



**TESTIMONY OF MICHAEL J. NORTON
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Regarding House Bill 15-1081 Concerning the Protection of
Physical Privacy in Sex-Segregated Locker Rooms

February 4, 2015

My name is Michael J. Norton. I am an attorney with Alliance Defending Freedom, an alliance-building, non-profit legal organization that promotes religious liberty and marriage and the family. I have also had the privilege of serving as the United States Attorney for the District of Colorado.

Most of my work with Alliance Defending Freedom is in civil litigation, including advocating for the right of people to freely live out their faith in the area of religious liberties and conscience rights. I am currently involved in a number of lawsuits in federal and state courts concerning the conscience rights of private business owners to be free from being required by the government to violate their sincerely held religious beliefs by providing contraceptives and abortifacients as part of their employee health insurance plan.

I am privileged to testify today on House Bill 15-1081 which permits places of public accommodation to restrict access to a sex-segregated locker room on the basis of an individual's actual, biological sex without being charged with discrimination in violation of these public accommodation provisions.

When Colorado's public accommodations statute was expanded by the General Assembly in 2008, one result has been a draconian burden on religious liberties.

Another perhaps unintended result has been a significantly increased public safety risk primarily to women and to children by prohibiting "sexual orientation

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discrimination,” which includes discrimination based on “transgender status,”¹ in bathrooms, locker-rooms, and other gender- restricted areas in private and public businesses and in places of public accommodation.

In the first place, this requirement has enormous reach. According to the Colorado Department of Regulatory Agencies website,² a place of public accommodation can be a bar; restaurant; financial institution; school or educational institution; health club; theater; hospital; museum or zoo; hotel or motel; public club; retail store; medical clinic; public transportation; nursing home; recreational facility or park; and library.

These places of public accommodation are, because of this 2008 law, required to permit access to locker rooms and rest rooms by members of the opposite sex based on that person’s “transgender status.”

This requirement is dangerous to our children and to adults, particularly women. Indeed, the Colorado Bureau of Investigation’s website relates that “[t]he way sex offenders select victims is often more influenced by opportunity and access than by preference in victim type.”³

Not only do most children and adults not want members of the opposite biological sex to be in a locker room or rest room with them, the parents of these children do not want that either. Parents are concerned about the safety and privacy of their children, and they justifiably expect the General Assembly to protect their children. Likewise, husbands are justifiably concerned about the safety and privacy of their spouses.

No man, woman or child should be forced into an intimate setting – like a bathroom or a locker room – with a person of the opposite sex. No school or other place of public accommodation should impose a policy like this against the will of so many Coloradans.

Parents have the right to protect their children. Adults, both women and men, also need to be protected. We have the right to expect that the members of the General Assembly will listen to the people they are paid to serve. As a husband and a father, I am concerned for my wife, my daughter, my grandchildren and other children and women who might suffer as a result of this current law. I expect you to protect our citizens as well.

¹ “Sexual orientation” is defined as “an individual’s orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual’s perception thereof.” C.R.S. § 24-34-301(7).

² <http://cdn.colorado.gov/cs/Satellite/DORA-DCR/CBON/DORA/1>. Last visited February 2, 2015.

³ <https://www.colorado.gov/apps/cdps/sor/faq.jsf>. Last visited February 2, 2015.

Allowing biological males into the locker rooms used by biological females will likely violate constitutional privacy rights. The United States Court of Appeals for the Tenth Circuit has explained that a person's constitutional right to privacy is violated where a government policy or conduct allows a member of the opposite sex to view him or her while "engag[ing] in personal activities, such as undressing, using toilet facilities, or showering."⁴ The United States Court of Appeals for the Ninth Circuit explained with great clarity that "[w]e cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from . . . strangers of the opposite sex[] is impelled by elementary self-respect and personal dignity."⁵ Thus, enacting HB 15-1081 will allow places of public accommodation to respect the dignity and constitutional privacy interests of their customers and minimize the potential of litigation.

In a public school setting, every student has a right to privacy and safety. And every parent has the right to not only expect, but to know that places of public accommodation, particularly public schools, will keep their children safe in intimate settings. But forcing children to share restrooms, showers, *and locker rooms* with the members of the opposite sex is a radical invasion of privacy for children and young adults who deserve to feel safe in such intimate settings.

It makes common sense to authorize places of public accommodation, including public schools, to craft policies that are respectful of the privacy concerns of children and their parents. As House Bill 15-1081 states in section 2, children and young adults have natural and normal concerns about physical privacy when they are in various states of undress in locker rooms.

Places of public accommodation, including public schools, restaurants, financial institutions, health clubs, theaters, hospitals, museums, the zoo, hotels, nursing homes, and the library, should honor the wishes of most children and their parents and respect the Constitution's protection for privacy rights. To do otherwise exposes a place of public accommodation to lawsuits from students and their parents whose privacy and safety are jeopardized by such misguided policies.

House Bill 15-1081 is a good first step by the General Assembly that will assure single sex access to locker rooms in places of public accommodation where children and young adults in various states of undress require privacy.

⁴ *Cumbey v. Meachum*, 684 F.2d 712, 714 (10th Cir. 1982). *See also Lee v. Downs*, 641 F.2d 1117, 1119-20 (4th Cir. 1981) (noting that men are "entitled to judicial protection of their right of privacy denied by the presence of female[s] . . . in positions to observe the men while undressed or using toilets").

⁵ *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963).

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I have attached a copy of Alliance Defending Freedom's model Student Physical Privacy Act which addresses these problems relating to students on a broader basis. We urge its consideration as well.

Thank you.

Student Physical Privacy Act

Section 1. Name. This provision shall be known and may be cited as the [NAME OF STATE] Student Physical Privacy Act.

Section 2. Findings.

A. Children and young adults have natural and normal concerns about physical privacy when they are in various states of undress, and most wish for members of the opposite sex not to be present in those circumstances.

B. Parents have a reasonable expectation that public schools in this State will not allow their minor children to be viewed in various states of undress by members of the opposite sex, nor allow their minor children to view members of the opposite sex in various states of undress.

C. Public schools in this State have a duty to protect the dignity, health and welfare of the students in their care.

D. Allowing students to use restrooms, locker rooms, and showers that are reserved for students of a different sex will create a significant potential for disruption of school activities and unsafe situations.

E. Allowing students to use restrooms, locker rooms, and showers that are reserved for students of a different sex will create potential embarrassment, shame, and psychological injury to students.

F. Public schools have a duty to respect and protect the privacy rights of their students. Courts have recognized a constitutional right to privacy that includes a right not to be compelled by the Government to undress or be unclothed in the presence of members of the opposite sex. *See, e.g., Cumbey v. Meachum*, 684 F.2d 712 (10th Cir. 1982); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981); *York v. Story*, 324 F.2d 450 (9th Cir. 1963).

Section 3. Purpose. The purposes of this Act are:

A. To further the State's interest in protecting all students in public schools in this State;

B. To provide for the privacy needs of all students in public schools in this State; and

C. To maintain order and dignity in restrooms, locker rooms, showers, and other facilities where students may be in various states of undress in the presence of other students.

Section 4. Definitions. As used in the Student Physical Privacy Act:

A. "Sex" means the physical condition of being male or female, which is determined by a person's chromosomes, and is identified at birth by a person's anatomy.

B. "Public school" means a school subject to [INSERT RELEVANT CODE PROVISION AUTHORIZING THE CREATION AND SUPERVISION OF PUBLIC SCHOOLS]. Public schools do not include any schools not subject to [THAT PROVISION], including private schools, religious schools, and home-educating families.

Section 5. Students' physical privacy to be protected.

A. Designation and Use of Public School Facilities.

1. Every public school student restroom, locker room, and shower room accessible by multiple students at the same time shall be designated for use by male students only or female students only.

2. In all public schools in this State, student restrooms, locker rooms, and showers that are designated for one sex shall be used only by members of that sex.

3. In any other public school facility or setting where a student may be in a state of undress in the presence of other students, school personnel shall provide separate, private areas designated for use by students based on their sex.

B. Accommodation for Certain Students.

1. Students who consistently assert to school officials that their gender is different from their sex, and whose parent or legal guardian provides written consent to school officials, shall be provided with the best available accommodation, but in no event shall that accommodation be access to student restrooms, locker rooms, or shower rooms designated for use by students of the opposite sex while students of the opposite sex are present or could be present.

2. Acceptable accommodations may include, but are not limited to: access to single-stall bathrooms; access to uni-sex bathrooms; or controlled use of faculty bathrooms, locker rooms, or shower rooms.

Section 6. Private cause of action and penalties provided.

A. Students who access a public school restroom, locker room, or shower room designated for use by their sex have a right not to encounter a person of the opposite sex.

B. Students who, while accessing a public school student restroom, locker room or shower room designated for use by their sex, encounter a person of the opposite sex, have a private cause of action against the school if:

(1) the school gave that person permission to use facilities of the opposite sex; or,

(2) the school failed to take reasonable steps to prohibit that person from using facilities of the opposite sex.

C. Any claims arising pursuant to this Section shall be brought in the state or federal trial court in whose jurisdiction either the student or the school resides at the time of filing.

D. All civil actions brought pursuant to this section must be initiated within four years after the violation occurred.

E. Students aggrieved under this section who prevail in court may recover from the offending public school \$2,500 for each instance in which they encountered a person of the opposite sex while accessing a public school student restroom, locker room, or shower room designated for use by the aggrieved students' sex. They may also recover monetary damages from the offending public school for all psychological, emotional, and physical harm suffered.

F. Students who prevail on a claim brought pursuant to this Section shall be entitled to recover reasonable attorney fees and costs from the offending public school.

G. Nothing in this Section shall limit other remedies at law or equity available to the aggrieved student against the school.

Section 7. Effective date. This act becomes operative upon its enactment.

Section 8. Severability. If any subsection or portion of this act is declared invalid, that declaration shall not affect the validity of the remaining portions.