



Sent via e-mail

January 19, 2016

Superintendent Michelle Johnstone (michelle.johnstone@dsd2.org)
Dallas School District #2
111 SW Ash St.
Dallas, OR 97338
(503) 623-5594

Re: Transgender students' access to sex-segregated facilities and privacy rights

Dear Superintendent Johnstone:

We write to clarify Dallas School District's obligations under the law with respect to transgender students. It is critical that Dallas School District uphold its decision to allow transgender students to access facilities in accordance with their gender identity. Allowing transgender students access to restrooms and other sex-segregated facilities that correspond to the gender they live every day is not only in the best interest of the entire school community, but is also required by federal and state nondiscrimination law. Similarly, Dallas School District must respect the privacy of transgender students and must not disclose, either specifically or generally, the identity of transgender students. Such a disclosure is against the law and risks great harm to transgender students.

Background

Gender identity is a person's deeply held sense of their own gender. For most people, their gender identity matches the sex they were assigned at birth. A transgender person is someone whose sex at birth is different from their gender identity. For example, a transgender boy is a person who was assigned the sex female at birth, but whose gender identity is male. A growing number of students—many from the time before they even reach school age—have and express a clearly established gender identity that is different from the sex they were assigned at birth.¹

¹ See World Prof'l Ass'n for Transgender Health ("WPATH"), *WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.* at 1-2 (June 17, 2008),

It is widely recognized that transgender students regularly face severe and unrelenting harassment, violence and discrimination in schools.² As a result, a significant number of states and school districts have adopted nondiscrimination laws and/or policies, modeled on robust federal nondiscrimination protections that allow transgender students to use facilities consistent with their gender identity. In the process of adopting such laws and policies, school districts have routinely faced the same fears being voiced in Dallas by those opposed to such laws and policies. However, such fears have happily turned out to be unfounded and school districts have instead found that the adoption of inclusive policies has created a safe and welcoming environment that enhances the educational experience for all students.³

Conversely, requiring transgender students to use facilities that correspond with their assigned sex at birth, or segregating them into single-user facilities, is profoundly harmful. Excluding transgender students from facilities used by other students that share their gender identity singles out transgender students and sends a message to the school community that transgender students should be treated differently. As a result, transgender students are at heightened risk of harassment and victimization by other students and staff. Requiring transgender students to use single-user restrooms also causes an additional host of problems. Such facilities are often far from classrooms, which can cause students to be late for class. To avoid being tardy or the stigma of being forced to use facilities that do not correspond to their gender identity, transgender students often refrain from using the facilities at all—leading to painful urinary tract infections or other medical problems. Consequently, transgender students experience worsened educational outcomes due to missed school, lower grades, and higher drop-out rates.

Besides being in the best of interest of transgender students as well as the entire school community, denying transgender students use of facilities consistent with their gender identity also violates federal and state nondiscrimination laws, as explained below.

http://www.wpath.org/uploaded_files/140/files/Med%20Nec%20on%202008%20Letterhead.pdf (citing American Academy of Pediatrics).

For individuals with Gender Dysphoria—distress associated with the incongruence between one’s gender identity and assigned sex at birth—there is a medical consensus that appropriate treatment includes living in accordance with one’s gender identity in all aspects of life, known as social role transition.

² See Gay, Lesbian and Straight Educational Network (GLSEN), 2013 National School Climate Survey, available at <http://www.glsen.org/article/2013-national-school-climate-survey>.

³ See *Amici Curiae Brief of School Administrators from California, District of Columbia, Florida, Illinois, Kentucky, Massachusetts, Minnesota, New York, Oregon, Washington, and Wisconsin in Support of Plaintiff-Appellant, G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015), available at <https://acluva.org/wp-content/uploads/2015/06/School-Admin.-Amicus-Brief.pdf>.

Legal Analysis

Title IX of the Education Amendments of 1972 (“Title IX”) prohibits discrimination “on the basis of sex” in any education program, such as a public school, that receives federal financial assistance.⁴ Binding guidance issued by the U.S. Department of Education and rulings from numerous federal courts have made clear that Title IX protects students from discrimination based on their gender identity, gender nonconformity, or transgender status.⁵

For example, excluding transgender students from using the same restrooms as other students deprives them of equal access to educational opportunity in violation of Title IX. The Office for Civil Rights (“OCR”) of the U.S. Department of Education (“Department of Education”), which enforces Title IX, has published guidance making explicit that “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity . . . and OCR accepts such complaints for investigation” and resolution.⁶ Moreover, the Department of Education has said that Title IX requires schools to treat transgender students consistent with their gender identity with respect to single-sex facilities, such as restrooms.⁷ The Department of Education and the U.S. Department of Justice have entered into binding settlement agreements requiring school districts to allow transgender students to use restrooms and other sex-segregated facilities that correspond to their gender identity—just like all other boys and girls.⁸ The “Alliance

⁴ 20 U.S.C. § 1681(a).

⁵ See, e.g., *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

⁶ U.S. Dep’t of Educ., Office for Civil Rights, Questions & Answers on Title IX and Sexual Violence, at 5 (Apr. 29, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

⁷ Statement of Interest of the United States, *G.G. ex rel. Grimm*, Exhibit B; Letter from Adele Rapport, Reg’l Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Dr. Daniel E. Cates, Superintendent, Twp. High Sch. Dist. 211 (Nov. 2, 2015), <http://www.nytimes.com/interactive/2015/11/02/us/document-letter-from-the-us-dept-of-education-to-daniel-cates.html>.

⁸ Resolution Agreement, Township High School District 211, OCR Case No. 05-14-1055, at 2 (Dec. 2, 2015), available at <http://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf>; Resolution Agreement, Downey Unified School District, OCR Case No. 09-12-1095, at 1 (Oct. 8, 2014), available at <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>; Resolution Agreement, Arcadia Unified School District, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, at 3 (July 24, 2013), available at <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>.

Defending Freedom” (ADF) asserts that two recent district court decisions disagreed with the Department of Education’s interpretation of the law, but in fact both decisions are on appeal and are not binding on the Department of Education, which continues to accept complaints of excluding transgender students from restrooms for investigation and resolution and to enforce Title IX.⁹

Allowing transgender students to use the same facilities used by other students consistent with their gender identity also is fully consistent with 34 C.F.R. § 106.33, erroneously cited by ADF as justification for denying transgender students access to facilities consistent with their gender identity. Section 106.33 authorizes schools to provide separate restrooms based on “sex” but does not define “sex”¹⁰ or address how to provide restrooms to a student whose gender identity is not congruent with the sex assigned to him or her at birth. In an opinion letter, the Department of Education has addressed that question directly and determined that the authorization to provide separate restrooms for boys and girls under Section 106.33 does not authorize schools to exclude transgender students from using the restrooms consistent with their gender identity.¹¹ Courts are required to follow the Department of Education’s interpretation of its own regulations,¹² and that interpretation correctly upholds Title IX’s guarantee of equal access to educational opportunities for all students regardless of sex.

The Department’s interpretation is also consistent with the vast number of federal courts and agencies that, contrary to ADF’s assertion, have likewise ruled with near-unanimity in the past 15 years that discrimination against transgender people is sex discrimination under other federal

⁹ *G.G. ex rel. Grimm*, No. 4:15-cv-54, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015), *appeal docketed*, No. 15-2056 (4th Cir. Sept. 8, 2015); *Johnston v. Univ. of Pittsburgh*, Civ. No. 3:13-213, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015), *appeal docketed*, No. 15-2022 (3d Cir. Apr. 24, 2015).

¹⁰ Under federal law, the term “sex” is understood to include “gender”—that is, more than a person’s “biological” sex assigned at birth. *See, e.g., Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (upholding claim brought by transgender prisoner under Violence Against Women Act, noting that under federal nondiscrimination laws “the terms ‘sex’ and ‘gender’ have become interchangeable”); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) (“[A]n individual’s transgender status is necessarily part of his ‘sex’[.]”); *In re Lovo-Lara*, 23 I&N Dec. 746, 753 (BIA 2005) (“[R]eliance on the sex designation provided on an individual’s original birth certificate is not an accurate way to determine a person’s gender.”).

¹¹ Statement of Interest of the United States, *G.G. ex rel. Grimm*, Exhibit B.

¹² *Auer v. Robbins*, 519 U.S. 452 (1997).

laws.¹³ Preventing a transgender student from using the restroom in accordance with his or her gender identity is unlawful sex discrimination.¹⁴ Federal agencies including the U.S. Department of Housing and Urban Development,¹⁵ the U.S. Department of Justice,¹⁶ the U.S. Department of Labor,¹⁷ the U.S. Equal Employment Opportunity Commission,¹⁸ and the U.S. Occupational Health and Safety Administration¹⁹ all have concluded that transgender people must be allowed to use the same restrooms and other facilities as everyone else.

¹³ See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (in employment discrimination case under Equal Protection Clause, “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination”); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) (Title VII of the Civil Rights Act of 1964); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 2014 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII).

¹⁴ See, e.g., *Lusardi v. McHugh*, EEOC Appeal 0120133395, 2015 WL 1607756, at *7-8 (EEOC Apr. 1, 2015) (employer discriminated against transgender woman based on her sex by requiring her to use single-user restroom and not women’s restrooms); *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, at 10 (Colo. Div. of Civil Rights June 17, 2013), http://www.transgenderlegal.org/media/uploads/doc_529.pdf (school district discriminated against transgender girl based on her sex by not allowing her to use the girls’ restroom); see also *Hart v. Lew*, 973 F. Supp. 2d 561, 581 (D. Md. 2013); cf. *Doe v. Regional Sch. Unit 26*, 86 A.3d 600 (Me. 2014) (denying transgender girl use of the girls’ restroom at her school violated state’s Human Rights Act).

¹⁵ U.S. Dep’t of Hous. & Urban Dev., Notice CPD-15-02: Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities (Feb. 2015), <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf>.

¹⁶ Statement of Interest of the United States, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-54, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015); Statement of the United States, *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 24, 2015); see also U.S. Dep’t of Justice, *Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013*, at 9 (Apr. 9, 2013).

¹⁷ U.S. Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program (May 1, 2015); Discrimination on the Basis of Sex, Notice of Proposed Rulemaking, RIN 1250-AA05, 80 Fed. Reg. 5247 (Jan. 30, 2015).

¹⁸ *Lusardi*, 2015 WL 1607756; see also *EEOC v. Deluxe Fin. Servs., Inc.*, No. 15-cv-02646 (D. Minn. filed June 4, 2015).

¹⁹ U.S. Occupational Safety & Health Admin., *A Guide to Restroom Access for Transgender Workers* 1 (2015), available at www.osha.gov/publications/OSHA3795.pdf.

Additionally, Oregon’s law prohibiting discrimination in schools prohibits discrimination based on gender identity.²⁰ Under this law, as well, transgender people have the right to use facilities that correspond to their gender identity. For example, the Oregon Bureau of Labor and Industry has issued guidance instructing Oregon employers that they “must allow a transgendered person to use whichever bathroom is consistent with the person’s expressed gender.”²¹

ADF misreads the Oregon law’s provision that allows schools to provide a “reasonable accommodation of an individual based on the health and safety needs of the individual.” That provision grants schools the flexibility to *allow* a transgender student to use a restroom other than the one associated with the student’s gender identity, if requested by the transgender student for their own health and safety. As explained above, it is humiliating and harmful either to force a transgender student to use either the facilities associated with their assigned sex at birth or to separate the student from their peers through requiring the use of a separate unisex facility. Such an exclusion can in no way be considered a “reasonable” accommodation under Oregon law.

Finally, in addition to violating federal and state nondiscrimination law, excluding transgender students from the same restrooms used by other students of the same gender identity violates the Equal Protection Clause of the state and federal constitutions. There is no government interest that justifies this kind of differential treatment of transgender students.²² A school district can allow any student who feels uncomfortable using a shared facility—whether because of modesty, embarrassment, or any other reason—to use separate private or curtained-off facilities if they choose. But schools cannot force transgender students to use separate facilities because some people might feel uncomfortable with them. This kind of unequal treatment of a minority group is precisely what the Constitution’s Equal Protection Clause prohibits.²³

Protecting Transgender Students’ Privacy

Revealing a student’s transgender status to others without the student’s consent violates the student’s constitutional right to privacy. Actions that could reveal a student’s transgender status to others include explicitly notifying other students, parents, or administrators that the particular student is transgender; notifying others that “a” student on campus is transgender and allowing them to draw the implicit conclusion that a student who appears gender non-conforming is

²⁰ ORS 659.850(1)-(2); ORS 174.100(6).

²¹ Or. Bureau of Labor & Industry, *How to Create a Transgender Friendly Work Place* (2008).

²² *See, e.g., Glenn*, 663 F.3d at 1320 (holding that discrimination against transgender person constitutes sex discrimination in violation of Equal Protection Clause).

²³ *See, e.g., City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (deference to community discomfort with a group is not a legitimate basis for government’s unequal treatment of that group).

transgender; or segregating a transgender student from their peers into unisex facilities or facilities inconsistent with the student's gender identity, thereby inviting others to draw the conclusion that the student is transgender.

The Supreme Court has long recognized that the federal constitutional right to privacy not only protects an individual's right to bodily autonomy but also the individual's right to control the nature and extent of highly personal information released about them.²⁴ This right to informational privacy restricts a government agency's ability to disclose information about an individual's sexual orientation or gender identity.²⁵ Because transgender people face such high rates of discrimination and harassment, even violence, courts have recognized that revealing a person's transgender status without their explicit and voluntary consent is plainly prohibited.

For example, one federal court held that the disclosure of a person's transgender status to others without consent violated the constitutional right to privacy, noting the widespread "hostility and intolerance" transgender people face, as well as the "excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, [which] is really beyond debate."²⁶ Another court recently considered a state policy that prevented many transgender people from changing the gender marker on their driver's licenses, and thereby "outed" many transgender people to others who could conclude that the person was transgender because their "lived sex" was inconsistent with the gender marker on the ID.²⁷ The court recognized the fact that transgender people face widespread discrimination and even violence, and held that it had "no reason to doubt that where disclosure of this [highly intimate] information may fall into the hands of persons' harboring such negative feelings, the Policy creates a very real threat to Plaintiffs' personal security and bodily integrity" and thereby implicated "their fundamental right to privacy."²⁸

²⁴ *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

²⁵ See, e.g., *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) ("It is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity."); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) ("Publicly revealing information [about sexuality] exposes an aspect of our lives that we regard as highly personal and private."); *Eastwood v. Dep't of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) (right to privacy "is implicated when an individual is forced to disclose information regarding sexual matters.").

²⁶ *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999).

²⁷ *Love v. Johnson*, -- F.Supp.3d --, No. 15-11834, 2015 WL 7180471, at *4 (E.D. Mich. Nov. 16, 2015).

²⁸ *Id.* at *5 (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1060 (6th Cir.1998)).

This right to informational privacy extends to students in a school setting. Students have the constitutional right to share or withhold information about their sexual orientation or gender identity, even from teachers, administrators, or their own parents²⁹, and it is against the law for school officials to disclose, or compel students to disclose, that information. Even when a student appears to be open about their sexual orientation or gender identity at school, it remains the student’s right to limit the extent to which, and with whom, the information is shared.³⁰

Conclusion

The refusal to allow transgender students to use the same facilities used by other students in accordance with their gender identity violates Title IX and impairs students’ ability to learn, grow, and thrive in the school environment. Research shows that denying transgender people access to facilities that correspond to the gender they live every day holds serious consequences for them, negatively impacting their education, employment, health, and participation in public life.³¹ Conversely, full acceptance of a student’s gender identity—including allowing them access to gender-appropriate facilities —goes a long way toward providing a welcoming environment and a positive educational experience.³² Moreover, disclosure of a student’s gender identity, without their permission, is against the law and can have serious, long-term negative repercussions. It is critical for schools to respect the privacy of transgender students, even if the school is operating with no ill intent.

We hope this letter has given you a firm understanding of why schools should—and must—allow transgender students to use school restrooms and other sex-segregated facilities that correspond to their gender identity, and why schools must respect the privacy rights of transgender students. You may wish to consult *Schools in Transition: A Guide for Supporting*

²⁹ In one particularly tragic case, a teenager committed suicide after a police officer threatened to disclose his sexual orientation to his family. *Sterling*, 232 F.3d at 196.

³⁰ *C.N. v. Wolf*, 410 F. Supp. 2d 894, 903 (C.D. Cal. 2005) (“[T]he fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of that information to others.”).

³¹ Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People’s Lives*, 19 J. Pub. Mgmt. & Soc. Pol’y 65 (Spring 2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf>.

³² See *Mathis*, Charge No. P20130034X at 13; see also *Amici Curiae Brief of School Administrators from California, District of Columbia, Florida, Illinois, Kentucky, Massachusetts, Minnesota, New York, Oregon, Washington, and Wisconsin in Support of Plaintiff-Appellant, G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015).

Transgender Students in K-12 Schools for more information about how to provide a safe and supportive environment for all transgender students.³³

Please do not hesitate to contact the ACLU of Oregon if you have any questions about this issue or if we can be of any assistance to you in evaluating and formulating school policy. We can be reached at (503) 227-6928.

Sincerely,

A handwritten signature in blue ink, appearing to read 'M. Santos', written in a cursive style.

Mat dos Santos
Legal Director
ACLU of Oregon

³³ <https://www.aclu.org/report/schools-transition>.