ALLIANCE DEFENDING
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August 14, 2017

Via Facsimile: (517) 522-8195

Grass Lake Community School Board
Rich Holcomb
Heather Brown
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Dear Grass Lake Community School Board Member,

I am an attorney with Alliance Defending Freedom, a legal organization that advocates for the constitutional speech, religious-exercise, and privacy rights of students and other individuals in cases across the country. I write on behalf of concerned parents and students in Grass Lake Community Schools to urge you reverse the policy, posted on your website, which states that students will be allowed to use sex-separated facilities such as restrooms and locker rooms corresponding to their gender identity regardless of biological sex. The stated reasons for the policy are based on incorrect information, and the policy threatens students' constitutional right to bodily privacy.

The Grass Lake Community Schools website states that a ruling by the United States Court of Appeals for the Sixth Circuit requires schools to allow transgender-identifying students to access sex-separated facilities based on their gender identity.[1] This statement is flatly incorrect. No ruling of the Sixth Circuit requires schools to jeopardize students' bodily privacy by allowing members of one sex to use the same restrooms, locker rooms, or showers as members of the opposite sex. The website further states that the Sixth Circuit recently "upheld a ruling that discrimination based

[1] "Correction to Transgender Information," Grass Lake Community Schools Website, available at http://www.grasslakeschools.com/ (last visited Aug. 14, 2017).

on gender identity, or non-conformity, is prohibited."[2] This statement is likewise incorrect. The Sixth Circuit has never held that Title IX—the federal law that prohibits discrimination based on sex in educational institutions and programs that receive federal funding—extends to discrimination based on transgender status. The Sixth Circuit did address the subject of sex discrimination against transgender individuals in the employment context in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). But in that case, the Sixth Circuit amended its initial opinion to delete a paragraph that would have extended protected-class status under Title VII and the Equal Protection Clause to individuals alleging discrimination based solely on their identification as transgender persons, clearly indicating the Court's intent *not* to do so. *See Smith v. City of Salem*, 369 F.3d 912, 921-22 (6th Cir. 2004), *amended and superseded*, 378 F.3d 566. In sum, no decision of the Sixth Circuit suggests that separating restrooms and locker rooms by sex constitutes unlawful discrimination.

That is no doubt because Title IX prohibits discrimination based only on the binary characteristic of sex and does not recognize "gender identity," "gender expression," or a "gender spectrum." Indeed, Title IX specifically states that schools can "maintain separate living facilities for the different sexes," 20 U.S.C. § 1686, and Title IX's implementing regulations state that schools may "provide separate toilet, locker room, and shower facilities on the basis of sex," 34 C.F.R. § 106.33. A number of federal courts have held that the federal Civil Rights Act, which includes Title IX, does not give individuals who identify as a member of the opposite sex the right to access facilities designated for use by the opposite sex, and that doing so raises legitimate privacy concerns. *See Sommers v. Budget Mkt., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (holding that a biological male who identifies as female use of 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); *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); *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").

It should also be noted that the federal Secretary of Education and the Attorney General recently took action to withdraw guidance that the Obama administration had issued in 2015 and 2016 regarding the interpretation of the prohibition of

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[2] *Id.*

discrimination "on the basis of sex" contained in Title IX. The now-rescinded guidance had erroneously interpreted Title IX to require schools, on threat of loss of federal funding, to open communal facilities to students based on students' claims to be male or female regardless of physiological reality. The Department of Justice and the Department of Education expressly stated that they will no longer rely on the positions taken in the withdrawn guidance. *See* Dear Colleague Letter from Sandra Battle, Acting Assistant Secretary for Civil Rights, U.S. Department of Education, and T.E. Wheeler, II, Acting Assistance Attorney General for Civil Rights, U.S. Department of Justice (Feb. 22, 2017).

In addition, in August 2016, a federal district court in Texas held that the term "sex" in Title IX and its implementing regulations unambiguously refers to biological sex and not gender identity. *Texas v. United States*, 201 F.Supp.3d 810, 8832-833 (N.D. Texas 2016). The court issued a nationwide injunction against interpreting "sex" in Title IX to include gender identity. *Id.* at 836. That nationwide injunction remains in effect.

Importantly, 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." *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."). 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 like showering risks their "permanent emotional impairment" under the "guise of equality." *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

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." *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 and restrooms. *Hendricks v. Commw.*, 865 S.W.2d 332, 336 (Ky. 1993); *see also McLain v. Bd. of Educ. of Georgetown Cnty. 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). Of course, the right is reciprocal: what holds true for girls' private facilities is no less true for boys' private facilities.

Forcing students into vulnerable interactions with opposite-sex students in secluded restrooms and locker rooms 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.

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. *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). The Grass Lakes Community Schools policy, as stated on the school district's website, denies minor students the rights to bodily privacy afforded even to prisoners.

In sum, the policy stated on the Grass Lakes Community Schools website is based on incorrect information and threatens students' constitutional right to bodily privacy, opening the school district to a risk of litigation. I urge you to reverse course and adopt a policy that protects the rights and safety of all students by limiting access to communal facilities based on biological sex while accommodating transgender-identifying students on a case-by-case basis by granting them access to single-user facilities.

Sincerely,

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