



December 6, 2016

Dear Board of Directors,

We know that many schools are grappling with the Obama administration's letter earlier this year suggesting that your district must abandon biologically distinct bathrooms, showers and locker rooms. **We want you to know that your district has no obligation to do so.** In fact, a Texas Federal court issued a nationwide injunction on August 21, 2016 against the federal government that prohibits it from "initiating, continuing, or concluding any investigation based on Defendant's interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex." The court reaffirmed that this applied nationwide again on October 18, 2016.

On Friday, October 28, 2016 the U.S. Supreme Court determined it would hear the case of *Gloucester County School Board v. G.G.*, a decision which leaves in place the August 3rd decision of five members of the Supreme Court which permitted the school to continue to protect the bodily privacy of all students by maintaining bathrooms, locker rooms, and shower facilities on the basis of biological sex. **As such your board should continue to stand firm and continue to fulfill its duty to protect the privacy and safety of all students as we await a final ruling to be issued in the Gloucester case.**

In that case, the district court ruled in favor of the school district relying on a 1975 regulation that allows schools to provide "separate toilet, locker room, and shower facilities **on the basis of sex**" as long as those facilities are comparable to those provided to the opposite sex. While that decision was reversed on appeal, five members of the Supreme Court stayed that decision and permitted the school to continue to maintain bathrooms, locker rooms and shower facilities on the basis of biological sex until the case is argued and a decision is made. The court will determine whether schools will be required to permit students who identify with the opposite sex to use private spaces with members of the opposite sex next year.

Until then, you can and must continue to protect the privacy and safety of all the children in our schools.

- Instruct your administration to continue to protect privacy of all students in restrooms, locker rooms and showers based on biological sex. Clarify that the administration must ensure all students still have a right to use the bathrooms, locker rooms, and showers that correspond to their biological sex and that bullying will not be tolerated. Make certain that single-user restrooms will be available to students who chose not to use multi-user bathrooms and locker rooms. *Respect everyone, without taking away privacy from anyone.*
- Know that federal case law supports you, including a Western District of Pennsylvania case that held in 2015 that Title IX and the U.S. Constitution's Equal Protection Clause *permit separate bathrooms on the basis of biological sex.* Title IX specifically says schools can "provide separate toilet, locker room, and shower facilities on the basis of sex."
- Opening restrooms and locker rooms to those of the opposite biological sex has resulted in litigation against schools for violating students' rights to bodily privacy. Just as courts have held prisoners have a right to



privacy from members of the opposite sex, children in schools have at least the same right to bodily privacy. Conversely, individuals who would like to use restrooms and locker rooms with members of the opposite sex could file an individual lawsuit against a school. However, because the Supreme Court will make a decision on this issue by the summer of 2017, and because the Supreme Court ruled that the school in that case can continue to maintain restrooms and locker rooms based on biological sex as the case continues, schools should follow that lead and continue to protect the right to bodily privacy of children while waiting for a final ruling to be issued in the Gloucester case.

We recognize that these issues of controversy require significant deliberation. We would be glad to assist your solicitor as they review these issues.

Sincerely yours,

A handwritten signature in black ink, appearing to read "R. Wenger", is written over the typed name.

Randall L. Wenger

Chief Counsel  
Independence Law Center