



November 21, 2022

Office for Civil Rights
U.S. Department of Education
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Re: Complaint of Sex Discrimination Against Frisco ISD

Dear Office for Civil Rights:

Frisco Independent School District, located in Denton and Collin County, Texas, has engaged in unlawful sex discrimination against transgender, non-binary, gender diverse, and intersex students in violation of Title IX of the Education Amendments of 1972. On November 14, 2022, the Frisco ISD school board voted to enact the attached policy CS (Local), entitled “Use of Bathrooms and Changing Facilities.”¹ For the reasons stated below, this policy violates Title IX. Absent federal civil rights intervention, the policy will harm transgender, non-binary, gender diverse, and intersex students, and substantially invade their privacy.²

Title IX bars discrimination on the basis of sexual orientation or gender identity,

¹ See Proposed Policy CS (Local), Frisco ISD (enacted Nov. 14, 2022) (**Exhibit 1**); Frisco ISD Board Meeting, November 14, 2022, <https://friscoisdtx.new.swagit.com/videos/189529> (video recording of school board meeting).

² Because CS (Local) allows for “reasonable accommodations on request,” it is not entirely clear how this policy will be implemented. Yet requiring students to seek a “reasonable accommodation” in order to use multi-user restrooms still places a burden on transgender, non-binary, gender diverse, and intersex students, requiring them to “out” themselves to the district and will lead to bullying, harassment, and/or invasion of their privacy. Further, the policy’s vagueness will allow for disparate and discriminatory enforcement across the district and has already caused profound distress and concern in the Frisco ISD community. See, e.g., Matt Howerton, *Frisco ISD adopts new policy on student bathrooms*, KHOU (Nov. 14, 2022), <https://www.khou.com/article/news/local/frisco-isd-adopts-policy-students-use-bathrooms-gender-assigned-when-born/287-9db27ba5-0e54-4695-a8f6-1f6b9a0e6567> (quoting the concerned parent of a transgender Frisco ISD student: “[The policy is] taking away and stripping the ability for the school to weigh in with the individual needs of kids fully.”).

as this department has recognized. We urge the Office for Civil Rights to open an investigation into Frisco ISD’s sex discrimination and to take all necessary remedial measures to ensure that the district complies with Title IX.

I. CS (Local) Was Enacted Specifically to Discriminate against Transgender, Non-Binary, Gender Diverse, and Intersex Students

During the school board meeting on November 14, the Frisco ISD school board member who drafted the policy—and who joined the rest of the board in unanimously adopting it—explained that his actions in crafting and passing the policy were based on animus towards lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ+) students. Trustee Marvin Lowe repeatedly asserted that the policy was intended to address what he sees as the “problem” of transgender, non-binary, gender diverse, and intersex students using the restrooms that align with their gender identities.³ He explained that he drafted the policy with the intent “to make it so boys use boys’ bathrooms and girls use girls’ bathrooms.”⁴ By vilifying transgender, non-binary, gender diverse, and intersex students and invalidating their identities and experiences, Trustee Lowe made it plain that his intention was to discriminate against students because of their sex, including their gender identity and non-conformance with gender stereotypes.⁵

This policy seemingly allows Frisco ISD and its teachers and administrators to ignore and erase students’ gender identities in violation of federal law and even to go far beyond Texas law by also ignoring students’ legal gender/sex listed on their birth certificates. Instead of respecting students’ gender identities and/or the gender listed on their birth certificates, Frisco ISD is attempting to categorize students based on their “biological sex,” which is not a term that is defined in either federal or Texas law. The words “biological sex” are also not defined in this policy, and it is not clear how Frisco ISD would determine students’ “biological sex” without substantially invading their privacy. 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.⁶ Because approximately 1.7% of people are born intersex, with many variations possible in genitalia, hormones, internal anatomy, and/or chromosomes,⁷ it is scientifically inaccurate and impossible for school districts to set policy based on a binary view of “biological sex.”

³ See, e.g., Frisco ISD Board Meeting, ~ 1:46:12, *supra* note 1 (“We brought the policy to the board to solve this problem once and for all . . . to have the board vote on a policy of having biological boys use the biological boys’ restroom and vice versa.”).

⁴ *Id.* at ~ 1:43:10.

⁵ It is not clear whether other school board members share Trustee Lowe’s views on this topic. During the school board meeting, the attorney for the district implied that this policy complies with federal law (*id.* at ~ 1:46:55; see also ~ 1:42:40), even though the policy itself is contrary to both federal and Texas law.

⁶ 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>.

⁷ 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/>.

The CS (Local) policy acknowledges that school districts keep records of students that identify their gender based on their birth certificate, but this policy seemingly allows Frisco ISD administrators to challenge or second-guess students' official birth certificates.⁸ The policy could lead 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. But Frisco ISD seeks to authorize school administrators to interrogate students' private medical information and to make a determination into a student's “biological sex,” regardless of the legal sex/gender on that student's birth certificate. Such an invasion of student privacy and discriminatory targeting of transgender, non-binary, gender diverse, and intersex students violates Title IX, as multiple courts across the country have found.

II. CS (Local) Violates Title IX

It is unlawful for Frisco ISD to categorically ban transgender students from accessing multi-user facilities that align with their gender identity. Across the country, federal courts of appeal have unanimously found that public school districts cannot exclude transgender students from multi-user, sex-separated facilities.⁹ Federal

⁸ The Texas Association of School Boards (TASB) and courts across the county have recognized that school districts must recognize students' gender identity, or deeply held sense of gender, regardless of the gender listed on their birth certificate. *See Legal Issues Relating to Transgender Students*, TASB (June 2022), at 6, https://www.tasb.org/services/legal-services/tasb-school-law-source/students/documents/legal_issues_related_to_transgender_students.pdf. CS (Local) ignores this guidance and goes far beyond the scope of federal law.

Parts of CS (Local) 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.

⁹ *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' 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, 708 (D. Md. 2018) (preventing a transgender male student from changing in the boys' locker room likely violated 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 to state a claim 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).

prohibitions on sex discrimination have repeatedly been interpreted to protect transgender people from discrimination. In June of 2020, the Supreme Court ruled in a 6-3 decision that Title VII’s prohibition on discrimination “because of sex” fully protects transgender people from discrimination.¹⁰ This precedent bolsters the rationale relied on by federal courts of appeals to resoundingly find that Title IX similarly requires government entities to grant transgender people access to sex-separated facilities in accordance with their gender identities.¹¹

Even though Frisco ISD’s policy only applies to multi-user restrooms, 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 students 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.¹² 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.¹³

It is also the position of the United States that public school districts violate Title IX when they try to exclude transgender students from sex-segregated facilities that align with their gender identities. The U.S. Department of Education’s Office for Civil Rights (OCR) has stated that public school districts cannot discriminate against transgender students by denying them access to multi-user restrooms that align with their gender identities, and OCR has already opened investigations into school districts in Texas that violate Title IX in this way.¹⁴

Across the country and here in Texas, thousands of transgender students have been using multi-use restrooms that align with their gender identities without any issues.¹⁵ As the Fourth Circuit noted in *Gavin Grimm v. Gloucester County School*

¹⁰ *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020).

¹¹ *See supra* note 9.

¹² *Doe*, 897 F.3d at 530.

¹³ *Whitaker*, 858 F.3d at 1045.

¹⁴ *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>. Note that this document has been preliminarily enjoined due to a court order in *State of Tenn., et al. v. U.S. Dep’t of Educ.*, No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022), but that injunction only runs against the specific parties in that case. *See also* 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>. OCR is also undergoing rulemaking to further clarify that “Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex.” Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972, U.S. Dep’t of Educ., 34 C.F.R. 106 (2022), <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf>.

¹⁵ 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->

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.”¹⁶ But Frisco ISD’s policy defies best practices from educational organizations in Texas and across the country while violating federal law.

III. CS (Local) Will Harm Frisco ISD Students, Particularly Transgender, Non-Binary, Gender Diverse, and Intersex Students

By allowing Frisco ISD administrators to interrogate any student’s “biological sex,” this policy could lead to immense and irreparable harm against all students in the district, since anyone could be subject to invasive questions about their genitalia, hormones, internal anatomy, and/or chromosomes at any time. This policy also specifically harms transgender, non-binary, gender diverse, and intersex students by ensuring that they do not have the same access to the multi-user restrooms as their peers.

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. Allowing transgender students to use restrooms that match who they are has been shown to reduce depression, suicidal ideation, and suicide attempts.¹⁷ 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.¹⁸

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.”¹⁹

Following this guidance from major educational associations across the country, the Texas Association of School Boards (TASB), and numerous federal courts of appeals, many other school districts here in Texas allow transgender students to use multi-user

[273 bsac school of administrators from thirty-one states and the dis.pdf](#) (describing examples in which transgender students have been able to use multi-user bathrooms without problems).

¹⁶ *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (quoting *Whitaker*, 858 F.3d at 1052).

¹⁷ 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).

¹⁸ *Id.*

¹⁹ *Transgender Students and School Bathrooms*, *Gender Spectrum* (2019), <https://genderspectrum.org/articles/bathroom-faq>.

restrooms and locker rooms that align with their gender identity on a case-by-case basis.²⁰ There is no reason for Frisco 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.

Transgender young people have also been confronted with significant harm and discrimination here in Texas. Forty-five percent of LGBTQ+ youth “seriously considered suicide in the past year, including more than half of transgender and nonbinary youth.”²¹ Tragically, 18% percent of LGBTQ+ youth attempted suicide this the past year.²² Phone calls to mental health crisis hotlines for LGBTQ+ youth have skyrocketed here in Texas. 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 LGBTQ+ youth in Texas in need of support.²³ This year, transgender youth continue to find their ability to play sports, their access to health care, and their very existence threatened and subject to political debate.

The undersigned organizations urge OCR to investigate Frisco ISD’s intentional sex discrimination against students who are transgender, non-binary, gender diverse, and intersex, and to take remedial measures to ensure that the district complies with federal law. We would be happy to discuss these legal issues further and appreciate your time and attention to this matter.

Sincerely,

American Civil Liberties Union of Texas

IDRA (Intercultural Development Research Association)

Children’s Defense Fund—Texas

Resource Center

Equality Texas

Transgender Education Network of Texas (TENT)

Texas Freedom Network (TFN)

²⁰ See *supra* note 15.

²¹ See *National Survey on LGBTQ Youth Mental Health 2022*, The Trevor Project, available at <https://www.thetrevorproject.org/survey-2022/>.

²² *Id.*

²³ 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/>.

Exhibit 1

PROPOSED POLICY**Use of Bathrooms
and Changing
Facilities**

To the extent permitted by law, each multiple-occupancy bathroom or changing facility owned or operated by the District shall be designated for and used only by persons based on the person's biological sex. This policy does not prohibit the District from providing reasonable accommodations upon request.

In accordance with law, a person's biological sex is identified on the person's official birth certificate provided the statement was:

1. Entered at or near the time of the person's birth; or
2. Modified only to the extent necessary to correct any type of scrivener or clerical error in the person's biological sex.

[See Birth Certificate Statement in FM(LEGAL)]

For the purposes of this policy, "bathroom or changing facility" means a location where a person may reasonably be in a state of undress, including a restroom, locker room, or shower room. Also, for purposes of this policy, "multiple-occupancy bathroom or changing facility" means a location designed or designated for use by more than one person at a time, where a person may be in a state of undress in the presence of another person, regardless of whether the facility provides curtains or partial walls for privacy. The term includes a restroom, locker room, changing room, or a shower room.