



March 4, 2016

Via U.S. Mail and Facsimile at 615-451-5216

Dr. Del R. Phillips, III, PhD
Director of Schools
Sumner County Schools
695 East Main Street
Gallatin, TN 37066

Re: Transgender students' access to sex-segregated facilities

Dear Dr. Phillips:

ACLU of Tennessee represents the parents and a student currently attending a Sumner County high school with regard to what we understand is your policy of denying transgender students access to the same restrooms and facilities used by other students and educational opportunities that correspond to their gender identity.¹ The school's decision to exclude transgender boys from the boys' facilities and transgender girls from the girls' facilities harms transgender students by stigmatizing them and impairing their ability to participate fully at school and to enjoy a safe learning environment. Allowing transgender students to access restrooms and other sex-segregated facilities or classes that correspond to the gender they live every day not only is in the best interest of the students, but also is required by federal antidiscrimination law.

Background

A transgender person is someone whose gender identity is different from the sex they were assigned at birth. For example, a transgender girl is a person who was assigned the male sex at birth, but her gender identity is female. Gender identity is a person's deeply held sense of their own gender. Medical opinion is unequivocal that gender identity is not a choice.² Many people in school—or

¹ In the interest of protecting the confidentiality of our clients, the identity of the parents and student represented by ACLU-TN and Ms. Rubinfeld will not be revealed in this letter. As indicated below, we welcome the opportunity to discuss this issue and the particular facts in a confidential meeting.

even before they reach school age—have and express a clearly established gender identity that is different from the sex they were assigned at birth.³

Our clients received a document entitled “Procedural Guidance Regarding Transgender Students” from Katie Brown, Safe Schools Coordinator for Sumner County Schools. The document sets forth several rules governing transgender students. The policy requires that transgender students use the restroom facilities for the gender assigned at birth or, upon request, a private restroom “as long as it is feasible and doable.” Transgender students are also required to participate in the physical education class for the sex assigned at birth and may not use locker room facilities corresponding with their gender identity, although “[i]f the parent/guardian requests for the student to have access to a private place for the student to change clothes, the school will provide a place to the best of its abilities.” Ironically, and inconsistently, the same Procedural Guidance also states that transgender students may dress in clothes for the gender with which they identify and have teachers use the pronouns for the gender with which they identify—but then says they are required to go to the wrong bathroom for who they are and the clothes in which they are dressed.

Requiring transgender students to use the restrooms that correspond with the sex they were assigned sex at birth, instead of the gender they live every day, or requiring them to use separate single-user restrooms, is profoundly harmful. Excluding transgender students from the same restrooms used by other students that correspond to their gender identity sends a message to transgender students and their peers that transgender students should be treated differently and that their mere presence in the same facilities used by their peers is unacceptable.

Requiring transgender students to use single-user restrooms can cause a host of problems because those facilities may be far from classrooms, causing students to be late for class after using the restroom. Students often try not to use the restroom despite their need so as to avoid being tardy or being forced to use restrooms that do not correspond to their gender identity, leading to painful urinary tract infections or other health problems.

Moreover, when transgender students are required to use separate facilities, it does not go unnoticed by other students. Being separated from other students in this way would be damaging to anyone, but it is especially harmful for transgender students. Transgender students are at heightened risk of stress and victimization by other children and adults, and those stressors can lead to problems in adulthood including post-traumatic stress disorder, depression, anxiety, and suicidality.⁴

³ 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), (citing American Academy of Pediatrics).

⁴ See, e.g., Sari L. Reisner et al., *Mental Health of Transgender Youth in Care at an Adolescent Urban Community Health Center*, 56 *J. Adolescent Health* 274 (Mar. 2015).

Your school district's refusal to allow transgender students to use the appropriate facilities harms their health and well-being and disregards widely accepted standards of medical care for transgender people. It also violates federal antidiscrimination law, as explained below.

Legal Analysis

Title IX of the Education Amendments of 1972 ("Title IX") prohibits discrimination based on sex in any education program, such as a public school, that receives federal financial assistance.⁵ Federal courts have already specifically ruled that Title IX's prohibition on discrimination "on the basis of sex" protects students from discrimination based on their gender identity, gender nonconformity, or transgender status.⁶ Likewise, many courts have also recognized that discrimination against transgender people is sex discrimination under other federal laws.⁷

Preventing a transgender student from using the facilities or participating in physical education requirements in accordance with his or her gender identity is unlawful sex discrimination.⁸ Federal agencies, including the U.S. Department of Housing and Urban Development,⁹ the U.S. Department of Justice,¹⁰ the U.S. Department of Labor,¹¹ the U.S. Equal Employment

⁵ 20 U.S.C. § 1681(a).

⁶ 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).

⁷ 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*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII).

⁸ 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).

⁹ 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>.

¹⁰ 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).

¹¹ 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).

Opportunity Commission,¹² and the U.S. Occupational Health and Safety Administration,¹³ conclude that transgender people must be allowed to use the same restrooms and other facilities as everyone else.

In the school context, excluding transgender students from using the same facilities as other students deprives them of equal access to educational opportunity in violation of Title IX. Recently, the Office for Civil Rights (“OCR”) of the U.S. Department of Education (“DOE”), which enforces Title IX, published guidance making explicit that “Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity and femininity.”¹⁴ Recently, DOE confirmed that Title IX requires schools to treat transgender students consistent with their gender identity when separating students in different facilities, such as restrooms.¹⁵ DOE 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.¹⁶

Allowing transgender students to use the same restrooms used by other students consistent with their gender identity also is fully consistent with 34 C.F.R. § 106.33. Section 106.33 authorizes schools to provide separate restrooms based on “sex” but does not 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, DOE 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.¹⁷ DOE’s interpretation of its own regulations is entitled to controlling deference under *Auer v. Robbins*, 519 U.S. 452 (1997), and is consistent with the plain text of the regulation and Title IX’s guarantee of equal access to educational opportunities for all students regardless of sex.

In addition to violating Title IX, excluding transgender students from the same restrooms used by other students also violates the Fourteenth Amendment equal protection clause. There is no

¹² *Lusardi*, 2015 WL 1607756; *see also EEOC v. Deluxe Fin. Servs., Inc.*, No. 15-cv-02646 (D. Minn. filed June 4, 2015).

¹³ U.S. Occupational Safety & Health Admin., *A Guide to Restroom Access for Transgender Workers* at 1 (2015), available at www.osha.gov/publications/OSHA3795.pdf.

¹⁴ U.S. Dep’t of Educ., Office for Civil Rights, *Questions and 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>.

¹⁵ 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) [hereinafter “Rapport Letter”], <http://www.nytimes.com/interactive/2015/11/02/us/document-letter-from-the-us-dept-of-education-to-daniel-cates.html>.

¹⁶ 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>.

¹⁷ Statement of Interest of the United States, *G.G. ex rel. Grimm*, Exhibit B.

important government interest—or *any* interest—that justifies this different treatment of transgender students based on their gender identity.¹⁸ The use of restrooms does not entail exposure to nudity, and locker rooms can be provisioned with curtains and other measures to ensure privacy. Thus, a school district may “satisfy its Title IX obligations as well as protect potential or actual student privacy interests” by allowing transgender students to use the restrooms and other facilities that correspond to their gender identity.¹⁹ To the extent any student feels uncomfortable using a facility—because of modesty, embarrassment, discomfort with the presence of a transgender student, or for any reason—private facilities can be made available for them to use if they choose. But what schools cannot do is force transgender students to use separate facilities because *some* people might feel uncomfortable with them.²⁰ The equal protection clause does not permit a school to predicate discriminatory treatment solely on the prejudice or discomfort of part of the community.²¹

The refusal to allow transgender students to use the same restrooms 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. Denying transgender people access to restrooms that correspond to the gender they live every day has a serious impact, impacting their education, employment, health, and participation in public life.²² Conversely, full acceptance of a student’s gender identity, including allowing them access to gender-appropriate restrooms, promotes a positive educational experience.²³

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.²⁴ With regard to the parents and student represented by ACLU-TN, we ask that you and any appropriate school staff agree to meet with the parents and counsel to discuss in more detail the school system’s policy regarding sex-segregated facilities.

¹⁸ See, e.g., *Glenn*, 663 F.3d at 1320 (holding that discrimination against transgender person constitutes sex discrimination in violation of Equal Protection Clause).

¹⁹ Rapport Letter at 12.

²⁰ Requiring transgender boys, who are known to all their peers as boys, to use the girls’ rooms, and requiring transgender girls, who are known to all their peers as girls, to use the boys’ rooms, is not a viable policy from the perspective of both transgender students and their peers.

²¹ 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).

²² 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>.

²³ 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 Cty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015).

²⁴ We encourage you to consult *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* for more information about how to provide a safe and supportive environment for all transgender students. It may be found at <https://www.aclu.org/report/schools-transition>.

Dr. Del R. Phillips, III, PhD

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Please respond by Thursday, March 10, 2016 with dates and times you are available for the suggested meeting. Failure to respond will force our clients to pursue other legal remedies, including filing suit under Title IX and other applicable federal or state laws. Our desire is to handle this situation discretely and without the cost to the school system inherent in litigation. To schedule a meeting to discuss these issues, please contact Thomas H. Castelli at [REDACTED]

[REDACTED] or [REDACTED]

Sincerely,



Thomas H. Castelli
Legal Director

Abby Rubenfeld
ACLU-TN Cooperating Attorney
The Rubenfeld Law Office, P.C.

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