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Reply to: Orlando

March 17, 2016

VIA E-MAIL ONLY - George.Tomyn@marion.k12.fl.us
Superintendent George Tomyn
Marion County Public Schools
512 SE 3rd Street
Ocala, FL 34471

Re: "Gender Identity" decision violating opposite-sex student privacy and religious liberty

Dear Superintendent Tomyn:

By way of brief introduction, Liberty Counsel is a non-profit litigation, education, and policy organization with an emphasis on constitutional law, with offices in Orlando, Florida, as well as Lynchburg, Virginia, and Washington, D.C. Liberty Counsel provides *pro bono* legal representation to individuals, groups, and government entities, such as school districts, with a particular focus on religious liberty and other First Amendment issues.

We write to provide the Marion County Public Schools ("the District") with accurate guidance regarding a request by a female student to use opposite-sex restrooms and lockers. The District has received inaccurate information, leading to the violation of the religious liberty, privacy and modesty rights of male students and teachers at Vanguard High School, by the administration's permitting a female student to use male restrooms at will.

The purpose of this letter is to therefore 1) offer assistance in defending the District from meritless charges, if the District returns to a sensible and legal gender-appropriate restrooms policy; and 2) to request that the District respect the First Amendment and other clearly-established rights of the other students and teachers.

Our client has informed us that last week, his son was using the male restroom when his privacy was violated by an encounter with a female student. Our client's son is a devout Christian, who holds sincere personal privacy, modesty and religious beliefs, and was extremely upset by this encounter in a place where he has a reasonable expectation that he will not encounter the opposite sex.

When our client questioned the principal of Vanguard High School, he learned that this was not the first complaint: the week before, a male teacher complained about encountering the same girl in the male restroom. The principal stated that the female student no longer wished to use the female restrooms, because girls had been making fun of her, so the school offered her two different private locations: a unisex bathroom in one location of the building, and a faculty restroom at the nurses' station. The female student declined both offers of accommodation, and her parents wrote a lengthy email demanding she be allowed to use the male restrooms. Our client spoke with you, and you confirmed that you were requiring Principal Kerley to allow the female student to use the male restrooms, on the basis that legal counsel said that "the law requires it."

The District should reject this position as bad advice. Objective biological sex – male and female – is (and should remain) the determining factor for access to gender-appropriate public school facilities and programs, not subjective mental "identity" claims or beliefs that one is the opposite sex, or a feeling that one does not fit in based on bullying or teasing. The answer is not to make a bad situation worse, by violating male students' and teachers' privacy, but to reign in the bullying in the female restrooms.

As set forth below, **there is no legal authority** for the claim that federal law requires the District to allow students to claim "gender identity" access to opposite sex restrooms, facilities, and programs. Such assertions are meritless. Thus, the District need not (and should not) have granted a female student's inappropriate request to use the male restroom, for the following reasons:

First, as you know, there is no state-wide Florida law recognizing "sexual orientation" or "gender identity" as protected classes, because they are not like others protected by law. Second, federal laws known as "Title VII"[1] (covering employees) or "Title IX"[2] (in the education context, covering students) prohibiting discrimination based on "sex" only prohibit discrimination between males and females. Neither statute requires or supports the idea that males *are* females, or the recognition of "sexual orientation" or "gender identity or expression," as claimed by advocacy organizations such as Equality Florida, the American Civil Liberties Union ("ACLU"); or by agencies such as the U.S. Department of Justice ("DOJ"), Equal Employment Opportunity Commission ("EEOC"), and Department of Education's Office of Civil Rights ("OCR").

Next, OCR's much-vaunted "Questions and Answers on Title IX and Sexual Violence"[3] **cites no legal authority - case law or statutory** - for the claim that Title IX now applies to students claiming to be the opposite sex for purposes of access to the opposite sex's restrooms and locker rooms. To be sure, OCR and ACLU's legal bullying has resulted in some school districts needlessly settling an OCR "complaint," but federal agency *ipse*

[1] Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.
[2] Title IX of the Educational Amendments of 1972, 20 U.S.C. § 168 1(a).
[3] http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

dixit does not make Title VII or Title IX apply to concepts (or create definitions) not within the intent of Congress when a given law was passed.

Fourth, despite the baseless positions of ACLU, DOJ and OCR, and their attempts to strong-arm school districts around the country, a federal court in Virginia recently **rejected** ACLU and OCR's positions and the DOJ's "statement of interest" when it **dismissed** a Title IX claim nearly identical to that claimed in the well-known Palatine, Illinois example. *See G.G. v. Gloucester County School Board,* 2015 WL 5560190 at *9 (E.D. Va. 2015). Liberty Counsel has filed an Amicus Brief to the Fourth Circuit Court of Appeals[4] in that case.

Fifth, in addition to this case, and in addition to the lack of reported cases for OCR's position, a federal judge in *Johnston v. Univ. of Pittsburgh*[5] held in March 2015 that a "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."** (Emphasis added).

Finally, the decisions in *Gloucester* and *Johnston* are consistent with how numerous other courts have dismissed cases of alleged "discrimination" brought by "transgender" individuals claiming "gender identity" access to private facilities. *See, 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).

Even if a heightened standard of review were applied, the result would be the same as under rational basis review. 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

[4] https://lc.org/PDFs/Attachments2PRsLAs/2015/113015GloucesterBriefAmicus.pdf
[5] *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.,* No. CIV.A. 3:13-213, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015).

public restrooms by a biological, cross-dressing male could result in liability for employer, and such a motivation constitutes a legitimate, nondiscriminatory reason).

Conclusion

For the reasons set forth above, there is no legal mandate requiring the District to override the privacy rights of students and concerns of parents, by permitting gender-confused (or attention-seeking) students to inappropriately use restrooms and facilities reserved for the opposite sex. No school district has ever lost federal funding for maintaining gender-appropriate facilities, despite the claims of activists.

A student with gender confusion who *truly* believes he or she is the opposite sex should be treated with care, compassion, and kindness, but must not be officially affirmed in his or her confusion, no matter how sincerely-held. A student who is subjected to bullying or teasing in her gender-appropriate restroom should be relieved from that mistreatment by the District appropriately disciplining the misbehaving students. Such a student may be accommodated with a private, single-user restroom or changing area, but that student is not free to override biology, as well as the safety, privacy, and religious concerns of other students by being given access to opposite-sex restrooms, lockers or programs. Two wrongs do not make a right, and male students and teachers should not have their rights violated, rather than the District's addressing the real problem.

Liberty Counsel is therefore prepared to assist the Marion County Schools if it returns to a gender-appropriate and legal policy accommodating claims of "gender identity." If the District refuses, and instead violates the First Amendment rights of other students and teachers, Liberty Counsel stands prepared to advocate on their behalf against the District.

It remains our hope, however, to achieve an amicable solution that appropriately balances the interests of all involved, including gender-confused students, to the maximum extent possible, while fully respecting the rights of others. Should you have questions about any of the points contained in this letter, please don't hesitate to contact us at 407-875-1776.

Sincerely,

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