



June 28, 2023

**Re: *SB 180 and Kansas School Districts' Continued Obligations to Protect LGBTQ+ Students and Employees in Kansas Schools***

Dear Principal, Superintendent, or School Board Members:

On behalf of the ACLU of Kansas and the Kansas chapter of the National Education Association, we write to you because your school or school district may soon be receiving policy recommendations regarding implementation of SB 180, a bill passed by the Kansas Legislature that is scheduled to take effect on July 1, 2023.

In anticipation of these recommendations and any potential discussion in your school or district regarding SB 180, we felt it prudent to send this advisory letter clarifying that SB 180 does not affirmatively require districts to change current policies, nor does it relieve Kansas school districts of their obligations under the U.S. Constitution and federal statute to protect LGBTQ+ students and employees.

## **I. Background**

During the 2023 Kansas legislative session, the legislature passed SB 180 over Governor Kelly's veto. SB 180 is a definition-based bill that provides "a meaning of biological sex for purposes of statutory construction."<sup>1</sup> This bill does not have any enforcement mechanisms and does not provide for any penalties, civil or otherwise, for agencies, businesses, school districts, or other entities that decline to change their policies to adopt the definitions contained in SB 180.<sup>2</sup>

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<sup>1</sup> See SB 180, 2023 Kan. Sess. Laws ch.84, <https://www.sos.ks.gov/publications/sessionlaws/2023/Chapter-84-SB-180.html>.

<sup>2</sup> Please note that this letter does not provide policy recommendations regarding a district's implementation of SB 180's subsection (c) regarding collection of vital statistics information. Rather, this letter seeks to clarify that SB 180 itself does not require a district to adopt policies that exclude or single out transgender students or employees for different treatment, and that adopting such policies would violate your district's legal obligations owed to LGBTQ+ students and employees.





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Of note, nothing in the language of SB 180 requires school districts to adopt policies that would exclude or harm transgender students or employees. For example, SB 180 does not require districts to adopt policies that force trans students to use the restroom that aligns with their gender assigned at birth. Further, SB 180 does not bar districts from adopting LGBTQ+ affirming policies. For example, a district may still adopt a policy that allows trans students to use the restroom that aligns with their gender identity or other LGBTQ+ affirming policies—as recommended by dozens of national physical and mental health organizations, including the Centers for Disease Control and Prevention.<sup>3</sup>

However, Kansas school districts may receive policy recommendations from outside entities or organizations that encourage them to adopt facility policies that discriminate against transgender students or employees, or individual districts or buildings may be considering taking such action on their own. These recommendations may sow confusion regarding school districts’ obligations under SB 180, and/or how to comply with nondiscrimination protections consistent in federal law.

The remainder of this advisory letter describes Kansas school districts continued legal obligations to their LGBTQ+ students and employees and discusses policy outcomes and best practices for creating safe and inclusive environments for all Kansas students.

## II. Legal Obligations to LGBTQ+ Students

The U.S. Constitution and Title IX of the Education Amendments of 1972 both place a legal duty on every Kansas school district to protect its students, including LGBTQ+ students, from bullying and harassment.<sup>4</sup> In addition to this affirmative legal duty, school districts also must protect students’ privacy rights and cannot adopt policies that discriminate against or single out transgender or LGBQ+ students.

The Supreme Court has long recognized that the federal constitutional right to privacy not only protects an individual’s right to bodily autonomy, but

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<sup>3</sup> See *e.g.*, Adolescent and School Health: Inclusive Practices, Centers for Disease Control and Prevention, <https://www.cdc.gov/healthyyouth/safe-supportive-environments/LGBTQ-policies-practices.htm>.

<sup>4</sup> See, *e.g.*, *Doe v. Hutchinson*, 728 Fed. Appx. 829, 832 (10th Cir. 2018); *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996).



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also the right to control the nature and extent of highly personal information released about that individual.<sup>5</sup> This right to informational privacy extends to students in a school setting—meaning that it is against the law for school officials to disclose, or to compel students to disclose, information about their sexual orientation or gender identity.<sup>6</sup> The Family Educational Rights and Privacy Act (“FERPA”) also protects students against the disclosure of personally identifiable information.<sup>7</sup> The National Association of Secondary School Principals (“NASPP”) has recognized that students’ “transgender status, legal name or sex assigned at birth is confidential medical information and considered ‘personally identifiable information’ under” FERPA and cautions that “[d]isclosure of that information to other school staff or parents could violate the school’s obligations under FERPA or constitutional privacy protections.”<sup>8</sup>

School districts also have constitutional and statutory obligations to treat LGBTQ+ students equally and avoid discriminating against LGBTQ+ students because of their sex. These obligations bar districts from categorically banning trans students from accessing multi-user facilities that align with their gender identity—as courts across the country have overwhelmingly found that public schools with such facilities bans are violating the Equal Protection Clause of the Fourteenth Amendment and Title IX.<sup>9</sup>

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<sup>5</sup> *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

<sup>6</sup> See e.g., *C.N. v. Wolf*, 410 F. Supp. 2d 894, 903 (C.D. Cal. 2005) (“[T]he fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of that information to others.”).

<sup>7</sup> See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. §§ 99.00, et seq.

<sup>8</sup> NASPP, Position Statement on Transgender Students (2016), <https://www.nassp.org/policy-advocacy-center/nassp-position-statements/transgender-students/>.

<sup>9</sup> 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, 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



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And forcing trans students to use separate restrooms from their peers, even when those restrooms are single-user facilities, is no solution. Federal appeals court decisions in this area recognize the deeply harmful effects of forcing trans students to use such separate facilities—with one court finding that 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 cause ostracization and expose these students to bullying and harassment.<sup>10</sup>

**The federal government has made clear that public school districts violate the U.S. 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 schools may be putting their federal funding at risk if they discriminate against transgender students and has already opened investigations into school districts that violate Title IX in this way.<sup>11</sup> The U.S. Department of Education also proposed new Title IX regulations which clarify discrimination on the basis of sex includes discrimination on the basis of “sex stereotypes, sex characteristics, ...sexual orientation, and gender identity.”<sup>12</sup> This final rule is anticipated to be released in October 2023, and once finalized, will provide further authority that trans students’ rights are protected under federal antidiscrimination law.

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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).

<sup>10</sup> *Doe*, 897 F.3d at 530.

<sup>11</sup> 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>.

<sup>12</sup> 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>.



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Additionally, courts have routinely rejected arguments that allowing transgender students to use facilities corresponding with their gender identity violates the privacy rights of cisgender students.<sup>13</sup> And 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 gender assigned at birth. In fact, across the country and here in Kansas, thousands of transgender students have been using multi-user restrooms that align with their gender identity without any issues.<sup>14</sup>

### III. Legal Obligations to LGBTQ+ Employees

The U.S. Constitution and federal law also place a duty on Kansas school districts to protect LGBTQ+ employees from discrimination and unequal treatment. **Title VII of the Civil Rights Act of 1964 protects employees in Kansas schools from discrimination on the basis of sex, which the Supreme Court said also encompasses discrimination on the basis of sexual orientation or gender identity.**<sup>15</sup> Additionally, Kansas public schools cannot harass employees based on their LGBTQ+ status or allow others to create a hostile work environment for LGBTQ+ employees.

Courts and agencies tasked with interpreting Title VII have found that LGBTQ+ employees' Title VII protections extend to protect their privacy rights and ability to access facilities that align with their gender identity at work. For example, an employer's disclosure of an employee's private

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<sup>13</sup> 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).

<sup>14</sup> 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](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).

<sup>15</sup> *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)



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information related to their sex or gender has been found to violate Title VII's protections.<sup>16</sup> Additionally, an employer's policy forcing trans employees to either use a single-user restroom or a multi-user restroom based off their gender assigned at birth has been found to violate Title VII.<sup>17</sup> Thus, Kansas school districts have a duty under Title VII to ensure LGBTQ+ employees privacy rights are respected and to provide LGBTQ+ employees equal access to district facilities.

#### **IV. Policy Outcomes and Best Practices for LGBTQ+ Students and Employees**

Not only do school districts have constitutional and statutory obligations to protect their LGBTQ+ students and employees from discrimination, but research shows that districts that adopt LGBTQ+-inclusive and affirming policies create safer, healthier environments for LGBTQ+ students and employees.<sup>18</sup> These inclusive and affirming policies are critical, as research also shows that LGBTQ+ youth and adults experience disproportionately higher levels of depression, anxiety, substance abuse, and suicidal ideation as compared to their cisgender heterosexual counterparts.<sup>19</sup>

We know that when schools adopt exclusionary policies or policies that target trans students or employees for different treatment, it can lead to increased bullying and harassment of LGBTQ+ students, cause students to feel more stressed and scared while at school, and even lead to increased suicide attempts.<sup>20</sup> However, when schools adopt inclusive and affirming

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<sup>16</sup> 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).

<sup>17</sup> See *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (concluding in an EEOC decision involving a federal employee that Title VII is violated where an employer denies an employee equal access to a common restroom corresponding to the employee's gender identity).

<sup>18</sup> See e.g., Enoch Leung, et. al., Social Support in Schools and Related Outcomes for LGBTQ+ Youth: A Scoping Review. *Discov. Educ.* 2022; 1(1); 18, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9662773/>.

<sup>19</sup> See 2022 National Survey on LGBTQ Youth Mental Health, The Trevor Project, <https://www.thetrevorproject.org/survey-2022/>; Diversity in Health Equity Education: Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning, American Psychiatric Association, <https://www.psychiatry.org/psychiatrists/diversity/education/lgbtq-patients>.

<sup>20</sup> See e.g., New Poll Emphasizes Negative Impacts of Anti-LGBTQ Policies on LGBTQ+ Youth, The Trevor Project, <https://www.thetrevorproject.org/blog/22881/>; Transgender



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policies—such as policies allowing students and employees to use their chosen name and pronouns at school or allowing students and employees to use facilities that align with their gender identity—it leads to a decrease in suicide attempts, an increase in feelings of safety at school, and better grades and health outcomes for LGBTQ+ students.<sup>21</sup>

Kansas school districts that desire to not only comply with their federal legal obligations to LGBTQ+ students and employees, but to create safe and supportive learning environments for all students and employees should consider adopting comprehensive LGBTQ+-inclusive policies that protect students and employees from harm and discrimination.<sup>22</sup>

Thank you for your prompt attention to this letter. Should you wish to discuss this or any other related issues, please do not hesitate to contact us at [dhiegert@aclukansas.org](mailto:dhiegert@aclukansas.org), [sbrett@aclukansas.org](mailto:sbrett@aclukansas.org), or [kimberly.vogelsberg@knea.org](mailto:kimberly.vogelsberg@knea.org).

Kind regards,

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

<sup>21</sup> See e.g., Transgender Athletes: A Research-Informed Fact Sheet, KU School of Social Welfare, <https://socwel.ku.edu/sites/socwel/files/documents/Transgender-Sports-Youth-FactSheet.pdf>.

<sup>22</sup> See e.g., Model Laws & Policies, GLSEN, <https://www.glsen.org/model-laws-and-policies>. GLSEN is a national nonpartisan nonprofit organization that works to ensure that every member of every school community is valued and respected regardless of sexual orientation, gender identity, or gender expression. GLSEN's website includes model policy for a school, a district, or a local education agency outline inclusive policy protections from bullying and harassment.

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