

September 8, 2022

USD 231 Gardner Edgerton District
School Board

Via email: [reddint@usd231.com](mailto:red dint@usd231.com), sutton1@usd231.com,
chapmang@usd231.com, ellisr@usd231.com, millerjef@usd231.com,
williamska@usd231.com, robinnsonn@usd231.com

USD 231 Superintendent Dr. Brian Huff
Via email: huffb@usd231.com

Re: USD 231 Proposed Name, Pronoun, and Facilities Policy

Superintendent Huff and Members of the USD 231 School Board:

We write concerning a proposed policy for USD 231 that, if adopted and enforced, would violate the rights of transgender students and USD 231 employees, placing them at risk in your schools. We understand that the Board will vote on this proposed policy at the upcoming USD 231 School Board meeting on September 12, 2022. We strongly urge the Board to reject this proposed policy, as adherence to the directives contained therein would result in numerous violations of federal law and irreversible harm to the transgender students and staff in your district.

Background

Over the last several weeks, USD 231 has held two meetings during which district officials discussed a proposed policy¹ (“the policy”) that addresses how faculty, staff, and students in USD 231 schools must treat transgender and nonbinary individuals in a variety of contexts. For example, the policy requires students and staff to use the gendered pronouns (he/him or she/her) associated with their sex assigned at birth. The policy also states that male restrooms and changing areas are “for the exclusive use of the male sex,” and female restrooms and changing areas are “for the exclusive use of the female sex,” while defining “sex” as what is identified on a person’s “original birth certificate.” Further, the policy provides that any violation of the policy’s terms will result in disciplinary action, and invites parents and guardians to sue the district for noncompliance with the policy’s provisions.

¹ General Statement of Policy, Gardner Edgerton School District 231,
[https://go.boarddocs.com/ks/usd231/Board.nsf/files/CGPMEU5AF06E/\\$file/General%20Statement%20of%20Policy%20-%20Amended%20Agenda%2011.14%20on%207-25-22.pdf](https://go.boarddocs.com/ks/usd231/Board.nsf/files/CGPMEU5AF06E/$file/General%20Statement%20of%20Policy%20-%20Amended%20Agenda%2011.14%20on%207-25-22.pdf)



Kansas

PO Box 917
Mission, KS 66201
(913) 490-4100
aclukansas.org

Susan Estes
President

Micah W. Kubic
Executive Director

Brad Stuewe, M.D.
Treasurer

Leslie Bissell
Secretary

James Bell
Amii Castle
Robert Eye
Brandi Fisher
Liz Hueben
Mark Johnson
Lon Lewis
Raymond Rico
Joy Springfield
Annie Tietze
Marie Woodbury
Board of Directors



Legal Implications of the Policy

The proposed policy, and the district's enforcement of it, is inconsistent with federal law regarding the rights of transgender students in schools. It will also subject the district to liability for violations of federal employment law.

The ACLU of Kansas has repeatedly instructed school officials across the state that failure to respect a trans student's identity runs afoul of the student's statutory and constitutional rights.² Consistent with state and federal law, USD 231 employees can and should refer to trans students by the name and pronouns of their choice, without regard for the name or pronouns listed on the students' legal documents. Denying students the right to use the name and pronouns that affirm their gender identity could violate Title IX of the Educational Amendments of 1972 and the Equal Protection Clause of the United States Constitution.³ This is especially true for the policy before the Board next week. The proposed policy does not account for legal gender marker changes to students' birth certificates, nor does it allow for affirming parents or legal guardians to advocate for name or pronoun changes on behalf of their child.

The policy's restroom and facility provisions raise similar legal concerns. There are *no* Kansas or federal statutes that require schools to force students to use restrooms or locker rooms that correspond with their sex assigned at birth. And it is settled law that a policy requiring students to use facilities corresponding with their sex assigned at birth violates Title IX and the Equal Protection Clause of the United States Constitution.⁴ We are not aware of any court cases in Kansas finding a school or its employees liable for damages for allowing transgender students to use the bathroom or locker room that corresponds with their gender identity as opposed to their sex assigned at birth. Courts have routinely rejected arguments that allowing transgender students to use facilities corresponding with their gender identity violates the privacy rights of cisgender students.⁵ While the proposed policy provides a

² Also available at ACLU Kansas – Know Your Rights,

<https://www.aclukansas.org/en/know-your-rights/rights-transgender-students>.

³ See *Grimm v. Gloucester County School Board*, 972 F. 3d 586 (4th Cir. 2020), cert. denied 141 S. Ct. 2878 (holding school board's refusal to amend transgender student's records to reflect his male gender, consistent with his amended birth certificate, violated Equal Protection Clause and unlawfully discriminated against transgender male student in violation of Title IX)

⁴ See *Grimm*, 972 F.3d at 593.

⁵ See, e.g., *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018) (holding board policy honoring rights of transgender students to use restrooms corresponding with their gender identity did not violate Title IX); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075 (D. Or. 2018) (holding board policy honoring rights of transgender students to use restrooms corresponding with their gender identity did not violate Title IX, Due Process Clause of 14th Amendment to U.S. Constitution, or Oregon law).



single-occupancy restroom or changing room accommodation, this accommodation still harms and stigmatized trans students by sending the message that they should be treated differently and that their presence in the same facilities used by their peers is unacceptable.

The U.S. Department of Education also proposed new Title IX regulations in June 2022, clarifying that discrimination on the basis of sex includes discrimination on the basis of “sex stereotypes, sex characteristics, . . . sexual orientation, and gender identity.”⁶ Once finalized, these new regulations will provide further authority that trans students’ rights are protected under federal antidiscrimination law—and policies like the one proposed in your district infringe on those rights.

In addition to potentially violating federal antidiscrimination law and your students’ constitutional equal protection rights, the proposed policy could also violate federal privacy law and your students’ constitutional privacy rights. Students are entitled to share or withhold information about their sexual orientation and gender identity under the federal Constitution⁷ and the Family Education Rights and Privacy Act (“FERPA”).⁸ And the National Association of Secondary School Principals advises that “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. . . could violate the school’s obligations under FERPA or constitutional privacy protections.”⁹ Not only would the proposed policy stop any trans students who have not yet changed their name or pronouns at school from doing so—it would also forcibly out

⁶ Federal Register Notice of Proposed Rulemaking – Title IX of the Education Amendments of 1972, <https://www.govinfo.gov/content/pkg/FR-2022-07-12/pdf/2022-13734.pdf>

⁷ See *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015) (state’s unduly burdensome policy for changing sex on driver’s license or ID violated the Constitution’s Due Process and Equal Protection clauses); *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000) (holding officer’s threat to disclose arrestee’s perceived sexual orientation violated their constitutional right to privacy); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) (“Publicly revealing information [about sexuality] exposes an aspect of our lives that we regard as highly personal and private.”); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (“the Constitution does indeed protect the right to maintain the confidentiality of one’s transsexualism”); *Eastwood v. Dep’t of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) (right to privacy “is implicated when an individual is forced to disclose information regarding sexual matters.”).

⁸ 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).

⁹ NASSP, *Position Statement on Transgender Students* (2016), <https://www.nassp.org/who-we-are/board-of-directors/position-statements/transgender-students?SSO=true>



trans students who have already changed their name or pronouns at school, in violation of their federal privacy rights.

The proposed policy may also open the district up to liability for employment law violations, in that the policy applies with equal force to both students and staff. Courts have found that deliberately refusing to address a transgender person by the name and pronouns consistent with their gender identity can be a form of sex-based harassment under state and federal antidiscrimination law.¹⁰ And deliberately deadnaming a transgender USD 231 employee may constitute sexual harassment under Title VII and under the Kansas Act Against Discrimination (“KAAD”), given the United States Supreme Court’s holding in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020) (holding that Title VII’s prohibition on discrimination on the basis of sex, which encompasses sexual harassment, also prohibits discrimination on the basis of sexual orientation and gender identity).¹¹

Implications for the Health and Safety of USD 231 Students

The proposed policy not only raises legal concerns—it also creates a detrimental and unwelcoming environment for the district’s trans students that could create lasting harm. The ability of trans students to live as their true selves is critical to their health and well-being.¹² Schools are intended to be safe spaces for youth where they are supported and uplifted in their academic journeys. A policy that requires staff and fellow students to deadname and misgender transgender students—or face disciplinary action—will create a hostile, threatening atmosphere for transgender students and staff alike. For these reasons, the American Psychological Association, the

¹⁰ See, e.g., *Doe v. City of New York*, 976 N.Y.S.2d 360 (N.Y. Sup. Ct. 2013) (holding that a 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).

¹¹ See also Kansas Human Rights Commission – Guidance on Sex Discrimination in Employment, Public Accommodations, and Housing, www.khrc.net/pdf/KHRC%20Guidance%20on%20Sex%20Discrimination%20in%20Employment,%20Public%20Accommodations,%20and%20Housing%20on%20letterhead%20rev%20dwh.pdf (stating that the KHRC interprets KAAD to prohibit sex discrimination, which encompasses discrimination based on sexual orientation or gender identity, in accordance with *Bostock*).

¹² See, e.g., 2022 National Survey on LGBTQ Mental Health, The Trevor Project, https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf.



National Association of School Psychologists, and the National Association of Secondary School Principals all advise schools to maintain records that reflect transgender students' gender identity, regardless of medical or legal transition.¹³ This is likely because trans youth in schools with inclusive policies report lower suicide, greater school safety, and higher grades.¹⁴ Conversely, when anti-transgender policies—like the proposed policy at issue—are introduced, debated, and passed, trans youth report experiencing negative mental health effects and increased suicide attempts.¹⁵

Indeed, we have spoken with at least one family that reported deep concerns regarding the effect that this policy would have on their children in USD 231, and their family as a whole. This family relayed concerns that if their child is not allowed to live as their authentic self at school, they are afraid it will have a deeply detrimental effect on their child's mental health and ability to be successful academically.

The very fact that USD 231 leaderships proposed this policy, and proceeded through debate at two separate board meetings, has already had negative effects on the transgender students that attend USD 231. These students should be excited about the new school year, but instead they are stressed and scared that their school does not accept who they are as people.

But this Board has the power to show the district's trans youth and staff that they are welcome, accepted, and respected, by rejecting the proposed policy on September 12. We therefore urge the Board to reject the proposed policy governing names, pronouns, and restroom/facility usage for the district.

Instead, the district should issue clear guidance that teachers and staff must honor students' requests regarding name and pronoun usage, and adopt a policy allowing transgender students to use the restroom and locker room that corresponds with their gender identity.¹⁶ This is vital to ensuring that USD

¹³ 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>.

¹⁴ Transgender Athletes: A Research-Informed Fact Sheet, KU School of Social Welfare, <https://socwel.ku.edu/sites/socwel/files/documents/Transgender-Sports-Youth-Fact-Sheet.pdf>.

¹⁵ *Id.*

¹⁶ See, e.g., Full text of USD 383's guidelines for transgender students, *The Mercury*, https://themercury.com/news/local/full-text-of-usd-383guidelines-for-transgender-students/article_bbe29c7c-0ca7-5f4b-8588-93720cdf2a15.html; Model Local Education Agency Policy on Transgender and Nonbinary Students, GLSEN,



231 is respecting the constitutional and statutory rights of its students. It will also help the district avoid any further harm to the mental health and safety of its trans students and staff, and work to create a more welcoming environment for all LGBTQ+ students and staff in the district.

We also urge USD 231 to adopt a comprehensive LGBTQ+ inclusive policy that will ensure policies like this, or other directives that could harm LGBTQ+ students, are not promulgated in the future. Transgender students must be provided with inclusive, supportive learning environments where they can thrive and be free from fear and discrimination. USD 231 should take all steps necessary to make this a reality.

Thank you for your prompt attention to this matter. Should you wish to discuss this or any other related issues, please do not hesitate to contact me at dhiegert@aclukansas.org.

Kind regards,

D.C. Hiegert
Skadden Legal Fellow
ACLU of Kansas

Sharon Brett
Legal Director
ACLU of Kansas

Aileen Berquist
Policy Director
ACLU of Kansas