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June 15, 2017

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Re: Prince William County School District Non-Discrimination Policy

Dear Ms. McGowan:

It has come to our attention that the Prince William County School Board is considering amending the school district's non-discrimination policy to specifically prohibit discrimination on the basis of a person's actual or perceived sexual orientation or gender identity. It is the ACLU of Virginia's position that the school board not only has the authority to implement such protections under Virginia law, but that it should amend its non-discrimination policy to reflect its current obligation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et. seq.* ("Title VII"), Title IX of the of the Education Amendments of 1972, 20 U.S.C. § 1681 *et. seq.* ("Title IX"), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to protect students and employees from discrimination based on sexual orientation and gender identity.

The ACLU of Virginia strongly supports the adoption of amended Policy 060, which will specifically prohibit discrimination against students and employees based on sexual orientation and gender identity.

Due to misinformation that was shared about the legality of this amendment during the school board's June 9, 2017, meeting, and concerns expressed by the public, we offer the following guidance.

Authority under Virginia Law

In a 2015 Opinion, Virginia's Attorney General Mark Herring clarified that school boards have authority under the Virginia Constitution and the Code of Virginia to amend their non-discrimination policies to prohibit discrimination based on sexual orientation and gender identity.

The opinion correctly explains that under the Dillon Rule, a school board's powers are limited to (1) powers expressly given to a school board by the Constitution of Virginia or by the Virginia General Assembly; (2) powers "necessarily or fairly implied from expressly granted powers"; and (3) powers that are "essential and indispensable" to a

school board's mission.[1] The Constitution of Virginia, however, *expressly* grants school boards the power to supervise schools.[2] Through this express supervisory power, school boards have implied authority to regulate students' safety and welfare[3], supervise personnel[4], and apply "local policies, rules, and regulations adopted for the day-to-day management of a teaching staff"[5]. No other local or state entity can interfere with a school board's far-reaching supervisory authority.[6]

The opinion goes on to state that "[r]egulating how a school system, students, and employees interact with and treat one another is a fundamental component of supervising a school system. A policy that allows some students or some employees to be treated differently from others necessarily implicates the welfare of students and supervision of personnel." As the Constitution of Virginia clearly allows school boards to regulate these areas, "the authority to prohibit discrimination, including discrimination based on sexual orientation or gender identity, is a power fairly or necessarily implied from the constitutional duty to supervise schools."[7]

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The General Assembly also granted school boards the power to "adopt bylaws and regulations ... for the management of its official business and for the supervision of schools,"[8] and to promulgate standards of conduct to "provide that public education be conducted in an atmosphere free of disruption and threat to persons or property and *supportive of individual rights.*"[9] As the Attorney General correctly concluded, a school board is well within its power to determine that specifically prohibiting discrimination on the basis of sexual orientation or gender identity is necessary to attain those goals.[10]

Other school districts in Virginia have enacted similar LGBTQ-inclusive non-discrimination policies. One such policy enacted in Fairfax County was recently challenged in Virginia state court on grounds that it violated the Dillon Rule and a student's right to privacy in restrooms and locker rooms. The Fairfax County Circuit Court dismissed the case because none of the plaintiffs—a student enrolled in Fairfax

[1] 2015 Op. Va. Att'y Gen. 80, at 1.
[2] Va. Const. Art. III, § 7. In addition, the Constitution of Virginia specifically prohibits state and local entities from discriminating against individuals on the basis of sex, Va. Const. Art. I, § 11, and, under the Virginia Human Rights Act, it is the public policy of the Commonwealth to "[s]afeguard all individuals within the Commonwealth from unlawful discrimination because of . . . sex," Va. Code Ann. § 2.2-3900. Under both federal and state law, discrimination on the basis of sex includes discrimination on the basis of sexual orientation or gender identity.
[3] *Commonwealth v. Doe*, 278 Va. 223, 230 (2009).
[4] *Riddick v. Sch. Bd*., 238 F.3d 518, 523 (4th Cir. 2000) (citing *Sch. Bd. v. Parham*, 218 Va. 950, 956 (1978)).
[5] *Id.* at 2 (citing *Doe*, 278 Va. at 230).
[6] *Id.* (citing 2002 Op. Va. Att'y Gen. 105).
[7] 2015 Op. Va. Att'y Gen. 80, at 2. *See also Shenandoah Cnty. Sch. Bd. v. Carter*, No. 16-79, 2016 Va. Cir. LEXIS 85, at *12 (Cir. Ct. Apr. 29, 2016) (explaining that a school board's supervisory power under Va. Const. Art. III, § 7 includes disciplining students and "deterring future conduct that may threaten the safety and welfare of the students or otherwise interrupt the educational process.").
[8] Va. Code Ann. § 22.1-78.
[9] 2015 Op. Va. Att'y Gen. 80, at 3 (quoting Va. Code Ann. § 22.1-253.13:7(c)(3) (emphasis added)).
[10] *Id.*

County Public Schools, his parents, and a taxpaying resident of Fairfax County—had standing to challenge the policy because none of them had experienced actual harm as a result of it. *Lafferty v. Sch. Bd. of Fairfax Cty*., 798 S.E.2d 164, 167 (Va. 2017). The Virginia Supreme Court upheld the dismissal on appeal, holding that "distress over a general policy does not alone allege injury sufficient for standing" for a student or his parents, *id*. at 168, and "zealous interest in [a] topic alone is not sufficient to create standing" for a resident taxpayer, *id*. at 170. In other words, Virginia courts will not entertain lawsuits against school boards based on nothing more than bald assertions that students will be harmed by an LGBTQ-inclusive non-discrimination policy.

Obligations under Federal Law

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Adopting the proposed amendment to Policy 060 to specifically prohibit discrimination on the basis of sexual orientation and gender-identity would bring the policy in line with the division's existing obligations under federal law.

The First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the U.S. Constitution.[11] In a recent landmark decision, the Seventh Circuit, *en banc*, held that Title VII's prohibition against discrimination on the basis of sex includes discrimination on the basis of sexual orientation.[12] As a covered employer under Title VII, the school district could be held liable for failing to protect school employees from discrimination on the basis of sexual orientation or gender identity. Acknowledging these obligations in the Prince William County School Board's official policies would provide employees with notice of their individual rights and what behavior is, and is not, permitted at work.

Title IX and the Equal Protection Clause protect students from being denied equal educational opportunities on the basis of sex, which includes discrimination based on a student's actual or perceived gender identity or sexual orientation. Moreover, excluding

[11] *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (in employment discrimination case under Equal Protection Clause, "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination"); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) (same under Title VII of the Civil Rights Act of 1964); *Rosa v. Park W. Bank & Trust Co*., 214 F.3d 213 (1st Cir. 2000) (same under the Equal Credit Opportunity Act); *Schwenk v. Hartford*, 2014 F.3d 1187 (9th Cir. 2000) (same under the Gender Motivated Violence Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (same under Title VII). Within the Fourth Circuit, two district courts have held that discrimination against transgender people is sex discrimination, see *Lewis v. High Point Reg'l Health System*, 79 F. Supp. 3d 588, 589 (E.D.N.C. 2015); *Finkle v. Howard County*, 12 F. Supp. 3d 780, 788 (D. Md. 2014), and another three have issued rulings in which the defendant did not dispute that Title VII applied, *see Cooper v. Micros Systems, Inc*., No. CCB-14-1373, 2015 WL 6549093, at *3 n.6 (D. Md. Oct. 27, 2015); *Muir v. Applied Integrated Tech., Inc*., No. 13-0808, 2013 WL 6200178, at *10 (D. Md. Nov. 26, 2013); *Hart v. Lew*, 973 F. Supp. 2d 561, 581 (D. Md. 2013). Federal district courts have also held that denying transgender employees access to gender-segregated restroom facilities constitutes sex discrimination under Title VII. *See, e.g., Roberts v. Clark Cty. Sch. Dist*., 215 F. Supp. 3d 1001, 1016 (D. Nev. 2016).

[12] *Hively v. Ivy Tech Cmty. Coll. of Indiana,* 853 F.3d 339 (7th Cir. 2017) (*en banc).*

boys and girls who are transgender from the same restrooms as other boys and girls subjects them to discrimination on the basis of sex in violation of Title IX. [13] The Seventh Circuit's landmark opinion in *Whitaker v. Kenosha Unified School District*, No. 16-3522, 2017 U.S. App. LEXIS 9362, at *2 (7th Cir. May 30, 2017), marked the first time a federal appellate court reached this conclusion without reliance on the U.S. Department of Education's guidance on schools' Title IX obligations to transgender students, which the Trump Administration rescinded in February.[14] The Fourth Circuit will hear arguments on the same issue in September in *Gavin Grimm v. Gloucester County School Board*. [15]

The school board also faces potential liability under the Equal Protection Clause of the U.S. Constitution if it excludes transgender students from using the same restrooms, locker rooms, and other sex-segregated school spaces as other students.[16] There is no important state interest – or *any interest* – that justifies treating students differently simply because they are transgender.

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The use of restrooms does not entail exposure to nudity, and locker rooms can provide curtains and other measures to ensure privacy for all students. Thus, a school district may satisfy its Title IX and Equal Protection Clause obligations as well as protect potential or actual student privacy interests by allowing transgender students to use restrooms and other facilities that correspond to their gender identity.[17] To the extent any student feels uncomfortable using a facility—because of modesty, embarrassment, discomfort with the presence of a transgender student, or for any reason—private facilities can be made available for them to use if they choose. But what schools cannot do is force

[13] *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. 2017).
[14] Federal courts in other circuits have similarly held that Title IX prohibits schools from denying students equal educational opportunities because they are transgender. *See Highland Local Sch. Dist. v. Dep't of Educ*., Civil Case No. 16-4117, Slip Op. at 3-4 (6th Cir. Dec. 15, 2016) (denying stay of district court injunction permitting transgender student to use restroom corresponding to her gender identity)
[15] The U.S. Supreme Court remanded *Gloucester County School Board v. G.G*., back to the Fourth Circuit to be reconsidered in light of the Departments of Justice and Education rescinding Title IX guidance that clarified schools' obligation to protect students from sex discrimination based on their transgender status. The Fourth Circuit will reexamine whether public schools are permitted to exclude transgender students from using the same restrooms as other students, or whether that practice deprives transgender students of equal access to educational opportunity in violation of Title IX. The issue of whether Gloucester County's "biological gender" restroom policy violates the Equal Protection Clause is not at issue in the current appeal, but remains pending in the U.S. District Court for the Eastern District of Virginia. To date, the Sixth and Seventh, Circuits have recognized that discrimination based on transgender status is prohibited under Title IX and other civil rights statutes. *See G.G. v. Gloucester County Sch. Bd.*, 822 F.3d 709, 729 (4th Cir. 2016) (Davis, J., concurring), *cert. granted* 2016 U.S. LEXIS 6408 (Oct. 28, 2016);
[16] *See Highland Local Sch. Dist. v. Dep't of Educ*., Civil Case No. 16-4117, Slip Op. at 3-4 (6th Cir. Dec. 15, 2016) (denying stay of district court injunction permitting transgender student to use restroom corresponding to her gender identity), available at https://assets.documentcloud.org/documents/3239555/Highland-6th-Circuit.pdf.
[17] *See* "Examples of Policies and Emerging Practices for Supporting Transgender Students, U.S. Dep't of Education, Office of Elementary and Secondary Educ., Office of Safe and Healthy Students (May 2016), available at http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf.

transgender students to use separate facilities because some people might feel uncomfortable with them.[18] This the Equal Protection Clause does not permit.[19]

Inclusive Policies Help Prevent Anti-LGBTQ Victimization

Even if federal law did not require schools to protect students and personnel from discrimination based on sexual orientation or gender identity, the Prince William County School Board would be acting in the best interests of its students and employees by amending its non-discrimination policy to specifically prohibit such discriminatory actions and behavior.

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Recent surveys have shown that 27 percent of gay, lesbian, and bisexual people, and 78 percent of transgender people, had experienced at least one form of sexual orientation or gender identity-based discrimination or harassment at work during the previous five years.[20] Widespread and continuing discrimination against LGBTQ people has been documented in court cases, state and local administrative complaints, academic journals, newspapers, books, and other media.[21] The federal government, as well as many state and local governments, have concluded that LGBT people face widespread discrimination in employment.[22] Discrimination and fear of discrimination can negatively affect employees in terms of wages, job opportunities, mental and physical health, productivity, and job satisfaction.[23] In contrast, studies have shown that LGBTQ-supportive policies and workplace climates are linked to greater job commitment, improved workplace relationships, increased job satisfaction, improved health outcomes, and increased productivity among LGBTQ employees.[24]

Feeling unsafe or uncomfortable at school can negatively affect a student's ability to thrive and succeed academically, particularly if it results in that student avoiding school. Among students surveyed in the Gay, Lesbian and Straight Education Network's (GLSEN) 2015 National School Climate Survey, nearly six in 10 reported feeling unsafe at school

[18] Requiring transgender boys, who are known to all their peers as boys, to use the girls' rooms, and requiring transgender girls, who are known to all their peers as girls, to use the boys' rooms, is not a viable policy from the perspective of both transgender students and their peers.
[19] *See, e.g.*, *City of Cleburne, Tex. v. Cleburne Living Ctr*., 473 U.S. 432, 450 (1985) (deference to community discomfort with a group is not a legitimate basis for government's unequal treatment of that group).
[20] Brad Sears & Christy Mallory, The Williams Institute, "Documented Evidence of Employment Discrimination & Its Effects on LGBT People" at 2 (July 2011), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf.
[21] *Id.* at 6-9.
[22] Brad Sears & Christy Mallory, *Employment Discrimination against LGBT People: Existence and Impact*, in Christine Duffy & Denise Visconti, eds., GENDER IDENTITY & SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE at 8-12 (BNA 2014), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/CH40-Discrimination-Against-LGBT-People-Sears-Mallory.pdf.
[23] *Id.* at 12-16.
[24] M.V. Lee Badgett, et al., *The Business Impact of LGBT-Supportive Workplace Policies*, The Williams Institute (May 2013), at 1, available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-Report-May-2013.pdf.

because of their sexual orientation, and four in 10 felt unsafe because of how they expressed their gender. Almost one-third of students surveyed missed at least one day of school in the previous month because they felt unsafe or uncomfortable.[25]

The GLSEN survey provides ample evidence of why schools should implement specific protections against sexual orientation and gender identity discrimination and harassment. For example, 85 percent of students surveyed had been harassed at school based on their sexual orientation or gender expression. [26] Yet, the majority of those students (57.6 percent) did not report these incidents to school staff.[27] The most common reasons for non-reporting were doubts that effective intervention would occur (67.2 percent), and fears that reporting would make the situation worse (64.3 percent).[28] When asked to describe how staff responded to reports of victimization, LGBTQ students most commonly said that staff did nothing or told the student to ignore it (63.5 percent).[29] Such outcomes should be unacceptable to school administrators.

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When schools do not address these situations, students suffer the consequences. Students who experienced high levels of anti-LBGTQ victimization at school had lower GPAs than other students, were more than three times as likely to have missed school in the past month because of safety concerns, had lower levels of self-esteem and higher levels of depression.[30]

Adopting amended Policy 060 to protect students from anti-LGBTQ discrimination and harassment would be a step in the right direction. Students in schools with non-discrimination policies that specifically included sexual orientation and gender identity reported the lowest levels of anti-LGBTQ victimization, compared to students in schools with a generic non-discrimination policy or no policy at all.[31] They were more likely to report that staff intervened when hearing anti-LGBTQ remarks; experienced less anti-LGBTQ victimization; and were more likely to report anti-LGBTQ discrimination or harassment to school staff and rate staff response to such incidents as effective.[32]

Inclusive Policies Help Transgender Students Thrive

By amending its non-discrimination policy to specifically prohibit discrimination against students on the basis of gender identity, the Prince William County School Board would not only clarify its intent to comply with federal law, it would also confirm its commitment to protecting transgender students' health and well-being by acting in accordance with widely accepted standards of medical care for transgender people.

[25] Joseph G. Kosciw, Ph.D., et. al., GLSEN, The 2015 National School Climate Survey, at 12-13 (2016), available at http://tinyurl.com/z5fjcke
[26] *Id.* at 17-18
[27] *Id.* at 28.
[28] *Id.* at 29.
[29] *Id.* at 31-32.
[30] GLSEN at 45, 48.
[31] *Id.* at 73.
[32] *Id.* at 75-77.

Requiring transgender students to use the restrooms that correspond with the sex they were assigned at birth, instead of the gender they live every day, or requiring them to use separate single-user restrooms, is profoundly harmful. Excluding transgender boys and girls from the same restrooms used by other boys and girls sends a message to transgender students and their peers that transgender students should be treated differently and that their mere presence in the same facilities used by their peers is unacceptable. When transgender students are required to use separate facilities, it does not go unnoticed by other students. Being separated from other students in this way would be damaging to anyone, but it is especially harmful for transgender children. Transgender children are at heightened risk of stress and victimization by other children and adults, and those stressors can lead to problems in adulthood including post-traumatic stress disorder, depression, anxiety, and suicidality.[33]

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In addition, requiring transgender students to use single-user restrooms can cause a host of problems because those facilities may be far from classrooms, causing students to be late for class after using the restroom. Students thus 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. This impairs their ability to learn, grow, and thrive in the school environment. Moreover, research shows that denying transgender people access to restrooms that correspond to the gender they live every day has a serious impact on their education, employment, health, and participation in public life.[34]

In contrast, accepting a student's gender identity – including allowing them access to gender-appropriate restrooms – can promote a positive educational experience.[35] School administrators collectively responsible for more than 1.2 million students in districts with transgender-inclusive restroom and locker room policies – some of which have been in place for over a decade – have had overwhelmingly positive experiences. Far from being disruptive or potentially unsafe, administrators have found that transgender-inclusive policies eliminated the disruption that resulted from singling out and stigmatizing transgender students, and avoided disrupting the normal social interactions involved in the use of communal bathrooms and other gendered spaces and activities. A copy of a brief detailing these administrators' experiences is enclosed for your reference.

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[33] *See, e.g.*, 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), available at http://www.jahonline.org/pb/assets/raw/Health%20Advance/journals/jah/feature.pdf.

[34] 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), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf.

[35] *See* Amici Curiae Brief of School Administrators from California, District of Columbia, Florida, Illinois, Kentucky, Massachusetts, Minnesota, New York, Oregon, Washington, and Wisconsin in Support of Plaintiff-Appellant, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015), available at https://www.aclu.org/legal-document/gg-v-gloucester-county-school-board-amicus-brief-school-administrators.

Conclusion

We hope this letter has given you a firm understanding of why Prince William County School Board should – and must – protect its students and employees from sexual orientation and gender identity discrimination – including allowing transgender students to use school restrooms and other sex-segregated facilities that correspond to their gender identity. We strongly encourage the board to adopt the amended Policy 060. The proposed amendment is permissible under Virginia law and consistent with the Board's obligations under federal law.

Please do not hesitate to contact the ACLU of Virginia if you have any questions about this issue or if we can be of any assistance to you in evaluating and formulating school policy. We can be reached at (804) 644-8080.

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Sincerely,

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Enclosures.