

November 9, 2015

Via First-Class Mail and Facsimile

Donald Hobart, President
Jacalyn Whiting, Vice President
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Thomas Dambra, Board Member
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Re: The use of single-sex school facilities by transgender and gender-nonconforming students

Dear Members of the Board, Superintendent Cox, and Principal McArdle:

We write to address a letter sent by the Alliance Defending Freedom (“ADF”) dated October 30, 2015 requesting that the Le Roy Central School District (the “School District”) and Le Roy Jr.-Sr. High School (the “High School”) adopt a policy and practice that would discriminate against transgender students by prohibiting them from using restrooms and other single-sex school facilities that match their gender identities. It is our understanding that the School District and High School have so far respected the gender identities of its students. Such practice is commendable and allows all students to thrive and learn. We urge you to continue to respect the gender identity of each of your students and to adopt inclusive, nondiscriminatory policies. To do otherwise would violate federal law, expose the School District to legal liability, and endanger the health and welfare of students.

As the nation’s oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender (LGBT) people and people living with HIV, Lambda Legal has frequently been counsel of

record or *amicus curiae* in cases addressing coverage of transgender people under sex discrimination law.¹ We write to provide you with accurate information about the law governing the use of restrooms and other single-sex facilities by transgender and gender-nonconforming students.

As discussed in detail below, and contrary to the representations in the letter sent to you by ADF, one simple principle is abundantly clear:

The School District has a legal responsibility to respect the gender identity of all its students and to not discriminate against students on the basis of gender identity or expression.

Federal law prohibits discrimination against students on the basis of gender identity.

All students, including transgender students, are protected from sex-based discrimination under federal law. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (“Title IX”), and its implementing regulations, 34 C.F.R. § 106.31 *et seq.*, prohibit discrimination on the basis of sex in federally financed education programs and activities.

The U.S. Department of Education (“ED”) and Department of Justice (“DOJ”) have made clear 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 or femininity and [the Office of Civil Rights] accepts such complaints for investigation.”² Moreover, in the context of Title IX’s applicability to gender identity discrimination with regards to the use of single-sex facilities such as restrooms, the ED

¹ See, e.g., *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (counsel of record); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed. App’x 492 (9th Cir. 2009) (*amicus*); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (*amicus*); *Chavez v. Credit Nation Auto Sales, Inc.*, 2014 U.S. Dist. LEXIS 128762 (N.D. Ga. July 18, 2014) (*amicus*); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Texas 2008) (counsel); *Mitchell v. Axcan Scandipharm, Inc.*, 2006 U.S. Dist. LEXIS 6521 (W.D. Pa. Feb. 17, 2006) (*amicus*); *Jane ED v. Archuleta*, EEOC Case No. 510-2014-00364X (counsel); *John ED v. Archuleta*, EEOC Case No. 510-2014-00396X (counsel).

² Dep’t of Educ., Office of Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), at 5, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. See also Dep’t of Educ., Office of Civil Rights, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* (Dec. 1, 2014), at 25 (“Under Title IX, a recipient generally must treat transgender students consistent with their gender identity[.]”), available at <http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>.

Office of Civil Rights (“OCR”) issued a letter on January 7, 2015 making clear that: “The Department’s Title IX regulations permit schools to provide sex-segregated restrooms ... under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.”³

The federal government routinely enforces these nondiscrimination requirements. On multiple occasions, school districts, ED, and DOJ have entered into resolution agreements requiring that school districts allow transgender students to use the restrooms and other single-sex facilities that accord with their gender identity in order to resolve charges of discrimination on the basis of gender identity. For example, on July 24, 2013, DOJ entered into a settlement agreement with the Arcadia Unified School District in California after the school refused to allow a male student who is transgender to use the boys’ restrooms and locker rooms.⁴ The agreement made clear that “[a]ll students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX.”⁵ Similarly, on October 14, 2014, OCR approved a resolution agreement with a girl who is transgender and had been subjected to discrimination and gender-based peer harassment in her school district.⁶ The agreement memorialized the student’s ability to use sex-designated facilities, such as restrooms, in accordance with her gender identity.⁷

As recently as November 2, 2015, OCR found a public school district to be in violation of Title IX for denying a transgender girl access to her high school’s female

³ Letter from James A. Ferg-Cadima, Acting Deputy Asst. Sec’y of Policy, Office of Civil Rights, U.S. Dep’t of Educ. (Jan. 7, 2015) (attached as Exhibit B to Statement of Interest of the United States, *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-cv-0054 (E.D. Va. June 29, 2015), *available at* <http://www.justice.gov/sites/default/files/crt/legacy/2015/07/09/gloucestersoi.pdf>).

⁴ See Resolution Agreement Between the United States and Arcadia Unified Sch. Dist., DOJ Case No. DJ 169-12C-70, OCR Case No. 09-12-1020 (July 23, 2014), *available at* <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>.

⁵ Letter of Resolution, Arcadia Unified Sch. Dist., DOJ Case No. DJ 169-12C-70, OCR Case No. 09-12-1020 (July 24, 2013), at 2, *available at* <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf>.

⁶ Resolution Agreement Between the United States and Downey Unified Sch. Dist., OCR Case No. 09-12-1095 (Oct. 14, 2014), *available at* <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>.

⁷ *Id.* at 1.

locker rooms.⁸ In so doing, OCR noted that denying the transgender student access to the locker rooms in accordance with her gender identity amounted to discrimination on the basis of sex, in violation of Title IX—a finding that not only exposes the school district in question to legal liability, but also to losing federal funds.

The aforementioned interpretation of Title IX's prohibition on sex discrimination is not limited to ED and DOJ. Numerous federal courts have agreed that Title IX protects students from discrimination based on gender identity.⁹ And in March 2015, a federal court held that Section 1557 of the Affordable Care Act, which incorporates Title IX's prohibition on sex-based discrimination, "protects plaintiffs ... who allege discrimination based on 'gender identity.'"¹⁰ Such court decisions form part of an ever-growing consensus that discrimination on the basis of gender identity is a form of sex-based discrimination.¹¹ Simply put, discrimination on the basis of gender identity is "literally" discrimination on the basis of sex.¹²

Finally, the School District should be aware that the adoption of a discriminatory policy, practice, or custom on the basis of gender identity by a public school district could also be in violation of the constitutional guarantees to liberty and equality. It is undisputed that "[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and

⁸ Letter from Adele Rapport, Regional Director, Office of Civil Rights, U.S. Dep't of Educ., OCR Case No. 05-14-1055 (Nov. 2, 2015), *available at* <https://assets.documentcloud.org/documents/2501220/letter-from-the-u-s-dept-of-education-to-daniel.pdf>.

⁹ *See, e.g., Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151-52 (N.D.N.Y. 2011); *ED v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); *Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

¹⁰ *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 U.S. Dist. LEXIS 31591, *28 (D. Minn. Mar. 16, 2015).

¹¹ *See, e.g., Glenn*, 663 F.3d at 1317 ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."); *Smith v. City of Salem*, 378 F.3d 566, 572-73 (6th Cir. 2004) (holding that transgender plaintiff sufficiently stated constitutional and Title VII sex discrimination claims based on his allegations that he was discriminated against because of his gender-nonconforming behavior and appearance); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008); *Macy v. Holder*, Appeal No. 0120120821 (EEOC Apr. 20, 2012).

¹² *Schroer*, 577 F. Supp. 2d at 306-07.

express their identity.”¹³ Indeed, a public school district violates the Equal Protection Clause’s prohibition of sex-based discrimination when it discriminates against its transgender students on the basis of their gender identity or gender-nonconformity.¹⁴

State law also prohibits discrimination against students based on gender identity or expression.

The Dignity for All Students Act (“DASA”) provides that “no student shall be subjected to harassment or bullying by employees or students on school property or at a school function; nor shall any student be subjected to discrimination based on a person’s actual or perceived ... gender (including gender identity or expression), or sex by school employees or students on school property or at a school function.”¹⁵ Not only does DASA include gender as a protected category, it defines gender as “a person’s actual or perceived sex and includes a person’s gender identity or expression.”¹⁶ As such, in July 2015, the New York State Education Department (“NYSED”) issued guidance to school districts throughout New York on how to create safe and supportive environments for transgender and gender-nonconforming students.¹⁷ In its guidance, and relying in part on the guidance of ED and DOJ with regards to Title IX, NYSED emphasized that prohibiting a student from accessing the restrooms that match his or her gender identity is prohibited sex discrimination.¹⁸

Other state courts and agencies across the country have held that single-sex facilities in public schools must respect students’ gender identity.

Other school districts throughout the country have recognized that they need to respect their students’ gender identity, particularly within the context of using single-

¹³ *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 2593 (2015).

¹⁴ *Cf. Glenn v. Brumby*, 663 F.3d at 1320 (“We conclude that a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”).

¹⁵ N.Y. Educ. Law § 11(7); 8 NYCRR § 100.2[1][2].

¹⁶ N.Y. Educ. Law § 11(6).

¹⁷ N.Y. Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School Environment For Transgender and Gender Nonconforming Students* (July 2015), available at http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf.

¹⁸ *Id.* at 9-11.

sex facilities. In a Maine case involving a young transgender girl named Susan, the Maine Supreme Court held that a school's decision to bar a fourth-grade female transgender student from the girls' bathroom constituted discrimination on the basis of gender identity, because "[s]he was treated differently from other students solely because of her status as a transgender girl."¹⁹ In Susan's case, "the school determined that Susan should use the girls' bathroom" and "provided her with the same access to public facilities that it provided other girls." However, as a result of "others' complaints," the school made the "later decision to ban Susan from the girls' bathroom." Such an action, the Maine Supreme Court found, constituted discrimination on the basis of gender identity.

Similarly, the Division of Civil Rights for the State of Colorado found that a school's decision to ban a six-year-old transgender girl from the girls' bathroom constituted discrimination and was "objectively and subjectively hostile, intimidating or offensive."²⁰ In its determination, the agency found "that the restroom restriction [] created an exclusionary environment, which tended to ostracize the [student], in effect producing an environment in which the [student] was forced to disengage from her group of friends" and that "also deprived her of the social interaction and bonding that commonly occurs in girls' restrooms during these formative years."²¹

Adoption of a discriminatory policy on the basis of gender identity would be harmful to the health and well-being of transgender students.

Adopting policies that discriminate on the basis of gender identity would harm the health and well-being of the transgender students within the School District. The relegation of a transgender student to a faculty or nurse's restroom does not solve these problems, but rather exacerbates them by singling out the student for restrictions based on gender identity.

Discriminatory restroom policies stigmatize transgender students by singling them out as different and sending a clear message to their peers that there is something wrong with them, or inferior about them. Transgender students already face high rates of physical and verbal harassment in schools,²² and discriminatory restroom policies

¹⁹ *ED v. Reg'l Sch. Unit 26*, 86 A.3d 600, 606 (Me. 2014).

²⁰ *Coy Mathis v. Fountain-Fort Carson School District 8*, Colo. Civil Rights Div., Charge No. P20130034X (June 17, 2013), at 12, available at http://www.transgenderlegal.org/media/uploads/doc_529.pdf.

²¹ *Id.* at 11.

²² See G. Kosciw et al., GLSEN, *The 2013 National School Climate Survey* 23 (2014),

invite further harassment by inviting peers as well as school staff to question transgender students about their bodies – questions that would universally be considered inappropriate and harassing if they were directed toward cisgender children – and by causing transgender students to out themselves as they either go to separate restrooms not regularly used by most students, or use a restroom that does not match their gender identity.

These discriminatory restroom policies and ensuing stigma can contribute to lower self-esteem and serious mental health conditions, such as depression and suicidality.²³ And discriminatory restroom policies can inflict physical harm by causing transgender students to fast, dehydrate themselves, or “hold it in” all day simply to avoid the stigma, harassment, and rejection associated with having to use a different restroom than the one that matches their gender identity.²⁴ Exclusionary policies also interfere with medically necessary treatment for gender dysphoria, the medical diagnosis for “discomfort or distress that is caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth.”²⁵ Treating gender dysphoria typically involves social role transition, wherein transgender people come to live all aspects of their lives consistently with their gender identity.

available at

http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf; Jaime M. Grant, Lisa A. Mottet & Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 3 (2011), available at

http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf (“Those who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%) and sexual violence (12%); harassment was so severe that it led almost one-sixth (15%) to leave a school in K-12 settings or in higher education.”); Pub. Health Agency of Can., *Gender Identity in Schools: Questions and Answers* 4 (2010) (“Studies suggest that in the school setting, as many as 96% of gender variant youth are verbally harassed and as many as 83% physically harassed. As a result, as many as three-quarters of gender variant youth report not feeling safe in school and three out of four report dropping out.”).

²³ See Pub. Health Agency of Can., *Gender Identity in Schools: Questions and Answers* 4-5 (2010), available at <http://www.education.gov.sk.ca/Q-and-A-gender-identity>; Russell B. Toomey et al., *Gender-Nonconforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, 46 *Developmental Psychol.* 1580, 1581 (2010).

²⁴ See 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* 66 (2013).

²⁵ Eli Coleman et al., World Prof’l Ass’n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* 5, 8-10 (7th ed. 2012).

Further, discriminatory restroom policies and the stigma they impose upon transgender students also impair the academic success of transgender students by affecting their attendance, causing a decline in their grades, and driving some transgender students to drop out of school altogether.²⁶

The School District cannot accept private biases, or generalized and speculative privacy concerns as a basis for discriminatory policies.

Finally, the School District cannot accept the private biases of others, or generalized or speculative privacy concerns to justify a discriminatory policy that would prevent a transgender girl from using the same restrooms and single-sex facilities as other girls. Indeed, within the context of access to restrooms that are in accordance with a transgender student's gender identity, DOJ has specifically stated that "generalized assertions of safety and privacy cannot override Title IX's guarantee of equal educational opportunity."²⁷ To that end, OCR has noted that a school district can "satisfy its Title IX obligations as well as protect potential or actual student privacy interests."²⁸ For example, "the installation and maintenance of privacy curtains in [a] locker room go a long distance toward achieving [] a nondiscriminatory alternative because providing sufficient privacy curtain access to accommodate any students who wish to be assured of privacy while changing would allow for protection of all students' rights in [such a] context." However, should a student find the presence of a transgender student in a restroom or other single-sex space disconcerting, it is the objecting student who should bear the burden of utilizing a different restroom, and not the transgender student.²⁹

²⁶ See Herman, *supra*, at 74-75; Mark L. Hatzenbuehler, *How Does Minority Stigma "Get Under the Skin"? A Psychological Mediation Framework*, 135 *Psychol. Bull.* 707, 714 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2789474/>; Catherine Good, Joshua Aronson & Michael Inzlicht, *Improving Adolescents' Standardized Test Performance: An Intervention to Reduce the Effects of Stereotype Threat*, 24 *Applied Developmental Psychol.* 645, 647 (2003) ("[Stigma] can undermine the academic performance of females in math, students from low socioeconomic backgrounds and, in fact, any group that contends with negative stereotypes about their intellectual abilities."); Kathryn R. Wentzel & Kathryn Caldwell, *Friendships, Peer Acceptance, and Group Membership: Relations to Academic Achievement in Middle School*, 68 *Child Dev.* 1198, 1199 (1997).

²⁷ Br. for the United States, *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015), available at <http://www.justice.gov/crt/file/788971/download>.

²⁸ Note 8, *supra*, at 12.

²⁹ See Note 8, *supra*, at 12 ("Those female students wishing to protect their own private bodies from exposure to being observed in a state of undress by other girls in the locker rooms,

Transgender and gender-nonconforming students seek nothing more than to be treated like all other students – with dignity and respect. In order to assist transgender and gender-nonconforming students as well as school districts across the country, we have prepared several resources you may find useful. For more information, you can visit our “Know Your Rights: Transgender” hub at <http://www.lambdalegal.org/know-your-rights/transgender>, where we provide guidance on matters such as restroom access rights and the updating and maintenance of school records. You may also access our “Transgender Rights Toolkit: Equal Access to Public Restrooms” at http://www.lambdalegal.org/publications/trt_equal-access-to-public-restrooms.

We hope that the School District continues to respect the gender identity of all students and act in compliance with its obligations under federal and state law, as well as the Constitution. Should you have any questions or need further information, please do not hesitate to contact us at 212-809-8585.

Very truly yours,

**LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.**



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including transgender girls, could change behind a privacy curtain.”). *Cf. Cruzan v. Special Sch. Dist. # 1*, 294 F.3d 981 (8th Cir. 2002) (affirming dismissal of suit by non-transgender female teacher alleging discrimination and violation of her privacy based on school’s policy allowing transgender female teacher to use the women’s restroom and finding that objecting teacher could use other restrooms).