



December 4, 2023

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Dear Superintendent Dorland and Jefferson County Public School officials,

In the summer of 2023, on a cross-country overnight trip, Jefferson County Public Schools (JCPS) assigned a fifth-grade girl to sleep in the same bed with a fifth-grade boy who identifies as transgender *without* notifying the girl or her parents. The girl only found out because the boy who identifies as transgender told her on the first night of the trip. It then took the girl and her parents multiple requests to get her moved to another room. And even then, chaperones told the girl to lie about the reason for her move because of the district's overnight rooming policy—a policy that violates parental rights and student privacy by rooming students based on gender identity while hiding that information from other parents and students.

Every child should be treated with respect and privacy. But that respect and privacy must extend equally to all students. JCPS's overnight rooming policy does the opposite. JCPS's policy states that "students who are transgender should be assigned to share overnight accommodations with other students that share the student's gender identity consistently asserted at school." See JCPS, JB-R (2013) <http://go.boarddocs.com/co/jeffco/Board.nsf/goto?open&id=9DH3J76E6966>. The policy goes on to command that "[u]nder no circumstance shall a student who is

transgender be required to share a room with students whose gender identity conflicts with their own.” *Id.* However, the policy says nothing about a girl being required to share a bed with a boy who identifies as transgender. This policy and practice violates the sincerely held religious beliefs of our clients and their children, the parental rights of them and other parents in your district, and the privacy rights of all students

We, Alliance Defending Freedom (ADF), represent the girl, D.W., and her parents, Joe and Serena Wailes. The Waileases currently have two other children in JCPS, scheduled to go on that same Philadelphia and Washington D.C. trip. The Waileases ask that you immediately clarify JCPS policy; specifically, whether JCPS will continue this practice of intentionally withholding information about rooming accommodations from parents like the Waileases, who object to their children rooming with a student of the opposite sex, regardless of the other student’s gender identity. This practice renders it impossible for these parents to make informed decisions about their children’s privacy, upbringing, and participation in school-sponsored programs. Additionally, our clients request information related to JB-R and the ability to opt out of this rooming policy for all future school trips.

ADF shares our clients’ concerns. By way of introduction, ADF promotes the freedom of every person to live out their religious convictions in the public square and is dedicated to ensuring freedom of speech, religious freedom, and the fundamental right of parents to direct the upbringing of their children. We have a track record of success.¹ We are hopeful that we can resolve this matter amicably.

¹ Alliance Defending Freedom has consistently achieved successful results for its clients before the United States Supreme Court, including 15 victories before the highest court in the last 12 years. *See, e.g., 303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (upholding ADF client’s First Amendment rights); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022) (served on Mississippi’s legal team to defend the Mississippi Gestational Age Act); *Ams. for Prosperity Found. v. Bonta*; *Thomas More Law Ctr. v. Bonta*, 141 S. Ct. 2373 (2021) (upholding donors’ First Amendment rights); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021) (student free speech); *March for Life Educ. & Def. Fund v. California*, 141 S. Ct. 192 (2020); *Thompson v. Hebdon*, 140 S. Ct. 348 (2019) (overturning ruling upholding a law limiting political contributions); *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (upholding ADF’s client’s free-speech rights against California); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (upholding ADF’s client’s First Amendment rights); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017) (upholding ADF’s client’s First Amendment rights); *Zubik v. Burwell*, 578 U.S. 403 (2016) (representing Geneva College and Southern Nazarene University in consolidated cases) (upholding ADF’s clients’ First Amendment rights); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (unanimously upholding ADF’s client’s free-speech rights); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (representing Conestoga Wood Specialties Corp. in consolidated case) (striking down federal burdens on ADF’s client’s free-exercise rights); *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (upholding a legislative prayer policy promulgated by a town represented by ADF);

Factual Background

In June 2023, D.W. attended the JCPS-sponsored fifth-grade trip to Philadelphia and Washington, D.C. Serena accompanied her daughter D.W., but she was not a chaperone. The Wailes family was told at multiple parent meetings prior to the trip that female and male students would be roomed on different hotel floors, and on the trip the students were told by JCPS chaperones that boys were not even allowed to visit the girls' floor and vice versa without permission. D.W. was assigned to a room with three other students, two from her school and one from a different school, K.E.M., whom D.W. did not know prior to the trip. D.W. and K.E.M. were supposed to share a bed. Because she did not want K.E.M. to feel left out, D.W. made a point to be friendly throughout the first day of the trip.

The first evening, after the four students were in their room, K.E.M. revealed that K.E.M. was a male with a transgender gender identity. D.W. was immediately uncomfortable with the prospect of sharing a room and a bed with a male, regardless of the student's gender identity. D.W. snuck into the bathroom, which did not lock, and quietly called her mother, Serena. D.W. then met her mother in the lobby to share her concerns. Prior to the trip, no one at JCPS informed the Wailes or D.W. that her room would include a male who identified as transgender. In fact, JCPS told them just the opposite: that male and female students would stay on separate floors.

Next, Serena asked a school chaperone, a teacher at D.W.'s school, to come to the hotel lobby. After listening to Serena and D.W.'s concerns, the teacher called one of the trip leaders, Principal Ryan Lucas, who in turn called K.E.M.'s parents. K.E.M.'s parents confirmed their child's transgender gender identity and that K.E.M. was to be in "stealth mode," meaning students on the trip would not know about their child's transgender status.

The trip chaperones then asked D.W. if they could merely move her to a different bed rather than a different room. While D.W. was still uncomfortable with this arrangement, she agreed to try it for one night because she was tired after a long travel day. JCPS chaperones decided to lie to D.W.'s roommates, and instruct D.W. to do the same, telling D.W. to say she needed to switch beds to be closer to the air conditioner. But once the chaperone and D.W. were back in the room with the other three students, D.W. was again placed into a difficult position when another girl in the room offered to let K.E.M. also switch to the bed near the air conditioner, asking, "[K.E.M.], do you still want to sleep in the bed with [D.W.]?" Despite D.W.'s continued uneasiness with the arrangement, she was scared to speak up in front of the other students on such a contentious subject. Instead, D.W. went into the hall and again

Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125 (2011) (upholding a state's tuition tax credit program defended by a faith-based tuition organization represented by ADF).

told Serena she was uncomfortable. Serena and D.W. returned to the school chaperone and *again* asked for D.W. to be moved to a different room. This time, the chaperones agreed to move K.E.M. and one other girl to a different room but again lied about why, saying D.W.'s sick roommate needed more space. Throughout the entire evening, K.E.M.'s privacy and feelings were always the primary concern of JCPS employees.

After JCPS disregarded D.W.'s privacy and the Waileses' parental rights, JCPS then silenced D.W., thus infringing on her freedom of speech, when a JCPS teacher told the three girls that they were not allowed to tell anyone that K.E.M. was transgender, even though K.E.M. voluntarily chose to share this information.

JCPS's "Transgender Students" Policy

JCPS's policy and practice is to room students based on gender identity rather than sex "[i]n most cases." *See* JCPS JB-R at 3. JCPS's policy declares that "the needs of students who are transgender shall be assessed on a case-by-case basis with the goals of maximizing the student's social integration, providing equal opportunity to participate in overnight activity and athletic trips, ensuring the student's safety and comfort, and minimizing stigmatization of the student." *Id.* The policy then states that "[u]nder no circumstance shall a student who is transgender be required to share a room with students whose gender identity conflicts with their own." *Id.* The policy also explicitly requires school officials to keep a student's transgender status a secret: "[s]chool staff shall not disclose information that may reveal a student's transgender status to others, including parents and other school staff, unless legally required to do so or unless the student has authorized such disclosure." *Id.* at 2.

We are concerned with the unequal application of these policies in practice. The policy is supposed to "maintain[] the privacy of all students," *Id.* at 1, and allow for "[a]ny student who is transgender or not" to be "provided with a reasonable accommodation," including a "private room." *Id.* at 3. But in practice, JCPS does not provide this same opportunity to students like D.W., who do not wish to room with a student of the opposite sex, nor to parents like the Waileses, who would like to know whether JCPS intends to require their daughter to share a room with a boy. While K.E.M.'s parents had all the information and could make informed decisions about where and with whom K.E.M. would room, D.W.'s parents and the parents of the two other girls, were intentionally kept in the dark.

Because of JCPS's policy, eleven-year-old D.W. was placed in a position where her privacy and comfort were not respected or even considered. Her privacy was violated. And then, to try to protect her privacy, D.W. had to risk social ostracization because school officials required her to raise her privacy concerns during the trip and in front of other students and teachers, including the transgender student. Because

JCPS's policy prioritizes the "safety and comfort" of only transgender students to the exclusion of all other students, there was no way for D.W.'s parents to request an accommodation prior to the trip so they could protect D.W.'s privacy and "minimiz[e] stigmatization" of D.W. Therefore, an eleven-year-old child was placed in a position where she feared social backlash if she requested a different room in front of other students.

This current policy and practice violate the constitutionally protected parental rights of the Waileases and other parents in your district. The Supreme Court has recognized "the fundamental right of parents to make child rearing decisions." *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (plurality op.). In fact, parents' right "to direct the education and upbringing of [their] children" is "objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (cleaned up); see *Wisconsin v. Yoder*, 406 U.S. 205, 232–33 (1972). Indeed, "parents have the right to decide free from unjustified governmental interference in matters concerning the growth, development and upbringing of their children." *Bendiburg v. Dempsey*, 909 F.2d 463, 470 (11th Cir. 1990) (quoting *Arnold v. Board of Educ. of Escambia Cnty.*, 880 F.2d 305, 313 (11th Cir. 1989)); see *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

Applying parents' fundamental rights in a different but related context, a Wisconsin state trial court recently granted summary judgment to a family² who challenged a school district's decision to treat their daughter as a boy without notifying her parents. *T.F. v. Kettle Moraine Sch. Dist.*, No. 2021CV1650, 2023 WL 6544917, at *10 (Wis. Cir. Ct. Oct. 3, 2023). The court determined the school district's actions "implicate[] an infringement against the parental autonomy right to direct the care for their child." *Id.* at *5.

Because "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . . Parents can and must make those judgments." *Parham v. J.R.*, 442 U.S. 584, 603 (1979). But when schools withhold information from parents—like JCPS has done to the Waileases here—parents cannot make good choices about their children's education and well-being. *Gruenke v. Seip*, 225 F.3d 290, 306–08 (3d Cir. 2000) (finding a constitutional violation after a teacher withheld information about a student's pregnancy from her parents).

Similarly, JCPS's policy and practice, which intentionally hides information from parents, directly interfered with the Waileases' ability to make sound judgments

² Represented by ADF and the Wisconsin Institute for Law & Liberty.

for D.W. When JCPS kept K.E.M. in “stealth mode,” it failed to protect the privacy of all students. Specifically, the Waileses could not make informed decisions about whether to send D.W. on the trip and whether they needed to request an accommodation. In other words, “the means adopted” by JCPS to implement this Policy “exceed the limitations upon the power of the state and conflict with rights assured to plaintiff[s].” *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923). Instead, JCPS could have chosen a means that protects the privacy of all students by asking parents to opt-in to rooming with a student who identifies as transgender. Or JCPS could ask for a parent’s permission for their child to room with a student who identifies as transgender without giving out any child’s identity.

Conclusion

Joe and Serena Wailes have two fourth-grade children who are registered to attend a trip to New York, Washington, D.C., and Philadelphia next year. The planning and fundraising for the trip have already begun. Therefore, by 6:00 p.m. on December 18, 2023, please respond in writing with:

1. Clarification of your policy regarding room assignments for students and state whether parents of *all* students will be informed of the sex of their children’s roommates on school-sponsored trips *before* the trip;
2. Whether parents can opt their children out of any policy that rooms children by gender identity rather than sex; and
3. Any documents related to JB-R, including related policies, training materials, emails discussing JB-R, and documentation of previously granted accommodations.

We also expect assurances that any such clarification be included in the written policy going forward.

Respectfully submitted,



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Parental Rights