

LIBERTY COUNSEL



Post Office Box 540774
Orlando, FL 32854-0774
Telephone: 407•875•1776
Facsimile: 407•875•0770
www.LC.org

122 C St. N.W., Ste. 360
Washington, DC 20005
Telephone: 202•289•1776
Facsimile: 202•216•9656

Post Office Box 11108
Lynchburg, VA 24506-1108
Telephone: 407•875•1776
Facsimile: 407•875•0770
liberty@LC.org

Reply to: Orlando

September 28, 2018

VIA E-MAIL ONLY

Ms. Cynthia Armstrong, Chairman
District School Board of Pasco County
7227 Land O' Lakes Blvd.
Land O' Lakes, FL 34638
carmstro@pasco.k12.fl.us

Re: "Gender Identity" decision violating boys' privacy and teacher rights

Dear Ms. Armstrong:

By way of brief introduction, Liberty Counsel is a non-profit litigation, education, and public policy organization with an emphasis on constitutional law, with offices in Florida, 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 are writing you to request that the School Board take immediate action on behalf of Pasco County Public Schools ("the District"), in response to Pasco County administrators' adoption of an apparently unwritten "policy" regarding "transgender" issues, and subsequent civil rights violations it has engendered against students and teachers.

At the outset, both Liberty Counsel and our local contacts love all people. Our local employee contacts love working with students and desire to assist in their positive development. They would never "discriminate" against a child based on the child's beliefs about the nature of sex and gender, but would at all times treat them with kindness and respect.

The latest flashpoint for the application of this "unwritten policy" is at Chasco Middle School. The policy vests unfettered, unbridled discretion in district administrators – with no policy determination by the Pasco County School Board. It violates the conscience rights of two P.E. teachers, as well as the privacy and conscience rights of the boys they are charged with protecting. The parents of a girl who thinks (or at least says) she is a boy have determined to have her use the boys' bathroom, and to require others to refer to her with false gender pronouns "he" and "him."

Both of the P.E. teachers, Robert O. and Stephanie C., objected to administrators' orders to allow the girl into the bathroom, with no forewarning of the boys, or their parents, so that the boys could take steps to protect their privacy. Administrators told them that informing the boys so they could take steps to protect their privacy would be "discriminatory," and subject them to discipline.

Robert also objected to administrators' order that he continue to walk into and supervise the locker room, despite a girl potentially being nude or undressed in that area. The administrators told him that the girl in question had "every right to use the locker room," including the right to disrobe in the open locker area, and shower in its open showers, where Robert is required to periodically walk in and supervise. Robert will not knowingly place himself in a position to observe a minor female in the nude or otherwise in a state of undress. Now, Robert has been told by administrators that he will be transferred to another school as discipline for "not doing your job in the locker room."

Yesterday (Thursday, September 27, 2018), the girl was admitted to the boys locker room for the first time, and walked in, catching boys (literally) with their pants down, causing them embarrassment and concern by the fact that they had been observed changing by an obvious girl. Boys immediately came out of the locker room, and approached Stephanie and Robert, seeking assistance. The P.E. teachers were powerless to respond, because administrators had placed a gag order on them, and told them that they could not answer the boys on these questions. Today, boys were asking Robert why he is not supervising them. Again, he was not able to respond.

No law requires this course of events. 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 is not one's actual biological sex. The District is violating male students' and teachers' rights at Chasco Middle School.

The Board and the community should be aware that there is no state-wide Florida law recognizing "gender identity" as a protected class. In addition, the U.S. Departments of Education ("DOE"), Justice ("DOJ"), and Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), and various agency officials have been **enjoined** from asserting that Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their "gender identity" rather than their biological sex. *Texas v. United States*, 201 F. Supp. 3d 810, 815–16 (N.D. Tex. 2016), *order clarified*, No. 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016), and *appeal dismissed*, No. 16-11534, 2017 WL 7000562 (5th Cir. Mar. 3, 2017). The injunction applies nationwide.

It is not "discrimination" or "harassment" for District staff and students to continue using gender pronouns consistent with binary biological sex rather than any given person's subjective beliefs about the nature of gender. Government may not force others to call another person something he or she is not, in matters of conscience, religious belief, and

biology. If "there is any fixed star in our constitutional constellation, it is that **no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.**" *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). (Emphasis added). Instead of neutrality, the "unwritten policy" is forcing conformity to one girl's beliefs and those of her parents. Instead of accommodation, it is violating the rights of others by imposing this girl's beliefs about her own gender on everyone else.

Despite the patently wrong district court decision in *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018), and the settlement agreement entered into by the Volusia County School Board in *Doe v. Volusia County School Board*, No. 6:18-cv-00102-RBD-GJK (M.D. Fla.), the 11th Circuit Court of Appeals has never held that it is "discrimination" to maintain longstanding sex-appropriate accommodations for males and females, based on legitimate, unchangeable biological differences between the two sexes. It is not "discrimination" to respect safety and privacy rights based on biological sex; nor is it "discrimination" to respect parental rights to protect their minor children; and maintain safeguards against involuntary observation or molestation by members of the opposite sex, where children have a right to sex-based privacy protections.

The Supreme Court has acknowledged the lawfulness of sex-based standards that flow from legitimate biological differences between the sexes. These sex-based standards ensure fairness, equity, and safety; satisfy reasonable expectations of a constitutional right to privacy; reflect common practice in society; and promote core values of dignity and respect. between boys and girls. Even Supreme Court Justice Ruth Bader Ginsburg has stated, "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy."¹

The right to bodily privacy has long been recognized elsewhere 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 that the exposed plaintiff was female and the viewing

¹ <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/09/prominent-feminist-bans-on-sex-discrimination-emphatically-do-not-require-unisex-restrooms/>

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*).

The privacy rights of male students do not disappear or depend solely on the beliefs of one female student about her own gender. A boy's rights are his, and not dependent upon a female's beliefs. The same is true for the privacy rights of females as to males. The conscience rights of teachers likewise do not evaporate based simply upon one student's beliefs about her gender.

Conclusion

Liberty Counsel is prepared to assist the Pasco County School Board if it returns to a gender-appropriate and legal policy accommodating claims of "gender identity."

In order for Liberty Counsel to provide that assistance, the District must 1) immediately inform boys at Chasco Middle School (and their parents) about their privacy rights, vis-à-vis the girl in their locker room; 2) confirm that neither teachers nor students will be forced to use false gender pronouns to refer to other people; and 3) immediately cease all punitive action against the P.E. teachers, including any reassignment to another school.

Please inform us by close of business on Monday, October 1, 2018, whether the Pasco County School Board intends for Liberty Counsel to be an adversary or an ally in the coming fight.



Roger K. Gannam†

Sincerely,



Richard L. Mast††

CC:

Via Email:

District School Board of Pasco County
Alison Crumbley
Allen Altman
Colleen Beaudoin
Steve Luikart

acrumble@pasco.k12.fl.us
alaltman@pasco.k12.fl.us
crbeaudo@pasco.k12.fl.us
jluikart@pasco.k12.fl.us

Via Email to Executive Secretary Peggy Facemire
Pasco County Schools
Kurt Browning, Superintendent

mfacemir@pasco.k12.fl.us

Brandon Bracciale, Principal, Chasco Middle School

bbraccia@pasco.k12.fl.us

†Licensed in Florida
††Licensed in Virginia
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