



August 3, 2017

Dear Minnesota School Board Member,

It is our pleasure to provide you with information pertaining to the legal issues surrounding *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* (the "Toolkit") recently adopted by the School Safety Technical Assistance Council (SSTAC), on July 19, 2017. By way of introduction, the North Star Law and Policy Center is comprised of a group of local Minnesota attorneys who work to transform law, policy and public opinion through education, legislation, outreach, attorney networking and connecting legal needs to resources and representation. Alliance Defending Freedom is an international alliance-building legal organization that advocates for the constitutional rights of students to freely exercise their rights to speak, associate, and learn on an equal basis with other students.

The Toolkit's recommendations would, if enacted by school districts, seriously endanger students' privacy and safety, undermine parental authority, discriminate against female athletes, violate religious students' free exercise rights, and severely impair an environment conducive to learning.

Importantly, *neither the Toolkit, Title IX, nor any federal or state law, require schools to allow students to use opposite-sex restrooms, locker rooms, showers and overnight accommodations.* Indeed, *schools that allow students to use restrooms, locker rooms, or showers designated for members of the opposite sex, as recommended by the Toolkit, open themselves to legal liability for violating the fundamental rights of students and parents.* Students have the right to bodily privacy. Parents have the right to control their children's education and upbringing, including their knowledge of the differences between the sexes. Forcing students to interact with members of the opposite sex in restrooms and locker rooms would violate these fundamental rights, and has already led to a federal lawsuit against a Minnesota school district which permitted the sexes to intermingle in its privacy facilities under a policy very similar to that advocated by the Toolkit.

The most important point is this: *school districts have discretion to craft local policies that safeguard the privacy and safety of all students as well as the rights of parents and legal guardians.*

Enclosed is a memorandum outlining some of the legal issues with the Toolkit's recommendations as well as a model Student Physical Privacy Policy. Adopting the enclosed model Policy will help your district protect the rights of all students by accommodating students struggling with gender-identity issues while protecting the fundamental rights of other students and their parents consistent with both state and federal law. If your district would like to have further information and/or legal counsel on adopting the policy, please contact the North Star Law and Policy Center via email at info@northstarlawandpolicy.com, or Alliance Defending Freedom at 1-800-835-5233. We would be happy to speak with you or your counsel if further assistance is needed.

Sincerely,

A handwritten signature in black ink, appearing to read 'Doug Wardlow', written over a horizontal line.

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August 3, 2017

Dear Minnesota School Board Member,

We write to urge you to reject the policy recommendations included in *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students* (the “Toolkit”) approved by the School Safety Technical Assistance Council on July 19, 2017. The Toolkit’s recommendations, if adopted by school districts, would violate students’ constitutional rights, opening the door to litigation against school districts. We recommend you adopt the enclosed model Student Physical Privacy Policy that will help your district navigate these difficult issues.

I. The Toolkit’s Recommendations Concerning Locker Rooms, Restrooms, and Overnight Accommodations Jeopardize Students’ and Parents’ Constitutional Rights.

Title IX and the Minnesota Human Rights Act. The Toolkit asks schools to provide for both “shared” and “gender neutral” restrooms, locker rooms and other private facilities, as well as shared hotel rooms for out of town travel.¹ The drafters of the Toolkit rely on the federal Department of Education’s May 16, 2016 *Dear Colleague Letter* as guidance and legal support for their claims. But that guidance has been withdrawn and the federal government no longer relies on the positions expressed. Thus it is clear that Title IX prohibits discrimination based only on the binary characteristic of sex and does not expand to “gender identity,” “gender expression,” or a “gender spectrum.” Importantly, under Title IX schools can “maintain separate living facilities for the different sexes,”² and Title IX’s implementing regulations state that schools may “provide separate toilet, locker room, and shower facilities on the basis of sex”³.

The United States Court of Appeals for the Eighth Circuit, which includes Minnesota, has held that the federal Civil Rights Act, which includes Title IX, does not give biological males who identify as females the right to access female facilities, and that doing so raises legitimate privacy concerns for females.⁴ There is no standing federal case law allowing an interpretation of Title IX to include gender identity as a protected class.

Moreover, Minnesota law expressly allows schools to separate restrooms, locker rooms, and similar private facilities by biological sex. The Minnesota Human Rights Act (the “MHRA”) provides that the statute’s non-discrimination provisions “relating to sex, shall not apply to such facilities as restrooms, locker

¹ Toolkit at 9-10.

² 20 U.S.C. § 1686.

³ 34 C.F.R. § 106.33.

⁴ *Sommers v. Budget Mkt., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (holding that a biological male who identifies as female using the female restrooms is not protected by the Civil Rights Act, and employers have an interest in protecting the privacy rights of women in the female facilities). See also *Johnston v. Univ. of Pittsburgh of Com. Sys. Of Higher Educ.*, 2015 WL 1497753, *1 (W.D.Pa. 2015) (holding that “a policy 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”); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222-1225 (10th Cir. 2007) (employer’s requirement that employees use restrooms matching their biological sex does not expose transgender employees to disadvantageous terms and does not discriminate against those who do not conform to gender stereotypes).

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rooms, and other similar places.”⁵ The Minnesota Supreme Court has also ruled that “designation of restroom facilities based solely on biological gender does not violate the MHRA.”⁶ Not only may school districts prevent students from accessing opposite-sex showers, locker rooms, and restrooms, school districts must do so to avoid violating the rights of other students.

The right to bodily privacy. Students have a constitutional 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.”⁷ Similarly, teenagers are “embarrass[ed] . . . when a member of the opposite sex intrudes upon them in the lavatory.”⁸ Allowing opposite-sex persons to view adolescents in intimate situations like showering risks their “permanent emotional impairment” under the “guise of equality.”⁹ Notably, Minnesota has a 19-year legal history of protecting individual rights to privacy.¹⁰

These privacy rights explain 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.”¹¹ As the Kentucky Supreme Court observed, “there is no mixing of the sexes” in school locker rooms and restrooms.¹² Of course, the right is reciprocal: what holds true for girls’ private facilities is no less true for boys’ private facilities.

Forcing vulnerable students into interactions with opposite-sex students in restrooms and locker rooms would violate this basic right to privacy.¹³ These scenarios create privacy and safety concerns that should be obvious to anyone truly concerned with the welfare of students.

Significantly, numerous courts have found that prisoners have the right to use restrooms and changing areas without regular exposure to viewers of the opposite sex.¹⁴ The Toolkit’s recommendations, however, deny minor students the rights to bodily privacy afforded even to prisoners.

To date, plaintiffs in twenty-four states have sued the government for violating students’ basic rights in passing transgender policies, yet this Toolkit suggests that all Minnesota schools expose themselves to litigation by adopting the same anti-privacy policies giving rise to these lawsuits. Even the Minnesota School Board Association representative voted against the Toolkit and expressed concerns about the unsettled nature of the law regarding this topic and the importance of local discretion.

The right to the free exercise of religion. The Minnesota State Constitution affords strong protection for

⁵ Minn. Stat. § 363A.24, subd. 1.

⁶ *Goins v. West Group*, 635 N.W.2d 717, 725 (Minn. 2001).

⁷ *State v. Lawson*, 340 P.3d 979, 982 (Wash. Ct. App. 2014); *see also Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (“Shielding one’s unclothed figure from the view of strangers, particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”).

⁸ *St. John’s Home for Children v. W. Va. Human Rights Comm’n*, 375 S.E.2d 769, 771 (W. Va. 1988).

⁹ *City of Phila. v. Pa. Human Relations Comm’n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

¹⁰ *See Elli Lake v. Wal-Mart Stores, Inc.*, 582 N.W. 2d 231 (Minn. 1998).

¹¹ *People v. Grunau*, No. H015871, 2009 WL 5149857, at *3 (Cal. Ct. App. Dec. 29, 2009).

¹² *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).

¹³ *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).

¹⁴ *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).

religious liberty, even stronger than those afforded to individuals under the United States Constitution.¹⁵ Faith-based principles of modesty preclude many religious students from sharing intimate facilities with members of the opposite sex. State courts faced with claims that school districts' actions violate students' right to the free exercise of religion must ask whether the action is the least-restrictive means of advancing a compelling state interest. Here, the state has no compelling interest in admitting members of the opposite sex to sex-separated facilities, and there are numerous less-restrictive means of furthering any legitimate goals that a school district seeks to promote.

Parents' right to direct their children's upbringing and education. Parents also have the fundamental right to control their children's education and upbringing, including their children's knowledge of the differences between the sexes.¹⁶

Interaction between males and females in showers, locker rooms, restrooms, and overnight facilities will necessarily result in students being exposed to disrobing or nude members of the opposite sex, contrary to the well-established rights of parents to direct the education of their children. Such exposure to anatomical differences between the sexes should not be forced upon students. These sensitive matters should be disclosed at home when parents deem it appropriate, not forced on kids in school facilities. Respecting such parental choices requires sex separation in restrooms and locker rooms.

II. Adopting the Toolkit's Recommendations Concerning the Use of Pronouns Would Compel Speech in Violation of the First Amendment.

The Toolkit warns against the use of non-preferred pronouns by school staff or students, and it recommends the adoption of classroom practices that "affirm" students' gender identities by referring to gender non-conforming students using their requested pronouns.¹⁷ First, this wrongly privatizes language—which by its nature must have common understanding to enable communication among diverse speakers. Furthermore, requiring students to refer to a biological female student using a male pronoun (or vice versa), violates students' First Amendment free-speech rights. School districts should not adopt it.

When a school requires a student to refer to a classmate using a pronoun that does not match the classmate's biological sex, the school is requiring the student to make a substantive statement about the nature of sex and gender identity that the student may find objectionable. But the First Amendment prohibits the government from forcing individuals to convey messages that they deem objectionable or punishing them for declining to convey such messages.¹⁸ Adopting the Toolkit's recommendations concerning pronoun usage would thus jeopardize students' speech rights, subjecting school districts to a serious risk of litigation.

¹⁵ See, e.g., *Hill-Murray Fed'n of Teachers v. Hill-Murray High School*, 487 N.W.2d 857, 864-65 (Minn. 1992).

¹⁶ 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").

¹⁷ Toolkit at p. 7.

¹⁸ See, e.g., *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (forbidding school district from requiring students to salute the flag and recite pledge of allegiance, reasoning that "the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind"); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (forbidding government from requiring citizens to display state motto on license plates); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (forbidding government from requiring a newspaper to include an article). Nor may the government apply non-discrimination laws to infringe these expressive freedoms. See *Hurley*, 515 U.S. at 572-73 (forbidding government from applying such a law to require parade organization to facilitate the message of an advocacy group).

III. The Toolkit's Recommendations Concerning Athletics Discriminate Against Female Student Athletes.

The Toolkit states that Title IX “requires that schools provide transgender students with the right to participate in . . . athletics . . . in a manner consistent with their gender identity.” That is a false statement. As previously discussed, Title IX’s prohibition of discrimination based on sex does not extend to gender identity, and no court has ever held that a school must allow a biological male to participate on a female athletic team in order to comply with Title IX. The only citation supplied by the Toolkit for its position is the May 13, 2016 *Dear Colleague Letter* from the U.S. Department of Justice’s Office of Civil Rights. But, as previously mentioned, that guidance has been withdrawn.

Minnesota law specifically recognizes the need for an equal playing field for female athletes by limiting girls sports only to female athletes because girls’ “overall athletic opportunities have previously been limited.”¹⁹ In fact, “when an educational institution has established a team exclusively for members of the sex whose overall athletic opportunities have previously been limited, members of the other sex [that is, ‘boys’] may not try out for or participate on that team.”²⁰ The Minnesota State High School League acknowledges that Minnesota law “affirms that **a boy may not participate** on a team restricted to members of a sex whose overall athletic opportunities have previously been limited.”²¹

Such restrictions also reflect the physical differences and competitive athletic advantages boys have over girls. High school boys are on average 5 to 5 ½ inches taller than girls, 20 to 40 pounds heavier, have 150 percent more skeletal and body mass, have larger hands, pelvises and feet, and have significantly more fast twitch muscle fibers.²² With the unrestricted physical and hormonal competitive advantages that biological males have over female athletes, the risk of injury significantly increases. Female athletes concerned about their physical safety in competitive play have only one option: forfeit. *The very laws that were created to protect female students are now being used against them.*

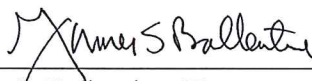
IV. Conclusion

The Toolkit recommends policies that, if adopted by a school district, would jeopardize the constitutional rights of students and their parents, opening the door to litigation. In order to protect the rights and safety of all students, we urge you not to adopt the Toolkit’s recommendations.

Sincerely,



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¹⁹ Minn. Stat. § 121A.04, subd. 3(d).

²⁰ Minnesota Rule 3535.3200, subd. 4 (prohibiting discriminatory practice in athletic programs) (emphasis added).

²¹ Minnesota State High School League, *Fact Sheet Regarding Athletic and Fine Arts Participation in Minnesota State High School League Activities* (Dec. 4, 2014), available at <http://www.mshsl.org/mshsl/MSHSLParticipationFactSheet.pdf>.

²² Center for Disease Control Growth Charts: <http://www.cdc.gov/growthcharts/data/set2clinical/cj411071.pdf> (boys), <http://www.cdc.gov/growthcharts/data/set1clinical/cj411022.pdf> (girls). Williams Textbook of Endocrinology: *Pubertal Growth Spurt, Bone Age & Skeletal Density*. Louis J G Gooren, MD and Vin Tangpricha, MD, PhD, *Treatment of Transsexualism* 3.

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 an individual’s immutable biological sex as objectively determined by anatomy and genetics existing at the time of birth. An individual’s original birth certificate may be relied upon as definitive evidence of the individual’s sex.

III. POLICY

A. Use of School Facilities

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

5. 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.

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B. 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. 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 students of the opposite sex are present or could be present.