

March 26, 2019

Via E-mail and Fax Only
Elko County School District
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Re: Elko County School District “Gender Non-Conforming Students” Policy

Elko County School District Board of Trustees,

The ACLU of Nevada writes to express great concern with the proposed “Gender Non-Conforming Students” Policy up for review and possible action at your board meeting tonight. Of greatest concern is Section 9 of the policy, which requires all students to use the school facilities, such as restrooms, locker-rooms, and showers based solely on a student’s sex assigned at birth. As discussed in detail below, this policy violates the recently enacted Nevada Department of Education Regulations, NRS 651.050 *et seq.*, Title IX and the Equal Protection Clause of the United States Constitution.

A. Preventing Equal Access to School Facilities Stigmatizes Students and Creates an Intimidating and Hostile Educational Environment for Youth with Diverse Gender Identities or Expression

We think it is helpful to begin with a background to understand how excluding transgender boys from the boys’ facilities and transgender girls from the girls’ facilities harms transgender students by stigmatizing them and impairing their ability to participate fully at school and enjoy a safe and respectful learning environment.

A transgender person is someone whose gender identity is different from the sex they were assigned at birth. For example, a boy who is transgender is a boy who was assigned the sex female at birth, but his gender identity is male. While a variety of medical procedures can be beneficial for the treatment of gender dysphoria, no particular surgical procedure should be a prerequisite for treating students in accordance with their gender identity.¹ **Medical opinion is unequivocal that gender identity is not a choice.**² Many

¹ Most minor youth will not have undergone genital surgery. *See Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1053 (7th Cir. 2017).

² *See* Wylie C. Hembree, *et al.*, *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, *J. Clinical Endocrinology & Metabolism* jc.2017-01658,



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people in school — or even before they reach school age — have and express a clearly established gender identity that is different from the sex they were assigned at birth.³

Requiring transgender students to use facilities that are not consistent with the gender they live every day or requiring them to use separate single-user restrooms, is profoundly harmful. The Journal of Adolescent Health concluded transgender youth are at heightened risk of depression, anxiety, and suicidality.⁴ Studies by the CDC and the American Foundation for Suicide Prevention have found these risks are exacerbated by harassment and rejection in school.⁵ A 2013 National School Climate Survey conducted by the Gay Lesbian and Straight Education Network, found that a majority of transgender students were verbally harassed at school based on their gender expression — and even compared to other LGB students, transgender students face the most hostile school climates.⁶ Although transgender youth face a far greater risk of harassment and discrimination at school, that risk is significantly reduced when students are allowed to integrate into school activities and facilities.⁷

Importantly, the adoption of this policy would stand in direct contravention to Nevada's commitment to creating a safe and respectful learning environment for all students. It would condone and encourage bullying of transgender students. The District *is*

7 (Sept. 2017), <https://academic.oup.com/jcem/article/doi/10.1210/jc.2017-01658/4157558/Endocrine-Treatment-of>; Amicus Br. of Am. Acad. of Pediatrics, *et al.*, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 15-2056, ECF No. 244, at 17-18 (4th Cir.), https://www.aclu.org/sites/default/files/field_document/document_0.pdf; World Prof'l Ass'n for Transgender Health (WPATH), Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. at 1, (Dec. 21, 2016), https://s3.amazonaws.com/amo_hub_content/Association140/files/WPATH-Position-on-Medical-Necessity-12-21-2016.pdf.

³ See Am. Psychological Ass'n & Nat'l Ass'n Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015), <http://www.apa.org/about/policy/orientation-diversity.aspx>; Nat'l Ass'n of Secondary Sch. Principals, *Position Statement on Transgender Students* (2016), <https://www.nassp.org/who-we-are/board-of-directors/position-statements/transgender-students?SSO=true>.

⁴ Sari L. Reisner *et al.*, *Mental Health of Transgender Youth in Care at an Adolescent Urban Community Health Center*, 56 *J. Adolescent Health* 274 (Mar. 2015), <http://www.jahonline.org/pb/assets/raw/Health%20Advance/journals/jah/feature.pdf>.

⁵ See, e.g., Centers for Disease Control and Prevention, *LGBT Youth*, <https://www.cdc.gov/lgbthealth/youth.htm>; Ann P. Haas *et al.*, *Suicide Attempts Among Transgender and Gender-Nonconforming Adults*, American Foundation for Suicide Prevention & The Williams Institute (Jan. 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>.

⁶ http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.pdf

⁷ Memorandum of Points and Authorities of Amici Curiae Equality California and Gay-Straight Alliance Network in Support of Defendant's Demurrer, p. 9, available at http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/ca-education-committee_ca_20090319_amicus-gsa-network-and-eqca.pdf



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*required by state law*⁸ to work towards creating an inclusive environment where students can focus on learning rather than which bathroom they are permitted to use.

In addition, even requiring transgender students to use single-user restrooms can cause a host of problems because those facilities may be far from classrooms and further stigmatize the student. Students often try not to use the restroom even though they need to, leading to painful urinary tract infections or other problems, to avoid being tardy or being forced to use restrooms that do not correspond to their gender identity.⁹

Research shows that denying transgender people access to restrooms that correspond with the gender they live every day has a serious impact on their education, employment, health, and participation in public life.¹⁰

“The right to use the restroom corresponding to one’s gender identity is one of the most basic aspects of nondiscrimination for a transgender person.”¹¹ **Those who identify with their biological sex do not face such demeaning choices.** This policy’s refusal to allow transgender students to use the appropriate facilities harms their health and well-being and disregards widely accepted standards of medical care for transgender people.

B. ECSD’s “Gender Non-Conforming Students” Policy Violates Nevada Department of Education Regulations and Violates NRS 651.050 et seq.

The Nevada Department of Education recently adopted regulation R099-17, prescribing requirements and methods for a public school to use when addressing the rights and needs of students with diverse gender identities and expressions. This regulation requires schools and school districts to “address the rights and needs of persons with diverse gender identities or expressions on an **individualized basis**,” and requires the school or school district to “**consider the unique circumstances of the person**,” R099-17(Section 3). Other relevant requirements include:

- Annual training concerning the rights and needs of persons with diverse gender identities or expressions. R099-17(Section 3 (2)(a))
- Creating a team to develop an **individualized plan**, to address the rights and needs of the gender diverse student. R099-17(Section 3 (2)(c)). This plan:

⁸ NRS 388.132(2)

⁹ See, e.g., *Whitaker*, 858 F.3d at 1040-41; *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t. of Educ.*, 208 F. Supp. 3d 850, 871 (S.D. Ohio 2016).

¹⁰ Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People’s Lives*, 19 J. Pub. Mgmt. & Soc. Pol’y 65 (Spring 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf>.

¹¹ Jennifer Johnson, *Transgender Youth in Public Schools: Why Identity Matters in the Restroom*, 40 WM. MITCHELL L. REV. 63, 75, available at <http://web.wmitchell.edu/law-review/wp-content/uploads/Volume40/documents/JohnsonFinal.pdf> (citing NAN D. HUNTER ET AL. THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS AND TRANSGENDER PEOPLE, 176 (4th ed. 2004)).



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- ***must not conflict*** with the policies of the Nevada Interscholastic Activities Association, or ***with the requirements of Nevada’s public accommodations laws under NRS 651.050.***
- must take into consideration the rights and needs of the pupil, the ability of the school to comply, and the rights and needs of all pupils at the school;
- must take steps to ensure protection of the privacy of the student; and
- must take steps to support the engagement of the student’s parents.

NRS 651.050 *et seq.*, the Nevada public accommodations law, requires that all people be entitled to “the full and equal enjoyment of the facilities, privileges, advantages and accommodations of any place of public accommodation, without discrimination or segregation on the ground of . . . sex, gender identity or expression.” (NRS 651.070)

Although the current ECSD policy at issue makes attempts to comply with R099-17, it falls short in several significant ways. As a general matter, ECSD’s policy does not recognize that the rights and needs of gender diverse students must be addressed on an individualized basis. This is a one size fits all policy.¹²

Moreover, the policy also fails to conform with the requirements of R099-17 because it: (1) does not provide for any training concerning the rights and needs of persons with diverse gender identities or expressions; and (2) does not require the development of any individualized plan to address the rights and needs of gender diverse students. Worse, Section 9 of the policy violates NRS 651.050, and by extension the regulations requirement that it not do so.

**Section 9 of the “Gender Non-Conforming Students” Policy Violates
NRS 651.050 et seq.**

Nevada state law plainly forbids places of public accommodation, including schools, from discriminating against anyone based on their sex or gender identity. Schools must give all people “the full and equal enjoyment of the... facilities, privileges, advantages and accommodations of any place of public accommodation, without

¹²Also of note, this policy defines “gender” as a student’s “sex assigned at birth. This definition demonstrates a misunderstanding of students with diverse gender identities or expression and must be changed. “‘Sex’ is defined as the “anatomical and physiological processes that lead to or denote male or female. Typically, sex is determined at birth based on the appearance of external genitalia. ‘Gender’ is a ‘broader societal construct’ that encompasses how a “society defines what male or female is within a certain cultural context.” *Parents for Privacy v. Dallas School District No. 2*, 326 F. Supp. 3d 1075 (D. Or. 2018) citing *Doe v. Boyertown Area Sch. Dist., No. 17-3113*, 2018 WL 3016864, at *1 (3d Cir. June 18, 2018).



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discrimination or segregation on the ground of... **sex, gender identity or expression.**” NRS 651.070 (emphasis added). A school is by definition a “place of public accommodation” *See* NRS 651.050(3)(k) (“Place of public accommodation’ means... [a]ny nursery, private school or university or other place of education[.]”).

However, Section 9 of the ECSD policy, as stated above, requires that access to school restrooms, locker-rooms, and showers be based solely on a student’s sex assigned at birth. This policy completely ignores the rights and needs of gender non-conforming and gender diverse students and denies them full and equal enjoyment of the facilities based on their gender identity or expression. This is a violation Nevada’s public accommodation statute, and thus also a violation of the DOE regulation.

Importantly, many courts and administrative agencies have found that denying transgender people equal access to restrooms violates public accommodation laws forbidding discrimination on the basis of sex or gender identity.¹³ These decisions hold that transgender men must be allowed access to locker rooms and restrooms, just like any other man, and transgender women must be allowed access locker rooms and restrooms, like any other woman. The same is true here in Nevada.

The District must abide by state law and must grant equal access to school facilities based on students’ gender identities.

C. Section 9 of the “Gender Non-Conforming Students” Policy Violates Title IX and the Equal Protection Clause of the United States Constitution

Section 9’s denial of equal access facilities based on gender identity violates Title IX of the Education Amendments of 1972 (“Title IX”), and the Equal Protection Clause of the United States Constitution, both of which prohibit government discrimination “on the basis of sex.”¹⁴ As the Seventh Circuit explained, “A policy that requires an individual to

¹³ *See, e.g., Blachana, LLC v. Or. Bureau of Labor & Indus.*, 273 Or. App. 806, 808, 359 P.3d 574, 575 (2015), *opinion adhered to as modified on reconsideration*, 275 Or. App. 46, 362 P.3d 1210 (2015) (holding that denying access to public accommodations because someone is transgender violates Oregon public accommodations law); *Doe v. Regional School Unit 26*, 2014 ME 11 (Me. 2014) (school district violated public accommodations statute by denying transgender girl access to girls’ restroom); *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, at 10 (Colo. Div. of Civil Rights June 17, 2013); http://www.transgenderlegal.org/media/uploads/doc_529.pdf (school district discriminated against transgender girl based on her sex by not allowing her to use the girls’ restroom); *Department of Fair Employment & Housing v. American Pacific Corp.*, No. 34-2013-00151153-CU-CR-GDS, minute order (Cal. Super. Ct. March 13, 2014); <http://transgenderlawcenter.org/wp-content/uploads/2014/03/Lozano-final-order.pdf> (employer discriminated against transgender man by denying him access to men’s locker room).

¹⁴ 20 U.S.C. § 1681(a), *et seq.* *See, e.g., Whitaker* 858 F.3d at 1049-51; *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221-22 (6th Cir. 2016); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t. of Educ.*, 208 F. Supp. 3d 850, 871 (S.D. Ohio 2016); *M.A.B. v. Bd. of Educ. of Talbot County*, 2018 WL 1257097 at *4 (D. Md. 2018).



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use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”¹⁵ Moreover, “[p]roviding a gender-neutral alternative is not sufficient to relieve” school districts “from liability . . . “because of their distant location . . . and the increased stigmatization they cause[.]”¹⁶

Title IX prohibits discrimination based on sex in any education program that receives federal financial assistance.¹⁷ Discrimination against transgender people is sex discrimination.¹⁸ The Ninth Circuit has specifically held that discrimination based on a person’s transgender status, or gender non-conforming identity can amount to gender discrimination. In *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 F. App’x 492, 493 (9th Cir. 2009), the Court reaffirmed the notion that “gender stereotyping is direct evidence of sex discrimination,” under *Price Waterhouse v. Hopkins*, 490 US 228, 251 (1989). The Court in *Kastl* then held that “it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with [] expectations for men or women . . .” *Id.*

Many courts and civil rights agencies have specifically found that preventing a transgender person from using the restroom in accordance with that person’s gender identity constitutes sex discrimination.¹⁹ Moreover, the Federal District Court in Nevada recently held that “discrimination against a person based on transgender status is

¹⁵ *Whitaker* 858 F.3d at 1049-50

¹⁶ *Id.* at 1050.

¹⁷ 20 U.S.C. § 1681(a).

¹⁸ *See, e.g., Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (upholding claim brought by transgender prisoner under Violence Against Women Act (VAWA), remarking that under Title VII and VAWA, “the terms ‘sex’ and ‘gender’ have become interchangeable”); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”); *Schroer v. Billington*, 577 F.Supp.2d 293, 308 (D.D.C. 2008) (holding that an agency’s rescission of a job offer to a transgender woman “after being advised that she planned to [undergo] sex reassignment surgery was literally discrimination ‘because of . . .sex’”); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (“Lopez’s “transsexuality is not a bar to her sex stereotyping claim. Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer.”); *Macy v. Holder*, EEOC DOC 120120821, 2012 WL 1435995 (E.E.O.C. 2012) (failure to hire woman because she was transgender was sex discrimination.).

¹⁹ *See, e.g., Hart v. Lew*, 973 F. Supp. 2d 561 (D. Md. 2013) (allegation that employer repeatedly denied transgender female employee access to the women’s restroom could establish a claim of sex discrimination); *Doe v. Regional Sch. Unit 26*, 86 A.3d 600 (Me. 2014) (denying transgender girl use of the girls’ restroom at her school violated state’s Human Rights Act); *Mathis v. Fountain-Fort Carson Sch. Dist. 8*, Charge No. P20130034X, at 10 (Colo. Div. of Civil Rights June 17, 2013), http://www.transgenderlegal.org/media/uploads/doc_529.pdf (school district discriminated against transgender girl based on her sex by not allowing her to use the girls’ restroom); *see also Lusardi v. McHugh*, EEOC Appeal No. 0120133395 (E.E.O.C. 2015), <http://transgenderlawcenter.org/wp-content/uploads/2015/04/EEOC-Lusardi-Decision.pdf> (refusal to allow woman access to the women’s restroom because she was transgender was sex discrimination under Title VII).



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discrimination “because of sex. . . .”²⁰ Other federal courts have also made clear that Title IX protects students from discrimination based on gender identity, gender nonconformity, or transgender status.²¹

In addition to violating Title IX, excluding transgender students from the same restrooms used by other students also violates the Constitution’s Equal Protection Clause.²² The use of restrooms does not entail exposure to nudity, and locker rooms can provide curtains and other measures to ensure the privacy of all students in a non-stigmatizing manner.²³ Schools can provide additional options for students to enhance their own privacy but cannot exclude transgender students from common spaces to address the discomfort of others.

D. CONCLUSION

Although we appreciate that parts of the ECSD’s policy attempt to protect the rights and needs of gender diverse and gender non-conforming students, as discussed above, the policy remains legally problematic. We urge the ECSD to not adopt this policy as written, and instead amend the language to conform with both state and federal anti-discrimination laws.

Sincerely,

A handwritten signature in black ink, appearing to read "Amy Rose".

Amy M. Rose
Legal Director
ACLU of Nevada

A handwritten signature in black ink, appearing to read "Lauren Kaufman".

Lauren Kaufman
Staff Attorney
ACLU of Nevada

CC: Elko County School District Superintendent, Tod Pherson
Acting Superintendent of Public Instruction in Nevada, Johnathan Moore

²⁰ *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016)

²¹ *Miles v. N.Y. Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997) (upholding complaint by transgender student brought under Title IX arising out of professor’s alleged sexual harassment of student); *Logan v. Gary Cmty. Sch.*, No. 2:07-CV-431, 2008 WL 4411518 (N.D. Ind. Sept. 25, 2008) (refusing to dismiss Title IX claim where transgender student was denied entry to prom for wearing a dress).

²² *Whitaker*, 858 F.3d at 1050-53; *Evancho v. Pine Richland Sch. Dist.*, 237 F.Supp.3d 267, 289-90 (W.D. Pa. 2017).

²³ *Doe by and through Doe v. Boyertown Area Sch. Dist.*, 2017 WL 3675418 at *53 (E.D. Pa. Aug. 25, 2017). See also *Amici Curiae Brief of School Administrators from Thirty-Three States and the District of Columbia in Support of Plaintiff-Appellant, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. 2017), https://www.aclu.org/sites/default/files/field_document/school_admin_amicus.pdf.