



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

West Virginia

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December 17, 2018

Dr. Mark A. Manchin, Superintendent
Harrison County Schools
P.O. Box 1370
Clarksburg, WV 26301-1370
Email: mmanchin@k12.wv.us
via first-class mail and email

Dear Dr. Manchin,

The American Civil Liberties of West Virginia (ACLU-WV) is writing on behalf of our client, Michael Critchfield, and his parents, Caroline and Jon Critchfield. It has come to our attention that Michael, a 15-year-old transgender boy, was subjected to harassment and bullying by Assistant Principal Lee Livengood on Tuesday, November 27, 2018. Mr. Livengood's egregious and unacceptable behavior is in violation of the U.S. Constitution, federal civil rights statutes, West Virginia state law, the West Virginia Constitution, and the Harrison County School District's own stated policies.

Michael and his parents seek to resolve this matter in a manner that will ensure a safe school environment for Michael and other students and provide a much-needed opportunity for learning among Harrison County administration, teachers, and staff.

To that end, we request a meeting with the Superintendent or other appropriate decision-making authority **on or before January 8, 2019**. Please contact us **on or before December 21, 2018** to schedule this meeting. Do not contact our client or his family directly about this matter.

I. Background

A. The November 27, 2018 Incident

Our understanding of the facts is as follows:

After the conclusion of the school day on Tuesday, November 27, 2018, Michael needed to use the restroom prior to a scheduled trip with the band to Morgantown. Michael, in accordance with his gender, uses the boys' restroom.

That afternoon, after classes had concluded, Michael went in to the boys' restroom near the cafeteria. He saw no one else in the restroom, and went into a stall. Shortly after, while Michael was still using the facilities in the stall, Mr. Livengood came into the restroom and began questioning Michael as to why he was using the restroom. Michael told Mr. Livengood that he was a boy and that is why he was using the boys' room. Michael told Mr. Livengood that the restroom was empty when he came in.

Although Mr. Livengood could confirm no one was in restroom, and although there was no reason for Michael to have to check that no one was in there, he asked Michael how he could have known that the restroom was empty before he went in. Shockingly, Mr. Livengood then challenged Michael to “come out here and use the urinal” if he was really a boy. Michael, stressed by the situation, told Mr. Livengood that he was assigned as a female at birth, but that he identifies as male.

When Michael left the stall, he found Mr. Livengood blocking the doorway to the exit of the restroom. There was no way for Michael to exit without a physical confrontation with Mr. Livengood.

Mr. Livengood continued to berate Michael, his voice rising, asking Michael what would happen if another boy thought Michael was checking him out. Michael’s classmates later told him that they could hear Mr. Livengood yelling from outside the restroom in the hallway and cafeteria.

After this humiliating and terrifying encounter, Mr. Livengood finally allowed Michael to leave the restroom and an adult parent of another member of the band, who had been told that something was happening by Michael’s classmates, was waiting outside the door to the restroom. Understandably stressed and angry, Michael began crying uncontrollably.

During the entire exchange between Mr. Livengood and Michael, Mr. Livengood refused to use the correct pronouns for Michael and continued to misgender him in the presence of another adult. The adult corrected Mr. Livengood and thankfully advocated for Michael during this traumatic incident.

Before Michael left to return to the band room with the adult, Mr. Livengood, an adult who is supposed to be responsible for the safety and well-being of children, looked at Michael and said, “I’m not going to lie. You freak me out.”

That evening, Michael and adults aware of the situation informed his mother, Caroline, about what happened.

Caroline and Jon Critchfield spoke with members of the administration at Liberty High School as well as an assistant superintendent within 24 hours following the event. Despite being assured that an investigation would take place, Mr. Livengood has continued to be at the school daily and no one has contacted the Critchfields in the weeks following the incident to take Michael’s statement or to give them an update.

In the days and weeks following the incident, Michael has suffered from severe anxiety.

B. Michael’s Experience at Liberty High School From 2017 to Present

Michael is a sophomore at Liberty High School. Prior to his freshman year, he and his parents met with members of the administration of the school so that the school would be informed that Michael was a transgender boy, that he expected to be referred to by the name Michael, that his pronouns were he, his, and him, and that he planned to use the boys’ restroom.

At that time, he was told he could not use the boys’ restroom and that he was expected to use the girls’ restroom. At the direction of his therapist, Michael distributed to his teachers a letter explaining why it is important that he be treated in accordance with the gender with which he identifies.

Despite the Critchfields’ efforts, many of Michael’s teachers have continued to use the incorrect pronouns and some refuse to refer to him as Michael. Some employees in the administration’s office also refuse to refer to him as Michael, and despite reminders from Michael’s parents, continue to call him by his birth

name over the intercom when announcements are made, causing Michael stress, embarrassment, and anxiety. Although Michael’s parents have done everything they can to advocate for Michael, Liberty High School has not been a safe and welcoming environment for him.

II. Applicable Law, Policies, and Regulations

A. West Virginia Anti-Bullying Statute

Article 2C of Chapter 18 of the West Virginia Code outlines statutory prohibitions on “harassment, intimidation, or bullying.” *See* W. Va. Code § 18-2C-1, *et. seq.*¹ The statutory scheme defines prohibited behavior to include, among other things, actions that “a reasonable person” would understand to create “an intimidating, threatening or emotionally abusive educational environment for a student.” W. Va. Code § 18-2C-2. The statutory scheme provides that each county board in West Virginia establish policies prohibiting harassment, intimidation, and bullying in accordance with the statutes. W. Va. Code § 18-2C-3. Those policies are required to appear in any student handbook. *Id.*

The legislation further encourages, although does not require, schools and county boards to form “bullying prevention task forces, programs and other initiatives involving school staff, students, teachers, administrators, volunteers, parents, law enforcement and community members.” W. Va. Code § 18-2C-5.

B. Harrison County School Policies and Regulations

The policies and procedures required by West Virginia law are set out in a handbook distributed to Harrison County students at the beginning of the school year. Policy 4103—the Manual for Expected Behavior in Safe and Supportive Schools—outlines what protections can be expected by students when faced with bullying or harassment. *See* Harrison County Schools, CALENDAR AND POLICY GUIDE 1, 53, <http://www.harcoboe.net/storage/file/39/3B1AC0F7CA/2018-2019-policy-guide.pdf> (last visited Dec. 13, 2018).

The policy provides that “[Harrison County Schools] believe[s] that all students and employees are entitled to a safe, secure, positive, productive, nurturing, equitable, and harassment-free educational environment, to assure the prompt and efficient response to such incidents, and to deter future incidents from occurring.” *Id.* at 64.

Pursuant to the policies outlined in the student handbook, instances of harassment, bullying, or intimidation fall under what the guide refers to as Level 3 conduct—actions that are considered “imminently dangerous, illegal and/or aggressive.” *Id.* at 80.

The policy’s definition of conduct constituting harassment, bullying, or intimidation includes “[a]cts of harassment, intimidation or bullying that are reasonably perceived as being motivated by any actual or perceived differentiating characteristic.” *Id.* at 85. Protected “characteristics” include, but are not limited to: race; color; religion; ancestry; national origin; **gender**; socioeconomic status; academic status; **gender identity or expression**; physical appearance; sexual orientation; and any mental/physical/developmental sensory disability. *Id.* at 85-86.

¹ “The Legislature finds that a safe and civil environment in school is necessary for students to learn and achieve high academic standards . . . [t]he Legislature further finds that students learn by example. The Legislature charges school administrators, faculty, staff and volunteers with demonstrating appropriate behavior, treating others with civility and respect, and refusing to tolerate harassment, intimidation, or bullying.”

The policy further specifically defines “sexual harassment” as conduct that may include, but not be limited to, “behavior, verbal or written words or symbols directed at an individual because of gender” and “the use of authority to emphasize the equality of a student in a manner that prevents or impairs that student’s full enjoyment of educational benefits, climate/culture or opportunities.” *Id.* at 86.

In instances involving bullying, intimidation, or harassment, it is required that any students or employees involved complete a document called an H-1 form. Michael and his parents do not recall being asked to fill out any such form.

C. The Equal Protection Clause of the West Virginia Constitution

Section three of Article three of the West Virginia Constitution provides:

Government is instituted for the common benefit, protection and security of the people, nation or community. Of all its various forms that is the best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government shall be found inadequate or contrary to these purposes, a majority of the community has an inalienable, and infeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal.

The West Virginia “common benefit, protection and security” provision is an equal protection clause. *United Mine Workers of Am. Int’l Union v. Parsons*, 172 W. Va. 386, 398 (1983). The equal protection clause of the West Virginia Constitution serves the goal of fundamental fairness. *Women’s Health Ctr. v. Panepinto*, 191 W. Va. 436, 444 (1993). When the state government—in this case a public school system—seeks to “act for the common benefit, protection and security of the people . . . it has an obligation to do **so in a neutral manner** so as not to infringe upon the constitutional rights of our citizens.” *Id.* at 445 (emphasis added). Under the equal protection clause of the West Virginia Constitution, Michael is entitled to be treated with the same consideration and respect as his fellow students—which includes allowing him to use the appropriate restroom. He is further entitled to the same safe environment as his classmates, including the security of being free from harassment by administrators when using the restroom.

D. The Equal Protection Clause of the United States Constitution and Title IX

Excluding transgender students from using the same restrooms as other students deprives them of equal access to educational opportunity “on the basis of sex,” in violation of Title IX of the Education Amendments of 1972 (“Title IX”), 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); *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 746-47 (E.D. Va. 2018); *M.A.B. v. Bd. of Educ. of Talbot County*, 286 F. Supp. 3d 704, 715 (D. Md. 2018). As the Eastern District of Virginia recently explained, “allegations of gender stereotyping are cognizable Title VII sex discrimination claims and, by extension, cognizable Title IX sex discrimination claims” and “claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory.” *Grimm*, 302 F. Supp. 3d at 746-47 (quoting *M.A.B.*, 286 F. Supp. 3d at 715. Moreover, “excluding transgender individuals from using restrooms consistent with their gender identity is harmful to their health and wellbeing.” *Id.* at 735 n.1 (internal quotations omitted).

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. *Whitaker*, 858 F.3d at 1050-53; *Evancho*

v. Pine Richland Sch. Dist., 237 F.Supp.3d 267, 289-90 (W.D. Pa. 2017). 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.² 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.

Finally, persistent and intentional misgendering can also amount to sex-based harassment or violations of students' privacy. Courts have recognized that deliberately refusing to address transgender individuals by the name and pronouns consistent with their gender identity can be a form of sex-based harassment under state and federal antidiscrimination law.³ Misgendering can also out students as transgender to others, and may violate federal privacy laws. Students have the right to share or withhold information about their sexual orientation and gender identity under the federal Constitution and the Family Educational Rights and Privacy Act (FERPA).⁴ As the National Association of Secondary School Principals advises, "transgender status, legal name or sex assigned at birth is confidential medical information and considered 'personally identifiable information' under FERPA. Disclosure of that information to other school staff or parents could violate the school's obligations under FERPA or constitutional privacy protections."⁵

III. Moving Forward to a Resolution

Michael, like all students, is entitled to a safe, positive, and harassment-free learning environment. The West Virginia legislature has codified protections against bullying and harassment in schools and the Harrison County School system itself has explicitly prohibited harassing conduct and behavior based on gender or gender identity. Further, the Equal Protection Clause of the United States Constitution and Title IX demand that administrators and teachers respect Michael and other students like him by addressing students by their name and appropriate pronouns.

² *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.

³ *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).

⁴ *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).

⁵ National Association of Secondary School Principals, *Position Statement on Transgender Students* (2016).

Parents and guardians entrust teachers and administrators to protect students against harassment; it is unconscionable when it is an administrator himself who inflicts the abuse. To prevent other students from encountering the issues that Michael has had to deal with, Michael and his parents propose the following to resolve this matter:

- (1) The promulgation and implementation of best practice policies in Harrison County schools for working with and handling appropriately unique issues faced by LGBTQ+ students;
- (2) Annual required training for administrators, teachers, and staff at Harrison County schools regarding how to appropriately handle LGBTQ+-specific issues; and
- (3) Appropriate remedial discipline of Mr. Livengood commensurate with his harassing and abusive conduct toward Michael.

Please contact me with any questions. I look forward to hearing from you by Friday, December 21.

Sincerely,



Loree Stark
Legal Director
ACLU-WV*

*Licensed in Kentucky and eligible for admission in West Virginia courts *pro hac vice*