



May 1, 2014

VIA EMAIL AND U.S. MAIL

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RE: School District Policy Allowing Students to Use Opposite-Sex Restrooms

Dear Tucson Unified School District Board Members and Dr. Sanchez:

It has come to the attention of Alliance Defending Freedom that Tucson Unified School District (TUSD) recently amended its Non-Discrimination Policy (Policy Code: AC) to include the terms “gender identity and expression” and has interpreted this amendment to allow students to use opposite-sex bathrooms and changing areas.¹ By way of introduction, Alliance Defending Freedom is an alliance-building 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.

¹ The principal of Anna Henry Elementary school has summarized TUSD’s policy change this way: “We have multiple restrooms, we have boys restrooms, we have girls restrooms, we have unisex restrooms, and the children can use the restroom they identify with.” Available at <http://www.lifesitenews.com/news/parents-outraged-after-arizona-school-allows-boys-and-girls-to-use-whichever>.

But TUSD has imperiled this safety by amending its anti-discrimination policy upon legal advice that federal laws like Title IX require it.² In fact, elementary students at Anna Henry Elementary school have already been forced into inappropriate and unsafe situations where they are being exposed to genitalia of the opposite sex.³ TUSD's policy change, however, allows such situations to continue. We write to inform you that the legal advice you received is incorrect: 1) no law requires TUSD to open changing areas to opposite-sex students and 2) providing such access violates the rights of students and parents.

No Law Requires TUSD to Give Students Access to Opposite-Sex Changing Areas

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. Contrary to the advice TUSD received, no court has ever interpreted Title IX to require schools to give students access to opposite-sex 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 MCCCCD was motivated by Kastl's gender, her claim is doomed..." *Id.* at 494 (emphasis added). Thus, under this precedent, TUSD 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."). *See also Goins v. West Group*, 635 N.W.2d 717, 723 (Minn. 2001) ("[W]e conclude that an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination"). Based on such cases, TUSD does not have any legal duty to open changing

² In the video of the Board Meeting where TUSD amended this policy, available at <http://www.tusd.k12.az.us/contents/govboard/gbvideo032514.html>, the TUSD Board is repeatedly advised that Title IX requires TUSD to amend its nondiscrimination policy.

³ This incident at Anna Henry Elementary school was widely reported in the news. *See, e.g.,* <http://www.tucsonnewsnow.com/story/25085673/parents-fired-up-over-bathroom-incident-at-tusd-school>.

areas to opposite-sex students as a means to prevent discrimination.⁴ There simply is no discrimination in protecting young children from inappropriate exposure to the opposite-sex.

TUSD's Policy Change Could Subject TUSD to Tort Liability for Violating Students and Parents' Rights

Not only may TUSD prevent students from accessing opposite-sex changing areas, TUSD should do so to avoid violating the rights of TUSD students and parents. With respect to TUSD 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 TUSD 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, TUSD 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, TUSD is treating its 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, TUSD students are entitled to the same courtesy and respect as prisoners. So TUSD students should also be free to use restrooms without worry about exposure to the opposite-sex.

Besides violating students' rights, TUSD's policy 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

⁴ Nor is there any Arizona state law or local law requiring TUSD to give students access to opposite-sex changing areas. Although Tucson has a very broad civil rights law, this law only applies to private, not public schools. *See, e.g., Tucson City Code*, §17-11(d) & (m) (defining public accommodations to include private, not public schools).

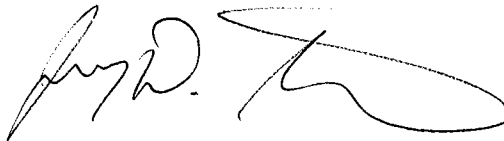
deem inappropriate for younger students to ponder. Information concerning anatomical differences should be disclosed at home when parents deem appropriate, not ad-hoc in a school restroom. To respect such parental choices, TUSD should require students to use restrooms appropriate to their biological sex.

CONCLUSION

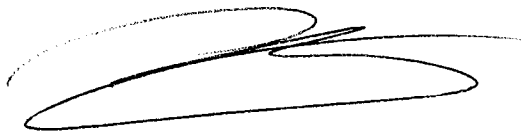
Permitting students to use opposite-sex restrooms would seriously endanger student safety, undermine parental authority, and severely impair an environment conducive to learning. These dangers are so clear-cut that a school district allowing such activity would clearly expose itself—and its teachers—to tort liability. We therefore suggest that TUSD reverse its decision and prohibit students from using opposite-sex changing areas. Specifically, we would advise TUSD to use the attached policy regarding use of bathrooms and changing areas. This attached policy not only accommodates transgender students, it protects students' privacy rights, it respects parents' rights to educate their children, and it insulates TUSD from legal liability. In fact, Alliance Defending Freedom is so confident in this attached policy that Alliance Defending Freedom is willing and herein offers to defend TUSD free of charge if TUSD enacts the attached policy and someone challenges this attached policy.

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,

A handwritten signature in black ink, appearing to read "Jeremy Tedesco", with a large, sweeping flourish extending to the right.

Jeremy Tedesco
Senior Legal Counsel

A handwritten signature in black ink, appearing to read "Jonathan Scruggs", with a large, sweeping flourish extending to the right.

Jonathan Scruggs
Legal Counsel