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Manchester Community Schools
Board of Education
404 West 9th Street
North Manchester, IN 46962
Via Electronic Mail

RE: Access to Privacy Facilities in Manchester Community Schools

Dear Members of the Board of Education:

I am Senior Litigation Counsel for the Child & Parental Rights Campaign, a non-profit public interest law firm founded to defend parental rights. I have been contacted by parents of students in Manchester Community Schools ("MCS") who are concerned about an unwritten policy they understand has been implemented that permits a biological boy in an elementary school who is said to identify as a girl to access girls' private facilities (bathrooms, locker rooms). Parents are concerned that this might lead to a districtwide policy that that would permit boys who identify as girls to use girls' privacy facilities and vice versa if those students claim to identify as the opposite sex. Some of the parents' children are already experiencing distress about the prospect of members of the opposite sex (irrespective of how they socially identify) using their privacy facilities. Because of these experiences and their wider concern about the privacy and safety consequences a districtwide policy would pose to all children in the district, the parents asked me to provide the board with information regarding such policies.

It is my understanding that on or about November 19, 2019 parents learned that a first grade boy stated that he identified as a girl and was given permission to use the girls' bathroom. On November 20, 2019, parents contacted the principal at Manchester Elementary School and Superintendent Gremaux and received verbal confirmation that a first-grade boy was now identifying as a girl and being allowed to use the girls' restroom. It is my understanding that the parents were told that there was no written policy regarding providing access to private facilities on the basis of "gender identity" instead of biological reality, but that the superintendent was relying upon Title IX.

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According to the parents, district staff did not notify them of the development regarding the transgender boy even though it would mean that female elementary age students would be encountering a biological boy in their private spaces. In fact, parents report that teachers said that they were instructed not to talk about the situation unless directly asked. After parents engaged in some discussions over social media, Superintendent Gremaux sent the following email on November 25, 2019:

> Dear students, parents and community members:
> There have been several recent Facebook posts raising concern regarding the restroom and locker room practices at Manchester Community Schools relating to transgender students and their gender identities. Manchester Community Schools follows **what is required by Title IX regarding the treatment of a transgender student's use of restroom and locker room facilities.** No new practice or policy has been implemented or adopted. **Transgender students must be allowed to use the restroom and locker room that corresponds with their gender identity.**
> Manchester Community Schools accommodates any student who is uncomfortable with such practices by providing an alternate facility to use. This is an issue that many school districts in the country are dealing with and Manchester Community Schools continues to monitor the status of certain lawsuits that are currently pending in the federal court system for further guidance on this issue. Manchester Community Schools is committed to maintaining a safe learning environment for all of its students.
> As always, thank you for choosing Manchester Community Schools. (emphasis added).

The statements highlighted in bold above indicate that it is the district's position that federal law requires that students be provided access to private facilities that correspond with a subjective gender identity instead of their sex. That is not the case. There have been some court decisions that decided that schools had to permit students who claim to identify as the opposite sex to use facilities corresponding to that sex. However, there are also cases that have decided that schools can continue to provide access to privacy facilities on the basis of sex. In addition, a federal court in Illinois (also part of the Seventh Circuit) recognized that parents of children affected by a gender identity-based privacy facilities policy could bring claims for violation of their children's rights. In other words, there are competing rights and interests at stake and the law is very much in flux on this issue.

The Southern District of Indiana found it was a violation of Title IX for a public school in Evansville to deny a high school trans-identified student who had begun male hormone treatments to use the boys' bathroom. *J.A.W. v. Evansville Vanderburgh School Corporation*, 396 F.Supp.3d 833 (2019). In *J.A.W.*, the student had begun social transitioning in her sophomore year and began hormone treatment before her junior year, and thereafter in the second semester of her junior year requested to use the boys' bathroom. She was permitted to use a single use restroom in the nurse's office, but that was away from her classes and was frequently locked. She sued the school district and the court issued a temporary order requiring that she be permitted to use the boys' bathroom. The court issued

a judgment stating that prior to her graduation there had been a violation of Title IX and her constitutional right to equal protection. The court did not require a district wide policy allowing transgender students to use the bathroom with which they identify in all cases. The case settled before the question of damages was reached.

The Seventh Circuit Court of Appeals, which governs Wisconsin, Illinois and Indiana, issued an opinion in 2017 addressing a bathroom use policy in a Wisconsin school district. *Ashton Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017). The high school student had been socially identifying as a boy for a few years. She had legally changed her name and, like the high school student in *J.A.W.*, had begun hormone treatments. She used the boys' bathroom for some time before a teacher reported on her presence. After that, she was told that she had to use the girls' bathroom or a single stall bathroom in the office or across campus, which was found to be impracticable. The court ruled that the student would be likely to win her claim that the school violated her rights under Title IX on the basis of "sex stereotyping." In other words, it was likely that she could prove that she was being discriminated against because in identifying as a boy she did not fit the stereotype of a girl. 858 F.3d at 1049. It is also important to note that, as in *J.A.W.*, this court did not require a district wide policy allowing transgender students to use the bathroom with which they identify in all cases. Since the Seventh Circuit governs federal courts in Indiana, this case does have to be carefully considered.

However, there are factual differences between the *J.A.W.* and *Whitaker* cases and the situation in MCS that are also worthy of consideration. Both cases involved high school students nearing graduation instead of elementary age students. Also, in both cases, the students had already begun hormone treatments and had been socially identifying as the opposite sex for at least a year or more. In addition, in both cases, the school districts reacted by offering facilities that were inaccessible either by distance or by being locked. These differences suggest that MCS is not compelled by such precedent to adopt a blanket district-wide policy abandoning sex-separate private facilities in favor of mixed sex facilities that pose privacy and safety issues for young students, but that it remains free to adopt a case-by-case approach. This, incidentally, is the approach being adopted by other large school systems for the last several years, apparently without legal challenge.[1]

Furthermore, the importance of addressing the privacy and safety interests of <u>all district students</u> is seen in the Illinois federal district court decision in *Students and Parents For Privacy v. School Directors of Township High School District 211, Cook County, State of Illinois*, 377 F. Supp. 3d 891, 904 (N.D. Ill. 2019) ("*District 211*"), and tragically exhibited in an incident in Decatur Georgia involving elementary school children and a school policy permitting access to privacy facilities based on "gender identity." In *District 211*, parents and students sued the school district after it had announced that it would be permitting students to access privacy facilities on the basis of subjective gender identity. The parents

[1] School districts in Atlanta and Gwinnett County Georgia have had policies in place which provide sex-separate privacy facilities with gender neutral alternatives since the Obama Administration guidance was released in 2016. *See* Arlinda Smith Broady, *Transgender Bathroom Issue Riles Pickens Parents*, Atlanta Journal-Constitution, October 14, 2019, https://www.ajc.com/news/local-education/transgender-bathroom-issue-riles-pickens-parents/DYtvcodA6DG2D3PNz2VnuK/.

and students claimed that the policy violated their constitutional right of privacy, constitutional parental right to direct the upbringing of their children, Title IX, and rights to free exercise of religion. The students reported that the presence of a member of the opposite sex in their privacy facilities caused them to change their behavior, including using restrooms less frequently. Also (as one of the students in MCS has said), a student in District 211 said she was so distressed about the possibility of changing in front of a member of the opposite sex that she began wearing gym clothes underneath her school clothes so as to not have to change. 377 F. Supp. 3d at 895-96. Students were required to take swimming, which required that they completely disrobe in the locker room and shower knowing that a person who was biologically the opposite sex could be present at any time. 377 F. Supp. 3d at 896. That caused students to be fearful, apprehensive and uncomfortable about changing for the mandatory swim class. *Id.* When one student used a private stall for changing clothes she was taunted by others for being "transphobic." *Id.* Several trans-identified students intervened on the side of the school district.

The federal district court held that these allegations by the District 211 students were sufficient for them to proceed with a claim against the district for violation of Title IX. 377 F.Supp.3d at 900. The court also held that the students and parents had stated sufficient facts to proceed with a claim that the district violated their religious freedom rights. *Id.* at 906. The plaintiffs dismissed their claims when after two years most of the students had graduated (and they were not seeking damages). Nevertheless, the court's decision to let the parents' and students' claims proceed demonstrates that parents whose children are affected by a policy requiring that they accept members of the opposite sex in their privacy facilities also possess actionable Title IX and constitutional claims can be asserted against school districts and, thus, must also be taken into consideration. In other words, there are competing rights and interests at stake.

The recent incident in an elementary school in Decatur, Georgia further demonstrates the importance of protecting children's privacy and safety by maintaining sex-separate privacy facilities with access based on physiological sex, not social identity. In Decatur, the school superintendent issued a directive that provided that privacy facilities could be accessed on the basis of "gender identity." Parents attended a school board meeting and warned the board that the directive would threaten the privacy and safety of students. One month later, a kindergarten girl was sexually assaulted in the bathroom by a boy identified to be "gender fluid." The incident is now being investigated by the Office of Civil Rights of the U.S. Department of Education, with implications for the district's federal funding. Furthermore, the child's mother retains her right to file a civil lawsuit against the district for damages. The details of the incident are summarized in a video available at https://childparentrights.org/the-campaign/.

Other court opinions have been divided. Some court cases have said that they believe federal law requires that access to sex-separated bathrooms be based on "gender identity." *See e.g., Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3rd Cir. 2018); *Highland Local School District v. U.S.*, 208 F.Supp.3d (S.D. Ohio 2016); *Adams v. St. Johns County School Board*, 318 F.Supp.3d 1293 (MD FL 2018). On the other hand, there are also several courts that have concluded that Title IX's ban on sex discrimination does not extend to "gender

identity" and authorizes schools to maintain separate facilities on the basis of biological sex. *See, Kastl v. Maricopa County Community College District*, 325 F. App'x 492 (9th Cir. 2009); *Texas v. U.S.*, 201 F.Supp.3d 810 (N.D. Tx. 2016); *Doe v. Clark Cty. Sch. Dist.*, 2008 WL 4372872 (D. Nev. Sept. 17, 2008).

The United States Supreme Court has just heard oral arguments in a case addressing the definition of sex under federal civil rights laws affecting employment (Title VII), *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC and Aimee Stephens*. The Court's decision in that case might influence how courts define "sex" under the comparable federal civil rights laws affecting education (Title IX). However, it remains to be seen whether the considerable differences between the environments in schools and workplaces and relationships between adult employers and employees versus minor students and adult administrators may diminish the precedential value of the case.

It is also important to note that the United States Department of Education and Department of Justice do not interpret "sex" in Title IX to mean "gender identity" or to require access to sex-separated facilities based on "gender identity." In 2016 certain administrators in the Obama Administration had stated that they believed that "sex" under Title IX included "gender identity" and directed school districts to follow that guidance in their facilities policies. However, the federal court for the Northern District of Texas issued a nationwide injunction that prohibited the Obama Administration from enforcing that directive requiring access to private facilities on the basis of gender identity. That court's reasoning is instructive:

> It cannot be disputed that the plain meaning of the term sex as used in [Title IX's regulations] when it was enacted by DOE following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth and not gender identity. . . . This [separation according to biological sex] undoubtedly was permitted because the areas identified by the regulations are places where male and female students may have to expose their nude or partially nude body, genitalia, and other private parts. And separation from members of the opposite sex, those whose bodies possessed a different anatomical structure, was needed to ensure personal privacy."

Texas v. U.S., 201 F.Supp.3d 810, 832-33 (N.D. TX 2016). The present administration withdrew he Obama Administration guidance on February 22, 2017, explaining that the previous guidance, basing access to sex-segregated facilities on "gender identity", did not "explain how the position is consistent with the express language of Title IX". *See* U.S. Dep't of Justice, Civil Rights Division, and U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter Re: Transgender Students (Feb. 22, 2017).

Supreme Court Justice Ruth Bader Ginsburg, as an attorney, was the pioneer in overturning laws that discriminated on the basis of sex. In a 1975 Washington Post editorial she wrote that "[s]eparate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy." She later wrote the

Supreme Court's decision in *United States v. Virginia*, which found that the Virginia Military Institute's male only admissions policy was unconstitutional. *United States v. Virginia*, 518 U.S. 515 (1996). Echoing her statement from 1975, Justice Ginsburg said that "[a]dmitting women to VMI will undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." *Id.* at 550 n.19.

Not only is the law in flux on this issue, the medical and social paradigms on which the call for gender identity affirming policies is built are also unsettled. A growing number of medical professionals are questioning the standards of care being used to justify beginning children on a path of social and medical interventions.[2] Many medical professionals are stating that these interventions are experimental, unproven and lacking in scientific proof.[3] Legislators in a number of states are introducing legislation to ban medical interventions on gender dysphoric children because of the growing concerns.[4]

In light of the shifting legal and medical landscape surrounding gender identity in children, it would be best if the school board would endeavor to work to reasonably accommodate requests concerning individual children on a case-by-case basis without creating a districtwide policy that could open the district up to potential claims from parents of children affected by a districtwide policy, such as occurred in *District 211*. Guidance from case law shows that reasonable accommodations for a situation such as the one involving the child here would be to provide gender neutral bathrooms that are readily accessible to all students (not just trans-identified students). These facilities should be made available to any student who feels uncomfortable using communal facilities of their biological sex, so as to avoid individualized stigma.

Incidents such as the one in Decatur point to the need to enact policies that respect the privacy, safety and dignity of <u>all students</u> within the district. Maintaining access to private facilities on the basis of sex is not arbitrary or invidious discrimination, but

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[2] Michael Laidlaw, M.D., Michelle Cretella, M.D., G. Kevin Donovan, M.D., *The Right to Best Care for Children Does Not Include the Right to Medical Transition*, 19 The American Journal of Bioethics (2) February 2019, 75. https://www.tandfonline.com/doi/abs/10.1080/15265161.2018.1557288.

[3] *See* Jane Robbins, *The Cracks in the Edifice of Transgender Totalitarianism*, The Public Discourse, July 13, 2019, https://www.thepublicdiscourse.com/2019/07/54272/.

[4] *See*, Penny Starr, *GOP Lawmakers Craft Bills to Ban Child Gender Transition Treatment*, Breitbart, November 4, 2019, https://www.breitbart.com/politics/2019/11/04/gop-state-lawmakers-craft-bills-to-ban-child-gender-transition-treatment/

acknowledgment of physiological reality. We encourage the School Board to continue to maintain such a policy. We wish to be of assistance and are readily available to consult with the superintendent and school board on this issue.

Sincerely,

Mary E. McAlister, Esq.[5]

Cc: Dr. Therese Gremeux (by email)

[5] Licensed in California, Florida and Virginia