SENT BY EMAIL TO AVOID DELAY

January 23, 2023

Re: Proposed Policy 3281 on Gender Identity and Sexual Orientation

Dear Honorable Members of the Caldwell School District Board of Trustees,

Pacific Justice Institute ("PJI") is a national, non-profit, legal organization specializing in the defense of constitutional freedoms and parental rights. Please be advised that numerous Caldwell School District parents have retained PJI to bring to your attention their concerns regarding the above proposed policy.

At the outset, we commend Caldwell School District for wanting to foster an educational environment that is safe and free of discrimination for all students. At the same time, the federal Constitution and laws strongly protect the fundamental right to privacy of students and all other persons, including a reasonable expectation that they will not be forced to undress or share intimate spaces with members of the opposite biological sex.

Student Privacy Interest

Courts have provided longstanding recognition that "[t]he desire to shield one's unclothed figure from [the] view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity" (*York v. Story*, 324 F. 2d 450, 455 (9th Cir. 1963)); *see also Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988). In fact, even in locker rooms, students retain "a significant privacy interest in their unclothed bodies" (*Beard v. Whitmore Lake Sch. Dist.*, 402 F. 3d 598, 604 (6th Cir. 2005)).

In fact, a federal court very recently ruled that a school board policy separating the use of male and female bathrooms based on biological sex serves an important government interest and does not amount to a constitutional violation (*Adams v. St Johns County School Board,* No. 18-13592 (11th Cir. Dec. 30, 2022)). In this case, the 11th Circuit court describes how "courts have long found a privacy interest in shielding one's body from the opposite sex in a variety of legal contexts, e.g., *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (recognizing a "constitutional right to bodily privacy because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating'" (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)); *Harris v. Miller*, 818 F.3d 49, 59 (2d Cir. 2016); *Brannum v. Overton Cnty. Sch. Bd.,* 516 F.3d 489, 494–95 (6th Cir. 2008); *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994); *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1141 (9th Cir. 2011) (en banc)."

All of this to say, *all* students within your District have a well-established, constitutional right to privacy. It is therefore imperative that the District's policy reflect these rights. For many students, if another student of the opposite biological sex enters an intimate space such as a bathroom or locker room, this right to privacy is violated. One student's claimed privacy right to share intimate spaces with members of the opposite biological sex cannot trump the privacy interests of all the other affected students.

Caldwell School District's Duty to Protect its Pupils

Idaho Code section 33-512(4) declares that a school district's board of trustees has the duty "to protect the morals and health of the pupils." When the Idaho legislature enacted this law, it created a statutory duty which requires a school district to act reasonably in the face of foreseeable risks of harm. (*Brooks v. Logan*, 127 Idaho 484, 490 (1995)).

In this regard, we direct the District to consider past instances where the atmosphere of such intimate spaces (toilets, showers, disrobing) can lead to sexual harassment, sexual violence, and significant litigation. Liability for school districts has been staggering. *See, e.g., Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008 (E.D. Cal. 2008) (denying summary judgment to school district on Title IX claims arising from incidents where student athlete was exposed to genitals, grabbed in the shower, and was violated in other ways during high school football camp). Locker room incidents, both same-sex and opposite-sex, have also triggered significant liability in the workplace. *See, e.g., Kelly v. City of Oakland*, 198 F.3d 779 (9th Cir. 1999) (upholding jury award to park ranger who experienced sexual harassment by his supervisor that included the supervisor staring at him repeatedly while he was changing in the locker room); *Washington v. White*, 231 F. Supp. 2d 71 (D.D.C. 2002) (male custodial employee stated a claim under Title VII for hostile work environment where a female co-worker who was subsequently promoted to supervisor repeatedly entered a locker room when he was changing out of his uniform); *Proietti v. City of Chicago*, 1998 U.S. Dist. Lexis 18220 (N.D.Ill. Nov. 9, 1998) (female police clerk stated a claim for Title VII sexual harassment where she had been assigned a desk located inside a closet in the men's locker room); *Cunningham v. Kansas City Star Co.*, 995 F. Supp. 2d 1010 (W.D.Mo. 1998) (female employee stated a claim for sexual harassment where offensive conduct included male co-workers seeing her in a state of undress in a locker room); *Spina v. Forest Preserv. Dist.*, 2002 U.S. Dist. Lexis 14016 (N.D.Ill. July 31, 2002) (following large jury award for Title VII sexual harassment, the court entered a permanent injunction ordering the defendants to provide separate locker rooms for female employees).

Additionally, we ask that you consider the impact of allowing students unlimited access to all sex-specific facilities. In that situation, some students may be unsure that their privacy rights will be respected in restrooms and locker rooms, and thus, may forego use of these facilities in ways that could negatively affect their health. The District has a compelling interest, and in fact a duty, to avoid such negative health outcomes.

Unconstitutional Compelled Speech

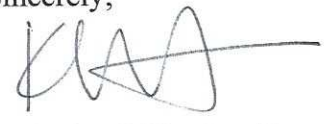
Finally, the United States Constitution guarantees free speech rights in most instances. The United States Supreme Court has frequently and consistently ruled that compelled speech is violative of the First Amendment.

The Supreme Court perfectly explained the essence of the compelled speech principle: "Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). Similarly, the Supreme Court rejected a California law forcing pregnancy centers to post in their waiting rooms that the state of California provides free or low-cost abortions. The Court declared that "governments must not be allowed to force persons to express a message contrary to their deepest convictions," (*Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (2018). Most importantly, this exact issue was determined to be unconstitutional as to First Amendment free speech and free exercise rights (Meriwether v. Hartop, 992 F. 3d 492, 512 (6th Cir. 2021)).

Proposed Policy 3281 states that "refusal to use the name and gender by which the student identifies is a violation of this policy and may subject an employee to discipline." Using a pronoun that does not correspond to a student's biological sex may violate the sincerely-held convictions of some teachers or other staff members in the District and may be considered compelled speech. As such, we discourage the District from adopting this unconstitutional mandate.

We thank you in advance for your professional and courteous handling of this sensitive issue.

Sincerely,



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