



**Re:** Access to Privacy Facilities: Protecting the Privacy and Dignity of All Students

Dear School Superintendent:

As the leader of your school district, you play a very significant role in the development of today's youth. You know that one of the vital ways to ensure their proper development is to protect their privacy and safety.

In recent years you may have encountered legal issues surrounding requests by students who profess a gender identity different than their birth sex to use school showers, locker rooms, and restrooms so as to affirm the perception they have of their gender. We know these issues can be difficult to navigate, so we would like to help.

By way of introduction, Alliance Defending Freedom (ADF) is an international legal alliance that advocates for the privacy, dignity, and safety of all students, and particularly defends the freedom of religious students to exercise their rights to speak, associate, and learn on an equal basis with other students.

It is our pleasure to provide you with information pertaining to these issues, so that you can protect the privacy and safety of all the students in your district. Within this letter, you will find information demonstrating that:

- (1) No federal law requires school districts to grant students access to facilities dedicated to the opposite sex,
- (2) Granting students access to opposite-sex changing areas could subject schools to legal liability for violating students' and/or parents' rights, and
- (3) Schools have broad discretion to regulate the use of school showers, locker rooms, restrooms, and overnight accommodations.

To assist school districts in adopting a constitutionally sound policy that protects the privacy and dignity of everyone, ADF has drafted a model **Physical Privacy Policy** that can be adopted or used as a resource either when drafting policies, or when handling specific situations involving this issue. This policy allows schools to accommodate those students with unique privacy needs, including students claiming a gender identity discordant with their sex, while protecting others' 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 situation and may opt to offer to defend that district free of charge. You can find the ADF model policy at the conclusion of this letter.

Much of the confusion over privacy facilities was driven by a short-lived effort by federal officials to redefine "sex" to mean "gender identity" under Title IX via a "Dear Colleague Letter"

to school officials in 2016. That misguided effort ended on February 22, 2017 when the U.S. Departments of Education and Justice issued a Dear Colleague Letter that rescinded the 2016 Letter which had wrongly told schools to allow students to use showers and restrooms on the basis of their professed gender identity or risk losing federal funding. The Departments rejected any further reliance on that rescinded guidance, and will instead defer 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>.

We advise school districts to continue to handle these matters as they arise utilizing the advice given in this letter or to adopt the model policy proposed by ADF or a substantially similar policy.

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,

Matt Sharp  
Senior Counsel  
Alliance Defending Freedom

## **1. 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 case law 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.

## **2a. Granting Students Access to Opposite-Sex Changing Areas Could Subject Schools to Legal 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. *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 to share privacy facilities with opposite-sex students 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 and statutes provide strong protections to religious liberty. Religious students are often 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.

### **2b. Granting Students Access to Opposite-Sex Changing Areas Could Subject Schools to Legal 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. Such unconsented exposure to the opposite sex should not be forced by schools upon students. These sensitive matters should be disclosed at home when parents deem appropriate, not ad-hoc in a school shower, locker room, or restroom. Respecting such parental choices requires school districts to prohibit students from accessing restrooms and locker rooms dedicated to the opposite sex.

### **3. School Districts Have Broad Discretion to Regulate the Use of School Showers, Locker Rooms, and Restrooms**

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, and has a high probability of violating the constitutional right to bodily privacy enjoyed by all students.

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.

As you review the Model Policy, we encourage you to contact ADF for further information or if you are seeking legal advice for a particular situation.

## 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 use of restrooms, locker rooms, showers, similar school facilities, and school-related overnight accommodations where persons may be in a state of undress in the presence of others.

### II. DEFINITIONS

“Sex” means a person’s immutable biological sex, either male or female, as objectively determined by anatomy and/or genetics existing at the time of birth. Evidence of a person’s biological sex includes, but is not limited to, any government-issued identification document that accurately reflects a person’s sex as listed on the person’s original birth certificate.

### III. POLICY

#### A. Use of School Facilities and Overnight Accommodations

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. During any school authorized activity or event where persons share overnight lodging, no person shall share a bedroom or multi-occupancy restroom with a member of the opposite sex, unless such persons are members of the same family (i.e., parent/guardian, child, sibling, or grandparent).

5. 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 emergency medical assistance; or

- c. during a natural disaster, emergency, or when necessary to prevent a serious threat to good order or student safety.

6. 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. Accommodations.

Persons who, for any reason, are unwilling or unable to use a facility described in subsection A may submit a request to the principal or other designee of the school district for access to alternative facilities. The principal or designee 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-user 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 persons of the opposite sex are present or could be present.