



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Texas

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Dr. Rick Westfall, Superintendent
Keller Independent School District (“Keller ISD”)
350 Keller Parkway
Keller, TX 76248

Via E-mail

Re: Supporting LGBTQIA+ Students in Keller ISD¹

Dear Keller ISD Board of Trustees and Superintendent Westfall,

We write to inform you that the proposed policies you are considering tonight, CS (Local) and FI (Local),² violate federal law and severely misinterpret Texas state law. Enacting these policies would harm Keller ISD students, invade their medical privacy, and defy best practices recommended by nonpartisan education associations, including the Texas Association of School Boards (TASB).

I. Proposed “Facility Standards” Policy CS (Local) is Unlawful and Harmful

a. The Proposed Policy Would Violate Students’ Privacy Rights, Title IX, and the Equal Protection Clause

The proposed CS (Local) begins with the words “To the extent permitted by law.” Yet no aspect of this policy is grounded in or permitted by federal or Texas law. The policy would ban all transgender students from accessing multi-user facilities that align with their gender identity and instead generally require them to use the restrooms that correspond with their so-called “biological sex.” But the words “biological sex” are not defined in this policy, nor are they

¹ LGBTQIA+ refers to people who are lesbian, gay, bisexual, transgender, queer, questioning, intersex, asexual, aromantic, or other identities that reflect the full diversity of gender identity and sexual orientation.

² See Proposed Policies CS (Local) and FI (Local), Keller ISD (last accessed Jun. 18, 2023), available at <https://meetings.boardbook.org/Public/Agenda/2320?meeting=587412>.

defined in any federal or Texas statute. Indeed, the American Medical Association (AMA) and other scientific organizations recognize that “biological sex” is not “simple and binary,” but is instead based on a variety of characteristics, including someone’s anatomy, genetic makeup, and hormones.³ And because approximately 1.7% of people are born intersex, with many variations possible in genitalia, hormones, internal anatomy, and/or chromosomes,⁴ it is scientifically inaccurate and impossible for school districts to set policy based on a binary view of “biological sex.”

The proposed CS (Local) acknowledges that school districts keep records of students’ gender based on their birth certificates, but this policy goes far beyond Texas law to allow Keller ISD administrators to challenge or second-guess students’ official birth certificates.⁵ The proposed policy would allow (and seemingly require) school administrators to ask whether the sex listed on students’ birth certificates was “[e]ntered at or near the time of the person’s birth” or “[m]odified only to the extent necessary to correct any type of scrivener or clerical error in the person’s biological sex.”

It is deeply invasive and unlawful for school administrators to interrogate students’ private medical information in this way. School districts have no right to question students’ sexual characteristics such as genitalia, hormones, internal anatomy, or chromosomes or to review outdated legal and medical documents that may reveal private medical information. When enacting Texas Education Code § 33.0834 in the 2021 legislative session, the Texas Legislature clarified that any UIL rules regarding transgender students must comply “with state and federal law regarding the confidentiality of student medical information, including Chapter 181, Health and Safety Code, and the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. Section 1320d et seq.).”⁶ Here, Keller ISD seeks to violate the Texas Education Code and other Texas laws by authorizing school administrators to interrogate students’ private medical information. Such a gross invasion of privacy would also violate students’ federal and state privacy rights, including the constitutional right to privacy in the U.S. and Texas Constitutions.

It is also unlawful for Keller ISD to categorically ban transgender students from accessing multi-user facilities that align with their gender identity. Across the country, federal courts of appeals, and federal district courts, have overwhelmingly found that public school districts cannot exclude transgender students from multi-user, sex-separated facilities that align with their gender identity.⁷ Courts have repeatedly interpreted federal prohibitions on sex

³ See Report 10 of the Board of Trustees, American Medical Association at 14 (June 2021), <https://www.ama-assn.org/system/files/2021-05/j21-handbook-addendum-ref-cmte-d.pdf>.

⁴ Caroline Medina and Lindsay Mahowald, *Key Issues Facing People with Intersex Traits*, Center for American Progress (Oct. 26, 2021), available at <https://www.americanprogress.org/article/key-issues-facing-people-intersex-traits/>.

⁵ Parts of this policy seem to borrow language from Texas Education Code § 33.0834, which was enacted in 2021 after House Bill 25 passed into law, but that language is not accurately quoted, has nothing to do with restrooms, does not permit Texas school districts to limit student restroom access, and cannot supersede federal law or allow school districts to discriminate against their students.

⁶ § 33.0834(d).

⁷ See, e.g., *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050–54 (7th Cir. 2017) (providing a single-user bathroom to a transgender student while denying him access to the boys’

discrimination to protect transgender people from discrimination. In June 2020, the Supreme Court ruled in a 6-3 decision that Title VII’s prohibition on discrimination “because of sex” protects transgender people from discrimination.⁸ This precedent bolsters the rationale relied on by federal courts of appeals to resoundingly find that federal nondiscrimination laws require government entities to grant transgender students access to sex-separated facilities in accordance with their gender identity.

Federal appeals court decisions in this area recognize the deeply harmful effects of forcing transgender students to use separate restrooms from their peers, even when those restrooms are single-user facilities. As the Third Circuit recently explained, requiring “transgender student[s] to use the single-user facilities’ under an assigned-at-birth-based bathroom policy ‘would very publicly brand all transgender students with a scarlet ‘T’” that would ostracize these students from their peers and expose them to bullying and harassment.⁹ The Seventh Circuit also found that requiring transgender students to use single-user facilities “actually invited more scrutiny and attention from [their] peers” and led to increased anxiety and depression for transgender students.¹⁰

The federal government has also made clear that public school districts violate the Constitution and Title IX when they try to exclude transgender students from sex-segregated facilities that align with their gender identity. The U.S. Department of Education’s Office for Civil Rights (OCR) has stated that public school districts may be putting their federal funding at risk if they discriminate against transgender students and has already opened investigations into school districts in Texas that violate Title IX in this way.¹¹

The Texas Association of School Boards (TASB) has likewise cautioned school districts against discriminating against transgender students and noted that “most federal courts have found in favor of a student’s right to use facilities corresponding to the student’s gender identity.

bathroom likely violated student’s rights under Title IX and the Equal Protection Clause); *Dodds v. United States Dep’t of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016) (injunctive relief was warranted to allow transgender female student to use the girls’ bathroom); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 715–26 (D. Md. 2018) (preventing a transgender male student from changing in the boys’ locker room stated a claim under Title IX and the Equal Protection Clause); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 323 F. Supp. 3d 1030, 1037–39 (S.D. Ind. 2018) (transgender male student who was prevented from using the boys’ locker room or restroom was likely succeed on merits of claims under Title IX and the Equal Protection Clause); *A.H. by Handling v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321 330–32 (M.D. Pa. 2017) (preventing a transgender female student from using the girls’ locker room and bathroom stated a claim under Title IX and the Equal Protection Clause); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1226 (9th Cir. 2020); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018). *But see Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 798 (11th Cir. 2022) (en banc) (finding that a school district policy requiring transgender students to use single-user, gender-neutral restrooms did not violate the Equal Protection Clause or Title IX under specific circumstances where the school district also respected transgender students’ pronouns and allowed them to dress in accordance with their gender identity).

⁸ *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020).

⁹ *Doe*, 897 F.3d at 530.

¹⁰ *Whitaker*, 858 F.3d at 1045.

¹¹ See *Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families*, U.S. Dep’t of Justice and Education (June 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>; En Banc Brief for the United States as Amicus Curiae, *Adams v. School Board of St. John’s County*, Case No. 18-13592 (11th Cir. Nov. 26, 2021), <https://www.justice.gov/crt/case-document/file/1458461/download>.

.. [and] [t]here is no law that prohibits a district from granting the transgender student’s request to use these facilities.”¹²

Further, countless principals and superintendents have explained that parents’ concerns and school administrators’ fears are often based on prejudice and misunderstandings. But across the country and here in Texas, thousands of transgender students have been using multi-user restrooms that align with their gender identity without any issues.¹³ As the Fourth Circuit noted in *Gavin Grimm v. Gloucester County School Board*, school administrators’ fears about allowing transgender students to use multi-use restrooms are often unfounded. “No one questions that students have a privacy interest in their own body when they go to the bathroom. But the [School] Board ignores the reality of how a transgender child uses the bathroom: by entering a stall and closing the door.”¹⁴

b. The Proposed Policy Would Harm Keller ISD Students by Worsening Mental Health and Academic Outcomes

Finally, in addition to violating students’ constitutional rights and federal anti-discrimination law, policies like CS (Local) can have devastating mental health consequences for transgender students. ***When transgender students are excluded from using facilities that match who they are and are separated from all other students, the mental health outcomes can be catastrophic.*** When restroom access is denied, one in three transgender students report attempting suicide in the year following that decision and one in five report attempting to end their life multiple times.¹⁵ On the other hand, allowing transgender students to use restrooms that match who they are has been shown to reduce depression, suicidal ideation, and suicide attempts.¹⁶

These serious and devastating consequences have been recognized by the American School Counselor Association, the National Association of Elementary School Principals, the National Association of School Psychologists, and the National Association of Secondary School Principals, which have all affirmed that “[h]aving support at school and acknowledging a student’s right to use the bathroom consistent with their gender identity is critical. A negative school experience not only hinders a transgender student’s academic achievement and growth but can also interfere with their long-term health and well-being.”¹⁷

¹² *Legal Issues Related to Transgender Students*, Texas Association of School Boards (January 2023) at 8–9, https://www.tasb.org/services/legal-services/tasb-school-law-source/students/documents/legal_issues_related_to_transgender_students.pdf.

¹³ Brief of Amici Curiae School Administrators from Thirty-One States and the District of Columbia at 7, *Gloucester Cnty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2017) (No. 16-273), http://www.scotusblog.com/wp-content/uploads/2017/03/16-273_bsac_school_of_administrators_from_thirty-one_states_and_the_dis.pdf (describing numerous examples in which transgender students have been able to use multi-user bathrooms without problems).

¹⁴ *Grimm*, 972 F.3d at 613 (quoting *Whitaker*, 858 F.3d at 1052).

¹⁵ Myesha Price-Feeney, et al., *Impact of Bathroom Discrimination on Mental Health of Transgender and Non-Binary Youth*, *Journal of Adolescent Health* (Dec. 4, 2020), [https://www.jahonline.org/article/S1054-139X\(20\)30653-4/fulltext](https://www.jahonline.org/article/S1054-139X(20)30653-4/fulltext).

¹⁶ *Id.*

¹⁷ *Transgender Students and School Bathrooms*, *Gender Spectrum* (2019), <https://genderspectrum.org/articles/bathroom-faq>.

Following this guidance from major educational associations across the country, TASB, and numerous federal courts of appeals, many other school districts in Texas allow transgender students to use multi-user restrooms and locker rooms that align with their gender identity on a case-by-case basis. There is no reason for Keller ISD to violate federal and state law, invade students' privacy, and defy best practices from TASB and other educational organizations, particularly when the district's actions will cause immense and irreparable harm to its transgender students.

II. Proposed "Identification of Students" Policy FI (Local) is Unlawful and Harmful

a. *The Proposed Policy Would Violate Students' Privacy Rights, Title IX, and the Equal Protection Clause*

The proposed FI (Local) would discourage the use of affirming pronouns that correspond to a student's gender identity. The policy seems to allow and encourage any student or staff member to purposefully misgender¹⁸ other students at school. ***However, it is a moral and legal imperative that students not be harassed or bullied at school, including by being deliberately called pronouns that do not align with who they are.*** This is required by federal law, it is supported by Texas law, and it is a matter of common courtesy, decency, and respect. Supporting students' pronouns also helps preserve their safety and privacy and defend against a hostile environment of bullying and harassment.

Refusing to use a student's affirming pronouns can trigger significant legal liability for school districts under the Constitution and Title IX. Courts across the country have recognized that deliberately refusing to address transgender individuals by the pronouns consistent with their gender identity can constitute gender-based harassment under the Constitution and Title IX.¹⁹ The U.S. Department of Education's Office of Civil Rights (OCR) has also explained that declining to use students' affirming pronouns violates Title IX, which can trigger OCR investigations and threaten schools' federal funding.²⁰ Refusing to respect a student's gender or non-conformance to gender stereotypes is also gender-based harassment as defined by your district's FFH policy that protects students from discrimination.

¹⁸ Misgendering occurs when someone uses pronouns to refer to another person that do not match how that person identifies.

¹⁹ See, e.g., *Doe v. City of New York*, 976 N.Y.S.2d 360 (N.Y. Sup. Ct. 2013) (holding transgender woman had sufficiently alleged discrimination under state sex discrimination law when the state HIV/AIDS Service Administration continued to address her by her former male name and male pronouns); *Burns v. Johnson*, 829 F.3d 1 (1st Cir. 2016) (plaintiff's allegations, including employer's purposeful and condescending use of the pronoun "she" to a male transgender employee, supported a reasonable inference of discrimination on the basis of sex); see also *OCR Instructions to the Field re Complaints Involving Transgender Students*, Dep't. of Educ. Office for Civil Rights (June 5, 2017), <https://assets.documentcloud.org/documents/3866816/OCR-Instructions-to-the-Field-Re-Transgender.pdf> ("refusing to use a transgender student's preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus" is an example of gender-based harassment).

²⁰ *Confronting Anti-LGBTQI+ Harassment in Schools*, Department of Education (June 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>.

The Texas Association of School Boards (TASB) also recognizes that transgender and non-binary students have a right to express themselves and be who they are at school. TASB has explained that a “transgender student’s preferred first name and gender should be used in speaking with the student and for class rosters, identification badges, awards, and any other similar purpose.”²¹ Under Section 25.0021 of the Texas Education Code, students must only be identified “by the student’s legal surname,”²² which means that school districts are free to use student’s affirming first names and pronouns in class, at graduation and school events, and in all non-official documents or records.

If school administrators use pronouns for a student that correspond with the “biological sex” identified on a “birth certificate . . . [e]ntered at or near the time of the person’s birth,” as recommended by this policy, that may also violate federal privacy laws by “outing” the student as transgender. Students have the right to share or withhold information about their gender identity under federal law.²³ As the National Association of Secondary School Principals (NASSP) advises, “transgender status, legal name or sex assigned at birth is confidential medical information and considered ‘personally identifiable information’ under the Family Educational Rights Privacy Act (FERPA). Disclosure of that information to other school staff or parents could violate the school’s obligations under FERPA or constitutional privacy protections.”²⁴ It could also expose students to an increased risk of bullying and harassment.

b. The Proposed Policy Would Harm Keller ISD Students by Creating a Hostile Learning Environment and Worsening Mental Health Outcomes

Finally, when school administrators misgender or deadname²⁵ transgender students, it not only violates the law but can cause immense and irreparable trauma and harm and spur bullying and harassment from other students, including online. A student’s need to undergo gender transition at school—including through the use of affirming pronouns—is part of the essential process of living consistently with their authentic self.²⁶ When transgender students are able to use their affirming name and pronouns at school, they are 29% less likely to experience suicidal ideation and 56% less likely to attempt suicide.²⁷ ***School boards’ decisions to require or***

²¹ *Legal Issues Related to Transgender Students*, Texas Association of School Boards (January 2023) at 6, https://www.tasb.org/services/legal-services/tasb-school-law-source/students/documents/legal_issues_related_to_transgender_students.pdf.

²² Tex. Educ. Code §25.0021.

²³ See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. §§ 99.00 et seq. Disclosure of private information related to sex or gender can also violate sex discrimination laws. See *Roberts v. Clark Cty. Sch. Dist.*, 215 F.Supp.3d 1001 (D. Nev. 2016) (disclosure of private information about employee’s transgender status in an email established a prima facie case for harassment/hostile environment under Title VII’s sex discrimination prohibition).

²⁴ *Transgender Students*, Nat’l Ass’n of Secondary Sch. Principals, <https://nassp.org/who-we-are/board-of-directors/position-statements/transgender-students?SSO=true>.

²⁵ Deadnaming occurs when someone uses a name to refer to someone that the person no longer uses. This can severely exacerbate a transgender person’s gender dysphoria, which is the clinically significant distress that occurs when someone’s gender identity, or deeply held sense of gender, does not match their sex assigned at birth.

²⁶ *Id.* at 14.

²⁷ Stephen T. Russell, et al., *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, J. Adolesc. Health (Oct. 2018), <https://pubmed.ncbi.nlm.nih.gov/29609917/>.

encourage the use of affirming pronouns therefore have a direct and immediate impact on students' mental health, and you have an obligation to keep your students safe from harm and to respect their names and pronouns under both Texas and federal law.

III. Conclusions

The Board is considering these policies at a time of extreme hostility for Texas LGBTQIA+ youth and, if passed, these policies will be a cruel escalation of the attacks on an already vulnerable group in Keller ISD. In addition to the challenges and worries that all youth face, transgender and non-binary young people have been recently confronted with significant harm and discrimination here in Texas. Phone calls to mental health crisis hotlines for LGBTQIA+ youth have skyrocketed in the state. During 2021, when the Texas Legislature debated dozens of bills targeting transgender youth, the Trevor Project received more than 14,500 calls, texts, and messages from LGBTQIA+ youth in Texas in need of support.²⁸ This year has posed similar, and more severe, challenges, as transgender and non-binary youth in Texas have endured attacks on their health care, their ability to play sports, their access to inclusive educational materials, and their very existence. Amid similar legislative attacks across the country, forty-one percent of LGBTQIA+ youth “seriously considered attempting suicide in the past year—and young people who are transgender, nonbinary, and/or people of color reported higher rates than their peers.”²⁹ Tragically, 14% percent of LGBTQIA+ youth attempted suicide this the past year, including nearly one in five transgender and nonbinary young people.³⁰

We urge you not to exacerbate the trauma and harm that many LGBTQIA+ students in your school district are already experiencing. CS (Local) and FI (Local) flagrantly violate federal and state law and would invade student privacy and harm students in your district. We would be happy to discuss these legal issues further and appreciate your time and attention to this matter.

Sincerely,



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²⁸ Josh Weaver, *The Trevor Project Reaffirms Support for Texas Trans Youth, Supportive Parents, and its Crisis Counselors Against Unlawful Attacks*, The Trevor Project (Feb. 24, 2022), available at <https://www.thetrevorproject.org/blog/the-trevor-project-reaffirms-support-for-texas-trans-youthsupportive-parents-and-its-crisis-counselors-against-unlawful-attacks/>.

²⁹ See 2023 U.S. National Survey on the Mental Health of LGBTQ Young People, The Trevor Project, available at <https://www.thetrevorproject.org/survey-2023/>.

³⁰ *Id.*