ALLIANCE DEFENDING
FREEDOM
FOR FAITH FOR JUSTICE

March 15, 2017

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Anoka-Hennepin School Board
2727 N. Ferry St.
Anoka, MN 55303

Via email schoolboard@ahschools.us and U.S. Mail

Re: Student Privacy in Locker Rooms, Restrooms, and Overnight Accommodations

Dear Chair Heidemann and Members of the Board:

At your board meeting last month, several individuals pressured board members to alter Anoka-Hennepin School District policies regarding access to sex-separated facilities such as communal locker rooms, changing rooms, restrooms, and showers. I write on behalf of concerned parents and students within the Anoka-Hennepin School District who oppose any change to District policy that would establish "gender identity" as a basis for admitting students to such facilities. To do so would intermingle the sexes within facilities designed to meet each sex's intimate biological needs. That would undermine the constitutionally protected privacy rights of all District students and open the District to a serious risk of litigation.

The legal landscape has shifted significantly in the last several months in a direction that underscores the strength of student privacy rights and the incoherence of gender-identity policies. The federal Secretary of Education and the Attorney General recently took action to withdraw guidance that the

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Obama administration had issued in 2015 and 2016 regarding the interpretation of the prohibition of discrimination "on the basis of sex" contained in Title IX of the Education Amendments of 1972 ("Title IX"). That guidance had interpreted "sex" to mean "gender identity," thus requiring 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. That guidance misinterpreted the term "sex" in Title IX, which was intended to refer to a student's actual, physiological sex. The withdrawal of the guidance signals that the Department of Education and Department of Justice now interpret Title IX according to its original meaning. And that original meaning recognizes the importance of protecting student privacy: Title IX's implementing regulations (specifically, Code of Federal Regulations chapter 34, section 106.33) expressly allow the separation of communal restrooms, locker rooms, and similar facilities on the basis of sex.

Closely related to the federal government's withdrawal of the gender-identity guidance, the U.S. Supreme Court remanded the lead federal case on these issues, vacating the opinion of the Fourth Circuit that had deferred to the now-withdrawn guidance's interpretation of Title IX. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *mandate recalled and stayed*, 136 S. Ct. 2442 (2016), *cert. granted*, 137 S. Ct. 369 (Oct. 28, 2016), *vacated and remanded*, __ S. Ct. __, 2017 WL 855755 (Mar. 6, 2017). The Supreme Court had previously stayed the lower court's injunction pending appeal, returning access to intimate facilities in the Gloucester County school district to the status quo before litigation commenced: boys and girls have access to sex-specific communal facilities based not on their gender identity but on their actual sex, and the bodily privacy of the professed transgender student is protected by granting the student access to single-user facilities.

Recent developments in federal law thus counsel against adopting any policy that would grant access to restrooms, locker rooms, or other sex-separated facilities on the basis of gender identity. State law does not suggest a different course. Indeed, in a recent public statement critical of the withdrawal of the federal gender-identity mandate, Governor Mark Dayton acknowledged that Minnesota law does not obligate schools to authorize students to access sex-separated facilities based on their professed gender identity: "According to my legal counsel, there is no explicit provision within Minnesota statutes that explicitly addresses what bathrooms transgender students should be allowed to use in schools. The Minnesota Supreme Court has however previously held in the employment context that the Minnesota Human Rights Act 'neither requires nor prohibits restroom designation

according to self-image or gender or according to biological gender.'"[1]

Accordingly, the reasonable and prudent course of action is to protect the privacy of all students by preserving intimate facilities to the use of either males or females, which would preserve the status quo in line with the Supreme Court's rulings in *Gloucester County* and Title IX's implementing regulations. *See* 34 C.F.R. § 106.33. The alternative—creating policies that would intermingle the sexes in facilities designed to afford privacy to allow each sex to attend to their intimate biological needs—has led to litigation in other districts where formerly sex-specific facilities were opened to members of the opposite sex. *See, e.g., Privacy Matters v. U.S. Dep't of Educ.,* No. 0:16-cv-03015 (D. Minn. Sept. 7, 2016), and *Students and Parents for Privacy v. U.S. Dep't of Educ.,* No. 1:16-cv-04945 (N.D. Ill. May 4, 2016).

To be clear, sex and gender identity are radically different from one another. Sex is determined at conception[2] and may be ascertained at or before birth, being evidenced by objective indicators such as gonads, chromosomes, and genitalia. *See* Am. Psychological Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) (sex "refer[s] to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia."). As a sexually reproducing[3] species, we are equipped with gonads and genitalia which facilitate the reproductive act and all the human sensitivities around sex (as a noun and as a verb), and these aspects of our anatomy give rise to critical privacy needs and correlated rights. This reality is precisely why Congress authorized schools to separate the sexes under 34 C.F.R. §106.33 without risking a Title IX violation.

Standing in stark contrast to sex, gender identity is a subjectively determined, fluid continuum that includes male, female, as well as other

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[1] Statement from Governor Mark Dayton on Protections for Transgender Students (Feb. 23, 2017), available at http://mn.gov/governor/newsroom/?id=1055-281455 (last visited Mar. 13, 2017).

[2] Developmental Biology, 6th Ed., (Sinauer Associates 2000), https://www.ncbi.nlm.nih.gov/books/NBK9967/ (last visited Mar. 14, 2017).

[3] Defined as "[a] form of reproduction that involves the fusion of two reproductive cells (gametes) in the process of fertilization. Normally, especially in animals, it requires two parents, one male and the other female." *Oxford Dictionary of Biology* (7th ed. 2015). It is essential to human survival, as "[s]exual reproduction, unlike asexual reproduction, therefore generates variability within a species." *Id.*

"genders":

> Other categories of transgender people include androgynous, multigendered, gender nonconforming, third gender, and two-spirit people. Exact definitions of these terms vary from person to person and may change over time but often include a sense of blending or alternating genders. Some people who use these terms to describe themselves see traditional, binary concepts of gender as restrictive.

Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression* 2 (3rd ed. 2014), http://www.apa.org/topics/lgbt/transgender.pdf (last visited Mar. 14, 2017); *see also* Asaf Orr et al., *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* (2015) at 5 (describing gender identity as falling on a "gender spectrum") and 7 (defining "gender identity" as "a personal, deeply-felt sense of being male, female, both or neither"), http://bit.ly/2di0ltr (last visited Mar. 14, 2017).

Notably, such fluidity is not mere theory. It has already arisen in the student-privacy cases that Alliance Defending Freedom ("ADF") is currently litigating. For example, when School District No. 211 in Palatine, Illinois refused to safeguard their students' privacy and allowed access to locker rooms based on gender identity, impacted parents and students commenced a lawsuit against the District. In that lawsuit, a student who professes to be transgender testified that she was born female, then identified as "gender queer" before changing again to present herself for a number of months "in a masculine manner." School officials are thus left trying to apply nondiscrimination standards intended to protect the objectively defined, reproductively grounded categories of male and female to instead affirm individual students' subjective perceptions of where they land within a fluid continuum at any given time.

Nor should gender identity be viewed as a supplementary class added to the defined classes of male or female. Rather, gender-identity theory supplants sex and becomes the sole factor to determine sex. Again, this is not theory, but confirmed in our *Highland Local School District* case in Ohio, when at oral argument the district court sought to confirm that the intervening, male-to-female transgender student had (as he does) male genitalia. The student's counsel responded that it was "*inappropriate* to label any part of [the student's] body as male." *See* Exhibit 1, oral argument transcript.

A long silence followed that comment, and rightly so, as the statement robs "male" and "female" of any real meaning. Indeed, the *reductio ad absurdum* of gender-identity theory is that it treats *every* sex-related characteristic, including those physiological systems which are uniquely male or female, as if they were merely sex stereotypes as opposed to physiological realities that define sex.

At bottom, gender-identity proponents advance a theory which actually eliminates the objective, reproductively grounded binary definition of sex in favor of deploying nondiscrimination law to affirm individual, subjective perceptions of one's sex; neither chromosomes nor male or female reproductive systems are defining characteristics under gender-identity theory.[4] That is a grave misuse of nondiscrimination law.

In contrast, protecting the important bodily privacy right is a proper use of the law, and evident in myriad areas of the law. For example, 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). 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, such as showering, risks their "permanent emotional impairment" under the mere "guise of equality." *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103 (Pa. Commw. Ct. 1973).

As a result of these privacy interests, a girls' locker room has always

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[4] Gender-identity advocates are fond of pointing to "intersex" conditions or chromosomal aberrations to support their theory. But that's a red herring. Intersex conditions are rare. Two that are noted in the literature are 5 alpha reductase deficiency, which is so rare that its incidence level is unknown, and androgen insensitivity syndrome, which is known to affect 2-5 persons per 100,000 people. U.S. National Library of Medicine, https://ghr.nlm.nih.gov/condition/5-alpha-reductase-deficiency (last visited Mar. 14, 2017); U.S. National Library of Medicine, https://ghr.nlm.nih.gov/condition/androgen-insensitivity-syndrome (last visited August 9, 2016). Both represent disorders of sexual development, not a different gender identity. And those who suffer from the most common but still very rare chromosomal disorder, Klinefelter's (XXY) syndrome, are treated and considered to be male. U.S. National Library of Medicine, https://ghr.nlm.nih.gov/condition/klinefelter-syndrome (last visited Mar. 14, 2017); U.S. National Library of Medicine, https://medlineplus.gov/ency/article/000382.htm (last visited Jan. 4, 2017 9, 2016). No person with any such condition has actually appeared in any of the numerous gender-identity lawsuits of which ADF attorneys are aware.

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 Cmty. 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).

And the right is bilateral—what holds true for placing a male in girls' private facilities is no less true for placing a female in boys' private facilities. In sum, the privacy needs driven by the real physiological, reproductively grounded differences between males and females have been recognized and protected by myriad courts, including the United States Supreme Court. *See United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (noting that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.").

In the midst of all this, some have assumed that bodily privacy concerns are mitigated simply by hanging a curtain or building stalls within communal intimate facilities. But the zone of privacy in such facilities begins at the facility door, not beside a curtain or stall door. The case of *Kohler v. City of Wapakoneta,* 381 F. Supp. 2d 692 (N.D. Ohio 2005) is instructive. *Kohler* involved a male who tape-recorded females using stall-enclosed toilets in the women's room. In finding a privacy violation, the court held that "it is appropriate to consider that even if Kohler did not expect privacy from other women in the women-only restroom, she reasonably expected her activities to be secluded from perception by men." *Id.* at 704. If an adult woman is protected from a male listening (remotely and after-the-fact) to her conduct of personal hygiene within a commode stall inside a ladies' room, then surely an adolescent or prepubescent girl should be protected from a male physically adjacent to her stall inside a District restroom.

Similarly, in *Norwood v. Dale Maintenance System, Inc.*, 590 F. Supp. 1410, 1415-17 (N.D. Ill. 1984), a federal court held that adult men would suffer an "extreme" invasion of privacy, and be subjected to unacceptable levels of stress, if women were allowed to service men's restrooms. This would be true even if the women did not actually see the men engaged in restroom activities—just their knocking on the door to determine if the restroom was in use "would still cause stress" to the men inside, who would fear that they might

be intruded upon. *Id.* at 1422. Certainly, what is true for adult men would be all the more true for adolescent students.

In light of these privacy issues, courts have rejected the notion that gender identity properly serves to gain access to facilities reserved for opposite-sex use. For example, in *Kastl v. Maricopa County Community College District*, 325 F. App'x 492, 493 (9th Cir. 2009), a community college banned Kastl, a male student and employee of the college, from using the women's restroom even though he asserted a female gender identity. Kastl sued the college for discrimination under Title IX, Title VII, and the First and Fourteenth Amendments. The United States Court of Appeals for the Ninth Circuit ruled in the college's favor because "it banned Kastl from using the women's restroom *for safety reasons*" and "Kastl did not put forward sufficient evidence demonstrating that [the college] was motivated by Kastl's gender." *Id.* at 494 (emphasis added). Kastl's claims were therefore "doomed." *Id.*

More recently, a Pennsylvania federal court similarly examined "whether a university, receiving federal funds, engages in unlawful discrimination, in violation of the United States Constitution and federal and state statutes, when it prohibits a transgender male student from using sex-segregated restrooms and locker rooms designated for men on a university campus." *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 663 (W.D. Pa. 2015), *appeal dismissed* (Mar. 30, 2016)). The court concluded that "[t]he simple answer is no." *Id.* It held that "the University's policy of 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." *Id.* at 672-73.

Of course, students are not alone in holding constitutional rights which are threatened by the proposed policies. Parents have the fundamental right to control their children's education and upbringing. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (holding that the Constitution "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights ... to direct the education and upbringing of one's children ...."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Wisconsin v. Yoder*, 406 U.S. 205,

233 (1972) (recognizing "the liberty of parents and guardians to direct the upbringing and education of children under their control").

Parental rights play out in a number of directions: with younger children, intermingling boys and girls in restrooms and locker rooms may lead to age-inappropriate discoveries about anatomical differences; this is information that many parents would prefer to deal with at home, at an appropriate time and not ad hoc in a school restroom. And for students of all ages, intermingling the sexes often runs counter to the moral and religious values that parents have a right to instill in their children—and something as basic as modesty and respect for the opposite sex's privacy should not be diluted (if not destroyed) by a public school policy.

Not only do serious issues of bodily privacy arise with the adoption of gender-identity theory, but the science regarding gender-identity theory and the notion that one's natal sex may change is increasingly seen to be flawed. For example, gender-identity proponents insist that gender identity is fixed around the ages of 2 to 4 years, and that a child's sex that was "assigned" at birth is deemed to be merely a "proxy" for their true sex, which is eventually determined by their gender identity. Thus, the argument goes, a young child who thinks that they are really a member of the opposite sex must be treated as such by public school policies.

Two brief examples show that this theory rests on weak ground. First is the fact that "there is no expert clinical consensus regarding the treatment of prepubescent children" who are gender dysphoric. Jack Drescher and Jack Pula, *Ethical Issues Raised by the Treatment of Gender-Variant Prepubescent Children*, Hastings Center Report 44, no. 5 (2014). These authors go on to state that about 75 percent of such children will realign with their natal sex once they have passed through puberty and that there is an "absence ... of randomized research" on whether current or alternate treatment modalities are damaging. *Id.* at 17-18.

Second, gender-identity proponents urge that their demands must be met because the influence of systemized stigma on transgender students is so severe. But again, that claim is scarcely proven. For example, a 2014 study was widely reported to confirm that stigma drove a 12-year decrease in lifespan among lesbian, gay, bisexual, and transgendered persons. But when other researchers tested the same data relied upon in that study—and then retested it ten different ways—the original results could not be replicated. *See* Regnerus, M., *Is structural stigma's effect on the mortality of sexual minorities*

robust? A failure to replicate the results of a published study, Social Science & Medicine (2016), http://dx.doi.org/10.1016/j.socscimed.2016.11.018 (last visited Mar. 14, 2017). Simply put, the 2014 study is now suspect if not outright discredited.

Again, from the prudential view, the District should maintain a healthy skepticism regarding gender identity proponents' science claims, especially when their own researchers raise profound ethical concerns, and keystone studies that they rely upon heavily cannot be replicated.

Moreover, the countervailing science is becoming more persuasive: a balanced and thorough overview of the literature is given in *Sexuality and Gender, Findings from the Biological, Psychological, and Social Sciences* by Dr. Lawrence S. Mayer and Dr. Paul McHugh, The New Atlantis No. 50 (Fall 2016), available at http://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf (last visited Mar. 14, 2017). On a more pragmatic level, well-credentialed experts testifying in our student privacy lawsuits show that the current vogue in fostering cross-sex hormone treatments is ill-advised, as illustrated in the attached expert reports of Dr. Paul Hruz (pediatric endocrinology) and Dr. Alan Josephson (psychiatry) (attached as Exhibits 2 and 3).

Finally, there is surely a legitimate concern with respect to bullying, which gender identity proponents have often leveraged to support their agenda. But bullying is bullying, and it must be suppressed regardless of a bully's motivation or the victim's characteristics. One need not fall into a particular class of people to merit protection: no person should suffer such offense as the price of attending public school. The model policy attached (Exhibit 4) can assist the District on this point as it clearly defines what conduct is regulated without venturing into the legal, medical, and ethical uncertainties swirling about gender-identity theory.

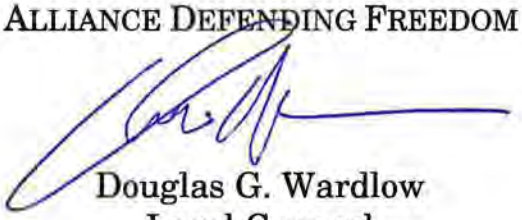
CONCLUSION

Allowing students to use opposite-sex restrooms and locker rooms seriously endangers students' bodily privacy and undermines parental authority, leaving the District exposed to legal risks. The bodily privacy of all students—including those professing transgender identities—is protected by relying on sex to regulate access to communal intimate facilities and providing individual facilities for those not comfortable with sharing a facility with others of their birth sex, or who simply need extra privacy.

I thus urge the District to act in accord with the simple reality that there are boys, and there are girls, and boys and girls are fundamentally different in ways that really do matter. Those differences merit respect for personal modesty and a commitment to protect the right to bodily privacy for all students. Please feel free to contact me should you have any questions or if I may be of further assistance.

Sincerely,

ALLIANCE DEFENDING FREEDOM



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