



May 12, 2014

VIA EMAIL AND U.S. MAIL

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RE: Allowing Students to Use Opposite-Sex Restrooms at Atherton High School

Dear Jefferson County Public Schools Board Members, Dr. Hargens, Ms. Miller, and Mr. Aberli:

It has come to the attention of Alliance Defending Freedom that the Principal at Atherton High School has recently decided to allow students to use opposite-sex bathrooms and changing areas. By way of introduction, Alliance Defending Freedom is an alliance-building non-profit legal organization that advocates for the right of religious students to safely exercise their rights to speak, associate, and learn on an equal basis with other students.

Alliance Defending Freedom wishes to inform you that the Atherton principal's recent decision has imperiled the safety of students and exposed Jefferson County Public Schools

(JCPS) to potential liability. Specifically, we wish to inform you that 1) no law requires JCPS to open changing areas to opposite-sex students and 2) providing such access violates the rights of students and parents.

No Law Requires JCPS to Give Students Access to Opposite-Sex Restrooms and Changing Areas

Contrary to what Principal Aberli may believe, neither he nor JCPS is legally obligated to open restrooms and changing areas to opposite-sex students. Although some school districts in other parts of the country have recently done so as a means to prevent sex discrimination under Title IX, Title IX requires no such thing. 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. And no court has ever interpreted Title IX to require schools to give students access to opposite-sex restrooms and changing areas.

In fact, the Ninth Circuit found the opposite in *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, where a community college refused to retain a male transsexual instructor after that instructor attempted to use the women’s restroom. 325 F. App’x 492, 493 (9th Cir. 2009). The instructor sued the school for unlawful discrimination in violation of Title VII and Title IX. But the Ninth Circuit ruled for the school because “it proffered evidence that it banned Kastl from using the women’s restroom for safety reasons. Because Kastl did not put forward sufficient evidence demonstrating that MCCCDC was motivated by Kastl’s gender, her claim is doomed...” *Id.* at 494 (emphasis added). Thus, under this precedent, JCPS may prohibit students from using opposite-sex bathrooms for safety reasons without violating Title IX.

This point is further confirmed by Title VII cases. These cases are instructive because Title IX and Title VII are so similar. And courts have repeatedly interpreted Title VII to allow employers to require employees to use restrooms and changing areas that are consistent with their biological 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.”); *Johnson v. Fresh Mark, Inc.*, 98 F. App’x 461, 462 (6th Cir. 2004) (holding that discharge of male-to-female transsexual after she refused to use men’s restroom did not amount to a violation of Title VII or the Americans with Disabilities Act). Based on such cases, JCPS does not have any legal duty to open restrooms and changing areas to opposite-sex students as a means to prevent discrimination.¹ There simply is no discrimination in protecting young children from inappropriate exposure to the opposite-sex.

¹ Nor is there any Kentucky state law requiring JCPS to give students access to opposite-sex changing areas. To the contrary, Kentucky’s law prohibiting sex discrimination in government funded facilities explicitly exempts “[r]estrooms, shower rooms, bath houses and similar facilities which are in their nature distinctly private” from its

Allowing Students to Access Opposite-sex Restrooms and Changing Areas Could Subject JCPS to Tort Liability for Violating Students and Parents' Rights

Not only may JCPS prevent students from accessing opposite-sex restrooms and changing areas, JCPS should do so to avoid violating the rights of JCPS students and parents. With respect to JCPS students, they have the right to bodily privacy. And this right is clearly violated when a person, much less a kindergartener as young as five years old, is forced into situations where members of the opposite sex can see their genitals. 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).

But the Atherton principal is now disregarding these basic notions of self-respect and personal dignity by forcing students into vulnerable interactions with opposite-sex students in a secluded bathroom. Such a scenario is fraught with hazards involving inappropriate displays and offensive touching obvious to anyone truly concerned with student safety. For this reason, the Atherton principal is now violating students' privacy right to use restrooms and changing areas without exposure to the opposite sex. *See Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (finding that transgender individual's use of 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 included a bathroom); *Brooks v. ACF Industries, 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). In fact, the Atherton principal is treating his students worse than prisoners, for even prisoners have the right to use restrooms without continual exposure to the watching eyes of the opposite sex. *See, e.g., Arey v. Robinson*, 819 F. Supp. 478, 487 (D. Md. 1992) (finding that prison violated prisoners' right to bodily privacy by forcing them to use bathrooms viewable to members of opposite sex). Surely, JCPS students are entitled to the same courtesy and respect as prisoners. So JCPS students should also be free to use restrooms and changing areas without worry about exposure to the opposite-sex.

Besides violating students' rights, the Atherton principal's decision also violates parents' rights to control the extent of their children's knowledge about the differences between the sexes. *See, e.g., 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 the restroom 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; likewise, the use of the urinal requires a certain level of exposure to which female students should not be subject. Such revelations 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

scope. KRS § 344.145. Thus, Kentucky legislators acknowledged the obvious privacy rights at stake in these changing areas.

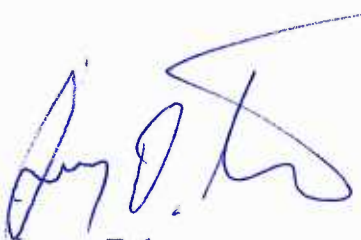
in a school restroom. To respect such parental choices, JCPS should not endorse the decision of Atherton's principal. Rather, JCPS should require students to use restrooms and changing areas appropriate to their biological sex.

CONCLUSION

Permitting students to use opposite-sex restrooms and changing areas would seriously endanger student safety, undermine parental authority, 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. We therefore suggest that JCPS reverse the decision of Atherton's principal and prohibit students from using opposite-sex changing areas. Specifically, we would advise JCPS to use the attached policy regarding use of bathrooms and changing areas. This attached policy protects students' privacy rights, respects parents' rights to educate their children, and insulates JCPS from legal liability, while at the same time providing a reasonable accommodation for transgender students. If JCPS enacts the attached policy and someone challenges it, Alliance Defending Freedom will defend JCPS free of charge.

If you should have any questions regarding this matter, please do not hesitate to contact us. We would be happy to speak with you or your counsel and offer any assistance we could provide.

Sincerely,



Jeremy Tedesco
Senior Legal Counsel
Alliance Defending Freedom



Clinton J. Elliott
Attorney and Counselor at Law



Jonathan Scruggs
Legal Counsel
Alliance Defending Freedom

Attachment

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

“Biological 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 biological sex shall only be used by members of that biological 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 biological sex.

B. Accommodation of Biological Sex Non-Conforming Students

Students that exclusively and consistently assert at school that their gender is different from their biological 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 biological sex. Such accommodations may include, but are not limited to: access to a single-stall bathroom; access to a uni-sex bathroom; or controlled use of a faculty bathroom, locker room, or shower.