex. Policies that allow students to use facilities based on their gender identity, rather than their biological sex, would thus make religious schools' and religious students' participation in high school athletics effectively impossible. Government actors 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). Furthermore, there is no real argument that such policies would survive the "compelling state interest balancing test" applied by Nebraska courts because there is no compelling interest in forcing members of the opposite sex to share locker and hotel rooms and there are numerous less restrictive means of furthering any legitimate goals NSAA seeks to promote.

Co-Mingling Students Of The Opposite Sex On Sports Teams Poses Serious Risks To Student Safety

It is medical fact that there are several physical differences between males and females that justify having separate teams for the sexes to ensure the safety of all student athletes. As reported by the Centers for Disease Control and Prevention, males are statistically taller and heavier than females, averaging over 5 inches taller and 25 pounds heavier.[2] Young men also have 1.5 times the lean body mass and skeletal mass of females. *See* Williams Textbook of Endocrinology: *Pubertal Growth Spurt, Bone Age & Skeletal Density*. Given the statistical physical differences in height, weight, skeletal mass, and body size between males and females, there is a substantially greater risk of injury to females if they are forced to compete against biological males on the playing field. Adopting a policy that

[2] *Compare* http://www.cdc.gov/growthcharts/data/set2clinical/cj41l071.pdf (males) *with* http://www.cdc.gov/growthcharts/data/set1clinical/cj41l022.pdf (females).

forces schools to allow students to play contact sports with the opposite sex undermines the safety of student athletes.

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 and educational entities 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 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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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. (Option 1) 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 unisex restroom; or controlled use of an employee restroom, locker room, or shower. Under no circumstances shall the options offered involve use of a facility described in subsection A that is designated for use by members of the opposite sex.

B. (Option 2) Accommodation of Students Who Do Not Self-Identify With Their Sex

Students that assert that their gender is different from their sex and request special accommodations regarding the facilities described in subsection A shall, to the extent reasonable, be provided with an available accommodation that meets their needs. Such accommodations may include, but are not limited to: access to a single-stall restroom; access to a unisex 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.