

December 1, 2021

Red Clay School District
1502 Spruce Avenue
Wilmington, DE 19805

RE: Transgender and Gender Diverse Student Policy

Dear School Board Members and Superintendent Green:

The ACLU-DE strongly supports the passage and implementation of Board Policy 8005 (“the policy”), the Transgender and Gender Diverse Student policy for Red Clay schools. The policy mandates Red Clay schools to ensure that transgender and gender diverse students are protected, supported, and fully included. The policy is a solid step forward to support and protect all students in the District.

As outlined, the policy ensures that the District follows federal law and guidance as interpreted by the U.S. Department of Education.

Transgender, gender diverse, and transitioning students have the right to be themselves at school. The First Amendment to the U.S. Constitution gives all public school students the right to free speech and expression. Therefore, students can talk and write affirmatively about who they are, the pronouns corresponding to their gender identity, and their experiences related to gender identity and expression. The policy ensures that all students are protected and affirmed in who they are by keeping students’ transgender status or gender diverse presentation confidential and addressing students by the name and pronoun that corresponds to their gender identity on school documents. Indeed, the right for transgender and gender diverse students to express themselves through clothes, and other ways to express their gender, are protected not only by the U.S. Constitution, but also Title IX of the Education Amendments of 1972, and Delaware’s Gender Identity Nondiscrimination Act.

Students have the right to be included in the group that corresponds to their gender in situations where students are typically separated by gender, including health education classes, physical education classes, and sports teams. Having the opportunity to participate in sports results in positive outcomes for students- better grades, greater homework completion, higher educational and occupational aspirations, and improved self-esteem. Misinformation about gender and biology should not be used to prohibit students from being included in sports that correspond to their gender. Barring transgender students from sports amounts to the same form of sex discrimination prohibited by Title IX.

All students should have access to the restroom and locker room that corresponds to their gender identity. Several courts have held that excluding transgender students from using the same facilities as their same-gendered peers violates Title IX. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-17 (4th Cir. 2020); *see also Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d



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1286, 1305 (11th Cir. 2020), petition for reh 'g en bane pending, No. 18-13592 (11th Cir. Aug. 28, 2020). Further, the mere presence of transgender students in sex-segregated spaces that align with their gender identity does not violate cisgender students' Title IX rights. *See Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518,534 (3dCir. 2018) (restrooms and locker rooms), cert. denied, 139 S. Ct. 2636 (2019); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1228-29 (9thCir. 2020), cert. denied, 141 S. Ct. 894 (2020) (restrooms, locker rooms, and showers). Schools should assess the needs of transgender and gender diverse students on an individual basis and create a plan that works for the student that supports their emotional well-being and protection.

This is a matter of civil rights for all, including students in public schools. Everyone has the right to be themselves at school. The fact is that without policies and practices that affirm and support transgender students- and a failure to implement protections that already exist through state and federal law- students continue to face ostracization, bullying, and discrimination. This puts students at physical and mental harm, limiting their educational outcomes.

We support Red Clay in taking a stand against unfounded fear, transphobia, and all forms of bigotry. Make no mistake-- the rights of transgender students are not up for debate as state and federal law protects the rights included in this policy. However, enacting the policy at the local level would ensure protections are effectively implemented and would remain in place far into the future. Passing the transgender policy will send a clear message that all students have a right to express themselves in ways that honor diversity, value differences, and encourage self-expression.

Sincerely,

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