LEGAL PARAMETERS FOR ACCOMMODATING TRANSGENDER STUDENTS

I. What would happen if the School District created a policy that prohibited transgender students from using facilities associated with their gender identity?

The Board consulted with two school law firms regarding this question. First, we spoke with the Board's appointed law firm, Kriha Boucek. Upon request of many community members, we sought a second opinion from Guin Mundorf. The law firms were substantially in agreement as to the current state of the law in Illinois. The Illinois Human Rights Act and the U.S. Federal Seventh Circuit Court of Appeals requires accommodations in facilities for transgender students.

Both law firms advised the Board of Education that the School District could face liability for adopting policies that go against Illinois law and court precedent. Neither law firm could guarantee that the Board members would not face personal liability for such action.

II. What are the legal parameters for accommodating transgender students?

1. Applicable Illinois Law

A. The Illinois Human Rights Act

The Illinois Human Rights Act ("IHRA") is a civil rights law that grants certain rights to certain classes of people in the state. Specifically, the IHRA States:

> Freedom from Unlawful Discrimination. To secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.

775 ILCS 5/1-102 (*emphasis added)*. While this section of the IHRA does not specifically mention gender identity as a protected class, the Act defines sexual orientation as "actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth." 775 ILCS 5/1-102(O-1) (*emphasis added)*.

Article 5 of the IHRA addresses civil rights violations in places of public accommodations, which includes school buildings. Under Article 5, the IHRA states that it is unlawful discrimination to deny or refuse another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation based on a protected class. 775 ILCS 5/5-102. Article 5A of the IHRA also specifically prohibits sexual harassment in Elementary, Secondary, and Higher Education. Thus, there is no question that the IHRA covers school districts and school district facilities.

The IHRA created the Illinois Human Rights Commission (IHRC) and the Illinois Department of Human Rights (IDHR), both of which are charged with the implementation of the IHRA. The IHRC is vested with the power to receive and investigate complaints, hold hearings, and issue penalties for the violation of the IHRA. Those penalties can include cease and desist orders, monetary damages, orders admitting people to public accommodations, and attorneys' fees and costs, among others.

In implementing the IHRA, the IHRC has issued guidance on bathroom usage by transgender students in schools. The IHRC guidance states, "[u]se of restrooms, locker rooms and changing rooms may not be restricted based upon a student's physical anatomy or chromosomal sex. A student must be permitted to access restrooms or bathrooms, locker rooms and changing rooms that align with their gender-related identity and without having to provide documentation or other proof of their gender identity."

The IHRC has heard two cases that are specifically related to this issue.

On March 15, 2018, the IHRC found Komarek School District 94 liable for committing sexual orientation discrimination (related to gender identity) and physical disability discrimination (related to gender dysphoria) when it prohibited a 9-year-old student access to the boys' communal restrooms in the elementary school he attended. Komarek staff offered to allow the student to use adult male faculty and staff restrooms, in addition to the unisex restroom located in his 3rd grade classroom. The student's parents asked Komarek to allow their son to use the communal boys' bathrooms at school. Komarek staff would not agree to this request due to the discomfort that they felt other students (and their parents) might experience. The student's parents filed a complaint with the Illinois Department of Human Rights, which was decided in favor of the student and his family on March 15, 2018 and more recently affirmed on September 11, 2019. In a lengthy decision, the Illinois Human Rights Commission stressed that the Superintendent had merely speculated about the "comfort level" of a hypothetical elementary school-age boy and held that "the prejudices of others are part of what the Act was meant to prevent." On February 4, 2019, Komarek School District was ordered to pay $55,000 to the family for emotional distress and another $100,000 in attorneys' fees for parents' counsel.

In July 2019, the IHRC similarly determined that Lake Park CHSD 108 violated the rights of a transgender high school student when the District denied him full and equal use of the school's locker room. The District required the student to dress behind a curtain in a separate part of the locker room, which was not required of any other student. The Commission found that "the District's sole motivation in mandating that the [student] use a privacy curtain to change clothes while using the boys' locker room was rooted in the [student's] gender-related identity, transgender male." Accordingly, the Commission found that requiring the use of a privacy curtain for this student was a denial of the student's "full and equal use of the District's facility," which violates the *Illinois Human Rights Act*.

Article 5 seemingly has an exemption for restroom and locker room facilities as places of public accommodation, stating:

> **Facilities Distinctly Private.** Any facility, as to discrimination based on sex, which is distinctly private in nature such as restrooms, shower rooms, bath houses, health clubs and other similar facilities for which the Department, in its rules and regulations, may grant exemptions based on bona fide considerations of public policy.

However, the Illinois Appellate Court examined this provision in the context of employment, and held that the definition of "sex" under the Illinois Human Rights Act cannot be construed to include any requirement based on reproductive organs or anatomy. See, Hobby Lobby v. Sommerville, 186 N.E. 3d 67 (Ill.App.2d 2021). The IHRC reviewed this exception specifically as it relates to school districts in the Lake Park case and opined that, while schools can create bathrooms that are segregated by sex, transgender students continue to have the right to full enjoyment of facilities based on their gender identity.

B. The Illinois State Board of Education Equal Educational Opportunities Policy

The Illinois State Board of Education (ISBE) adopted regulations requiring that school districts provide equal educational opportunities to students regardless of their status in a protected class. 23 Ill. Admin. Code 1.240. Like the IHRC, ISBE has issued guidance related to its interpretation of this section. In Section F-1 of the guidance, ISBE poses the question as to whether a school district can require a transgender, nonbinary, or gender nonconforming student to use the restroom or locker room that corresponds with the student's sex at birth. ISBE responded:

> No. Students must be allowed to use the facilities that correspond with their gender identity. Schools cannot impose on transgender, nonbinary, and gender nonconforming students conditions on the use of facilities that are not required of other students.

Unlike the IHRC, ISBE does not have a clear enforcement mechanism for its Equal Educational Opportunities Policy or this guidance. Instead, when issuing guidance like this, ISBE relies on its general responsibility to ensure school districts comply with the law and its authority to remove recognition from school districts that do not comply after given directives. This is the process ISBE followed during Covid and they were unsuccessful at actually removing recognition from any school districts. That said, if ISBE did successfully go through the process to remove recognition, a school district would lose its state funding.

2. United States Federal Case Law

There are a number of Federal cases across the country that have examined transgender student rights both from the perspective of the transgender student and from the perspective of the non-transgender students. The U. S. Supreme Court has not heard this issue, but this

may come before the SCOTUS in the near future. Until that time, Illinois is bound by the caselaw coming out of the 7th Circuit.[1]

In *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education,* 858 F.3d 1034 (7th Cir. 2017), the 7th Circuit Appeals Court heard an appeal related to a biological female who identified as a transgender male and wished to use the men's restroom. In its decision, the court determined that the school district's policy denying the student access to the bathroom of his identified gender likely violated Title IX and the Equal Protection Clause of the U.S. Constitution. In addressing privacy concerns, the 7thCircuit held:

> A transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions. Or for that matter, any other student who uses the bathroom at the same time. Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their privacy and those who have true privacy concerns are able to utilize a stall. Nothing in the record suggests that the bathrooms at Tremper High School are particularly susceptible to an intrusion upon an individual's privacy. Further, if the School District's concern is that a child will be in the bathroom with another child who does not look anatomically the same, then it would seem that separate bathrooms also would be appropriate for pre-pubescent and post-pubescent children who do not look alike anatomically. But the School District has not drawn this line. Therefore, this court agrees with the district court that the School District's privacy arguments are insufficient to establish an exceedingly persuasive justification for the classification.

Id. at 1052-1053. Notably, the school district in this case appealed the decision to the Supreme Court and the Supreme Court refused to take the case.

A recent Florida case brought about a conflicting Federal Court opinion, which signals that this issue is ripe for Supreme Court review. In *Adams v. the School Board of St. Johns County, Florida*, 57 F.4th 791 (11th Cir. 2022), a case referenced frequently by community members when discussing this topic, a transgender student brought a claim against the school district alleging that the school district's bathroom policy violated both the Equal Protection Clause of the U.S. Constitution and Title IX. In this case, the school district had a policy that required students to use a bathroom based upon their biological sex or to use a gender-neutral bathroom. The 11th Circuit issued a decision that is contrary to the 7th Circuit, holding that neither the Equal Protection Clause nor Title IX were violated by the school district's policy. On the issue of privacy, the court held:

[1] The Federal Courts are divided into eleven circuits. States are bound by legal precedent from within their circuit unless the Supreme Court changes that precedent. Illinois is in the 7th Circuit along with Wisconsin and Indiana.

> The protection of students' privacy interests in using the bathroom away from the opposite sex and in shielding their bodies from the opposite sex is obviously an important governmental objective. Indeed, the district court "agree[d] that the School Board has a legitimate interest in protecting student privacy, which extends to bathrooms." Understanding why is not difficult—school-age children "are still developing, both emotionally and physically." *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 636 (4th Cir. 2020) (Niemeyer, J., dissenting) ("[A]ll individuals possess a privacy interest when using restrooms or other spaces in which they remove clothes and engage in personal hygiene, and this privacy interest is heightened when persons of the opposite sex are present. Indeed, this privacy interest is heightened yet further when children use communal restrooms ...."). And even the more generally acceptable notion that the protection of individual privacy will occasionally require some segregation between the sexes is beyond doubt—as then-Professor Ruth Bader Ginsburg noted, "[s]eparate places to disrobe, sleep, [and] perform personal bodily functions are permitted, *in some situations required*, by regard for individual privacy." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Wash. Post, Apr. 7, 1975, at A21 (emphasis added).

Id. at 804. The 11th Circuit went on to hold that a policy can lawfully classify on the basis of biological sex without discriminating on the basis of transgender status. *Id.* at 808. Finally, the Court held that Title IX prohibits discrimination based on biological sex, not gender identity, and because the school district's policy does not discriminate between biological sex, Title IX was not violated.

We do anticipate that this issue will be appealed to the Supreme Court and it may be the case that clarifies transgender student access to facilities under Federal law. Even if that happens, it is unlikely that the Federal Court decision will change Illinois law. The Illinois Human Rights Act continues to be the greatest obstacle to Illinois schools that want to segregate bathrooms based upon anatomy.