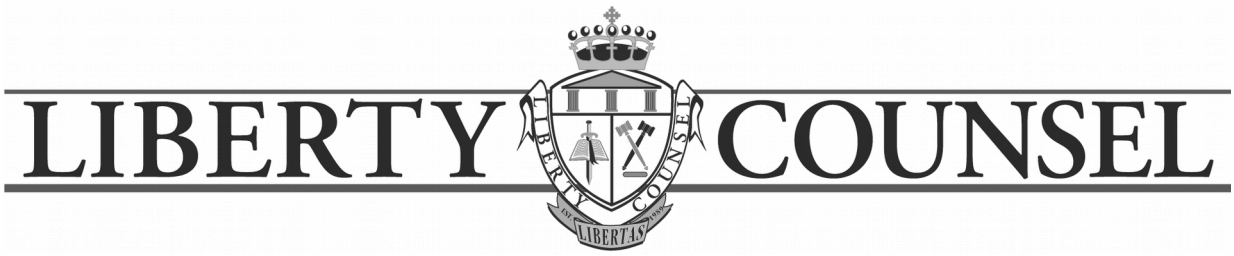

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Reply to: Virginia

March 14, 2017

Via Email only
Superintendent David Law
Anoka-Hennepin School District
David.Law@ahschools.us

Re: Proposed Changes to school policies regarding "gender identity"

Dear Superintendent Law and School Board Members:

By way of brief introduction, Liberty Counsel is a non-profit litigation, education, and policy organization with an emphasis on religious liberty issues. We have offices in Lynchburg, Virginia; Orlando, Florida; and Washington, D.C. Liberty Counsel is aware that the Anoka-Hennepin School District is scheduled to hold a “listening session” on March 20, 2017 on whether to implement policies that would add "gender identity" to school policies and change access to sex-separate facilities from biological sex to “gender identity.” We have been contacted by concerned citizens and parents who have asked us to provide the school board with information regarding the legal issues surrounding the board’s decision.

School districts and other governmental agencies are being pressured by various advocacy groups to include “gender identity” as a protected class in their non-discrimination policies and to grant access to sex-separate private facilities, sex-separate athletic teams and sex-separate accommodations on extracurricular trips on the basis of gender identity instead of biological sex. From May 13, 2016 until February 22, 2017, the Department of Education and Department of Justice asserted that schools had to implement policies that granted access on the basis of gender identity instead of biological sex. In a May 13, 2016 “guidance letter, “ the agencies claimed that Title VII and Title IX of the federal Civil Rights Act, which prohibit discrimination on the basis of sex in employment and education, respectively, should be interpreted to prohibit discrimination on the basis of gender identity. The agencies threatened to withhold federal funds if districts and employers did not comply by enacting policies recognizing “gender identity,” “gender expression,” “gender nonconformity,” “transgender,” and other subjective, invented categories as protected classes, ~~The~~ requiring teachers and/or students to address gender-confused students by false names and pronouns, and permit gender-confused students unfettered entry into opposite-sex lockers, showers, restrooms, and sports programs, and sleep in the bedrooms of opposite-sex students on overnight field trips.

The positions taken in the May 13, 2016 letter were wholly without basis in the law. Congress never expanded the definition of “sex” to include gender identity or any

other subjective category and no court decision adopted such a definition. Instead, the directive in the letter was based entirely on bureaucrats' determination that "sex" should be redefined to include "gender identity" in order to further a political agenda. On February 22, 2017, the Department of Justice and Department of Education rescinded the directive in the May 13, 2016 letter, leaving the question of educational policy in the hands of the states. Therefore, there is no longer any federal directive nor any risk to federal funding if school districts retain their common-sense policies basing access to sex-separate facilities and programs on biological sex.

Contrary to the advice in the May 2016 letter, schools that permit biological boys to use girls facilities and programs, or vice versa, on the grounds that they "identify" as the opposite sex will actually risk ~~of~~ violating Title IX and other rights to privacy and personal security of students who clearly have the right to use such facilities consistent with their birth sex. School districts which bend to the "transgender" demands expose themselves to liability from lawsuits filed by parents of students whose rights are violated.

No Scientific Authority

There is much disinformation on the "gender identity" and "transgender" issue. Actual science shows that the vast majority of gender-confused students who are not labeled or pigeonholed by parents, teachers, or government authorities; are affirmed in their masculinity or femininity; or are otherwise not subjected to misleading propaganda, will simply outgrow their confusion, and will achieve congruence with their biological sex. As observed by Dr. Paul McHugh, former chief psychiatrist at Johns Hopkins Hospital, "when children who reported transgender feelings were tracked without medical or surgical treatment at both Vanderbilt University and London's Portman Clinic, over 70%-80% of them spontaneously lost those feelings." Dr. McHugh's findings are emphatically confirmed by the DSM-V, which shows as many as 97.8% of gender-confused boys and 88% of gender-confused girls eventually accept their biological sex after naturally passing through puberty.[1]

Moreover, principled scientists and physicians are rejecting the false policy positions of professional associations captured by homosexual activists. A recent position statement of the American College of Pediatricians[2] (signed by Dr. McHugh) urges caution by educators and legislators, to avoid harming both gender-confused and gender-congruent children. It is a grave disservice to gender-confused children (not to mention the majority of gender-congruent children) to enact a policy which affirms a

[1] American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, Arlington, VA, American Psychiatric Association, 2013 (451-459). See page 455 re: rates of persistence of gender dysphoria.

[2] http://www.acpeds.org/the-college-speaks/position-statements/gender-ideology-harms-children

false notion of reality, and which violates the other children's fundamental rights to privacy, modesty, safety, and religious practice accommodated by restroom separation between biological males and females.[3]

No Legal Authority

In addition to the lack of scientific authority for current policy demands regarding the "gender identity" issue, **there is no legal authority** for the claim that federal law requires students to be given "gender identity" access to opposite sex restrooms, facilities, and programs. Such assertions are meritless, for the following reasons:

First, Title VII (covering employees) and Title IX (in the education context, covering students) only prohibit discrimination between males and females based on biological "sex," but they do not require the abolition of personal privacy. Neither statute requires or supports the idea that males *are* females, that females *are* males, or the recognition of "gender identity" or "expression." Congress has rejected multiple attempts to amend Title VII and Title IX, over the 40+ year history of these statutes, where these attempts tried to include specific recognition of "sexual orientation" and "gender identity." Neither statute requires admission to opposite-sex restrooms, lockers, showers, or other traditionally private places. On April 7, 1975, for that matter, Supreme Court Justice Ruth Bader Ginsburg, then a professor at Columbia Law School, wrote in The Washington Post, "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy."[4]

Second, the right to bodily privacy has long been recognized in U.S. law. *See, e.g., Doe v. Luzerne County*, 660 F.3d 169, 177 (3d Cir. 2011) (holding that bodily exposure may meet "the lofty constitutional standard" and constitute a violation of one's reasonable expectation of privacy); *Brannum v. Overton County School Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (holding that a student's "constitutionally protected right to privacy encompasses the right not to be videotaped while dressing and undressing in school athletic locker rooms"); *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) ("there is a right to privacy in one's unclothed or partially unclothed body"); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body."). Violations of the right to bodily privacy are most acute when one's body is exposed to a member of the opposite sex. *See Doe*, 660 F.3d at 177 (considering whether "Doe's body parts were exposed to members of the opposite sex" in deciding whether her reasonable expectation of privacy was violated); *Brannum*, 516 F.3d at 494 ("the constitutional right to privacy... includes the right to shield one's body from exposure to viewing by the opposite sex"); *York*, 324 F.2d at 455 (highlighting

[3] Paul McHugh, *Transgender Surgery Isn't the Solution*, THE WALL STREET JOURNAL, June 12, 2014, *available at* http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120.

[4] https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/09/prominent-feminist-bans-on-sex-discrimination-emphatically-do-not-require-unisex-restrooms/

that the exposed plaintiff was female and the viewing defendant male); *Poe*, 282 F.3d at 138 (citing with approval the Ninth Circuit's emphasis on the different genders of defendant and plaintiff in York). Thus, the proponents of "gender identity" or "transgender" admission to opposite-sex restrooms, lockers and other places completely ignore this long-standing right to bodily privacy.

Third, there are no federal appellate court decisions that support the claim that Title IX applies to students claiming to be the opposite sex for purposes of access to the opposite sex's restrooms and locker rooms. A three-judge panel of the Fourth Circuit Court of Appeals, which governs Virginia, Maryland, West Virginia, North Carolina and South Carolina, ruled that the May 2016 guidance document, which is now invalid, had to be given deference when deciding a transgender student's challenge to a school district's policy limiting access to sex-separate facilities to biological sex. That case, *G.G. v. Gloucester County*, was pending before the U.S. Supreme Court, but following the February 22, 2017 rescission of the 2016 directive, the Court has referred the case back to the Fourth Circuit for reconsideration.

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Numerous courts have dismissed cases of alleged "discrimination" brought by "transgender" individuals claiming "gender identity" access to private facilities. This includes the Seventh Circuit Court of Appeals, which affirmed that Title VII does not include "sexual orientation," *Hively v. Ivy Tech Community College,* 2016 WL 4039703 (7th Cir. july 28, 2016). *See, also, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir.2007); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir.1995); *Braninburg v. Coalinga State Hosp.,* No. 1:08–cv–01457–MHM, 2012 WL 3911910, at *8 (E.D.Cal. Sept.7, 2012) ("it is not apparent that transgender [sic] individuals constitute a 'suspect' class"); *Jamison v. Davue*, No. S–11–cv–2056 WBS, 2012 WL 996383, at *3 (E.D.Cal. Mar.23, 2012) (so-called "transgender" individuals do not constitute a 'suspect' class, so allegations that defendants discriminated...are subject to a mere rational basis review"); *Kaeo–Tomaselli v. Butts*, No. 11–cv–00670 LEK, 2013 WL 399184, at *5 (D.Haw. Jan.31, 2013) (noting the plaintiff's status as a claimed "transgender" person did not qualify the plaintiff as a member of a protected class and explaining the court could find no "cases in which transgender [sic] individuals constitute a 'suspect' class"); *Lopez v. City of New York*, No. 05–cv–1032–NRB, 2009 WL 229956, *13 (S.D.N.Y. Jan.30, 2009) (explaining that because such individuals are not a protected class for the purpose of Fourteenth Amendment analysis, claims that a plaintiff was subjected to "discrimination" based on his status as a transvestite are subject to rational basis review).

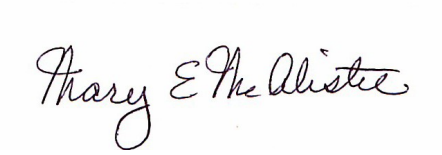
Sex separate bathroom and locker rooms are required to protect the rights of all students. A policy of limiting bathroom and locker room facilities on the basis of birth sex is "substantially related to a sufficiently important government interest." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir.2011) (*quoting Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47, (1985)). Such a policy is based on the need to ensure the

privacy of students to disrobe, shower or use the restroom outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by courts. *See, e.g., Etsitty v. Utah Transit Auth.,* 502 F.3d 1215, 1224 (10th Cir.2007) (the use of women's public restrooms by a biological, cross-dressing male could result in liability for employer, and such a motivation constitutes a legitimate, nondiscriminatory reason).

Conclusion

A student who truly believes she is the opposite sex should be treated with care, compassion, and respect, as should all students. Students can and should be provided with reasonable accommodations that do not infringe upon the rights of other students or violate federal and state law. We encourage the school board to consider these legal issues carefully and to decide against amending its non-discrimination policy.

Sincerely,



Mary E. McAlister[†]

MEM/ajr
CC

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