



January 28, 2016

RE: Transgender students' access to sex-segregated facilities

Dear Superintendent:

The American Civil Liberties Union of Tennessee (ACLU-TN) understands that you recently received a letter from the Alliance Defending Freedom (ADF) misleadingly asserting that schools are not legally required to allow transgender students to access restrooms and other sex-segregated facilities that correspond to the gender with which they identify, and which they express in their daily lives. The ADF letter only presented part of the picture.

We are sharing the following information so that your school system is fully informed when making important decisions about how to best treat all of your students with dignity and respect. Allowing transgender students to access restrooms and other sex-segregated facilities is not only in the best interest of students, it also is required by federal anti-discrimination law.

Unequal Treatment Of Students Based On Their Gender Identity Is Harmful And Counter To The Mission Of Educational Institutions

A transgender person is someone whose assigned sex at birth is different from whom they know they are on the inside. Understanding what it is like to be transgender can be hard, especially if you have never met a transgender person. But medical opinion is unequivocal that gender identity is not a choice. Many people in school have—and express—a clearly established gender identity that is different from the sex they were assigned at birth.ⁱ

Excluding transgender students from the restrooms that correspond to their gender identity sends a message to transgender students and their peers, as well as to school staff, that one group of students should be treated differently from others. Being separated from other students in this way would be damaging to anyone, but it is especially harmful for transgender children. Transgender children are at heightened risk of stress and bullying by other children and adults, and those stressors can lead to problems in adulthood, including post-traumatic stress disorder, depression, anxiety and suicidality.ⁱⁱ

Refusing To Allow Transgender Students To Use The Facilities That Correspond With Their Gender Identity Violates Federal Anti-Discrimination Law

The letter sent by ADF encourages you to discriminate against transgender students and assures that there will be no legal or practice repercussions. Their advice is incorrect because such discrimination can result in legal challenges under Title IX and the U.S. Constitution. 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.ⁱⁱⁱ Federal courts have 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.^{iv}

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Excluding transgender students from using the same restrooms 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, 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” and indicating that it would accept such complaints for investigation and resolution.^v Moreover, the U.S. Department of Education has said that Title IX requires schools to treat transgender students consistent with their gender identity when separating students in different facilities, such as restrooms.^{vi} The U.S. 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.^{vii}

While 34 C.F.R. § 106.33 authorizes schools to provide separate restrooms based on “sex,” it 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, the U.S. Department of Education 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.^{viii}

In ADF’s assertion that schools will not be subjected to liability for prohibiting transgender children from using their identified gender restroom, it relies on two federal district court opinions that disagree with the U.S. Department of Education’s interpretation of Title IX... What the ADF letter fails to disclose is that both of these cases are currently on appeal. The law is not settled on this issue; however, the government agency tasked with the administration of the law has clearly declared its interpretation of Title IX.

Discriminating Against Transgender Students Violates the Fourteenth Amendment’s Equal Protection Clause

In addition to violating Title IX, excluding transgender students from the same restrooms used by other students also violates the Equal Protection Clause. There is no important government interest—or *any* interest—that justifies this differential treatment of transgender students based on their gender identity.^{ix} 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 either transgender students or their peers.

Allowing Children to Use Bathrooms Does Not Threaten Safety or Privacy

All of us, including transgender people, care about safety and privacy in bathrooms and locker rooms. Allowing transgendered students to use restrooms and other facilities that correspond to their gender identity does not jeopardize that safety and privacy. It is already against the law to enter a bathroom or locker room for the purpose of harming someone or invading someone’s privacy.

The use of restrooms does not entail exposure to nudity. However, schools may provide curtains and other measures in restrooms and locker rooms to maximize privacy. To the extent that 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. What schools cannot do is force transgender students to use separate facilities because some people might feel uncomfortable with them.

Therefore, the sole purpose of ADF’s proposed policy is to target transgender children for differential treatment, opening the door for discrimination.

We hope this letter is helpful in addressing some of the misinformation you received in the ADF letter. You may wish to consult *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* for information about how to provide a safe and supportive environment for transgender students.^x If you have any questions, please feel free to contact me at (615) 320-7142. Thank you for ensuring the dignity, respect and equal treatment of all of your students.

Sincerely,



Hedy Weinberg
Executive Director

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

ⁱⁱ 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), <http://www.jahonline.org/pb/assets/raw/Health%20Advance/journals/jah/feature.pdf>.

ⁱⁱⁱ 20 U.S.C. § 1681(a).

^{iv} 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).

^v 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>.

^{vi} 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>.

^{vii} 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>.

^{viii} Statement of Interest of the United States, *G.G. ex rel. Grimm*, Exhibit B.

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

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