



June 22, 2021

**Sent via email and U.S. certified-mail to:**

Alamogordo Public School Board of Education

**Attn: President Cadwallader**

1211 Hawaii Avenue

Alamogordo, NM 88310

angela.cadwallader@alamogordoschools.org

*U.S. certified-tracking #: 70110470000030640092*

Alamogordo Public Schools Superintendent's Office

**Attn: Superintendent Perry**

1211 Hawaii Avenue

Alamogordo, NM 88310

jerrett.perry@alamogordoschools.org

*U.S. certified-tracking #: 70110470000030640085*

Alamogordo Public Schools Athletics

**Attn: Athletics Director and Title IX Coordinator Walker**

103 Cuba Avenue

Alamogordo, NM 88310

johnnie.walker@alamogordoschools.org

*U.S. certified-tracking #: 70191640000091988733*

Dear Alamogordo School Board, Superintendent Perry, and Athletics Director and Title IX Coordinator Walker:

This letter is to inform you that the ACLU of New Mexico considers your proposed policy of banning transgender children from participating in sports based on their gender identity a violation of both federal and state law. The purpose of this letter is to inform you of the liability you could incur if you make this proposal official policy. We have also provided background on the legal status of transgender people and discrimination they face and why this proposal flies in the face of civil rights and liberties. This is about protecting our children from discrimination by the very professionals we trust to keep them safe.

**I. FEDERAL AND STATE LAW PROVIDE EXPLICIT PROTECTION AGAINST DISCRIMINATION BASED ON GENDER IDENTITY, SEX, AND SEXUAL ORIENTATION.**

Transgender people have been advocating for their rights in federal and state legal systems vigorously in recent years. The United States Supreme Court held in 2020, in *R.G. & G.R. Harris Funeral Homes, Inc., v. Equal Employment Opportunity Commission* [hereinafter "*Harris*"], that

discriminating against someone on the basis of them being transgender or queer runs afoul of the provisions of Title VII of the Civil Rights Act prohibiting discrimination on the basis of sex. *See Bostock v. Clayton County* 590 U.S. \_\_\_\_ (2020); 140 S. Ct. 1731. The federal government, as of March 2021, determined the reasoning of this opinion logically applies to other provisions of the Civil Rights Act, like Title IX, which applies to schools. (“After considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the Division has determined that the best reading of Title IX’s prohibition on discrimination “on the basis of sex” is that it includes discrimination on the basis of gender identity and sexual orientation.” *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972*, US DOJ Civil Rights Division, 2-3 (March 2021)). This same memo cites two federal appellate courts which have held that the reasoning in *Bostock* applies to Title IX. *See Application of Bostock* at 2. In short, this means that the federal government considers it illegal to discriminate on the basis of sex, which includes gender identity discrimination, in schools. And importantly, on June 16, 2021, US Secretary of Education Miguel Cardona said: "The Supreme Court has upheld the right for LGBTQ+ people to live and work without fear of harassment, exclusion, and discrimination -- and our LGBTQ+ students have the same rights and deserve the same protections. I'm proud to have directed the Office for Civil Rights to enforce Title IX to protect all students from all forms of sex discrimination. Today, the Department makes clear that all students -- including LGBTQ+ students -- deserve the opportunity to learn and thrive in schools that are free from discrimination." The Office for Civil Rights has created resources for LGBTQ+ students that make it clear federal law “requires schools to ensure that LGBTQ+ students and other students have equal access to all aspects of a school’s programs and activities.”<sup>1</sup> While these exclusionary and discriminatory proposals clearly violate the Civil Rights Act of 1964, Titles VII and IX, they could also violate the Americans with Disabilities Act 34 CFR Part 106, Nondiscrimination on the basis of Sex in Education.

Similarly, the New Mexico Human Rights Act (NMHRA), NMSA 2009 28-1-1 *et seq.*, explicitly provides that gender identity and sex are protected from discrimination in matters of employment, housing, credit, union membership, and at *public accommodations*. (emphasis added). Public school athletic and extracurricular activities fall squarely within the definition of public accommodation pursuant to the New Mexico Human Rights. A “public accommodation” is defined in the NMHRA as “any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private.” NMSA § 28–1–2(H). Alamogordo Public Schools provides its educational services to all children who are of grade school ages. It is unlawful for any person in any public accommodation to discriminate against any person because of their gender identity.

Additionally, APS must comply with NMSA, School Athletic Equity Act 28-1-2 NMSA *et seq* which states “[e]ach public school shall operate its program in a manner that does not discriminate against students or staff on the basis of gender.” By prohibiting students from participating in sports that align with their correct gender identity, APS would be explicitly discriminating against students on the basis of their gender and gender identity.

Finally, in July 2019, the Safe Schools for All Students Act, an anti-bullying law, went into effect requiring, among other things, school districts adopt policies to prohibit bullying and cyber

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<sup>1</sup> US Department of Education, Office for Civil Rights, Resources for LGBTQ+ Students; available at <https://www2.ed.gov/about/offices/list/ocr/lgbt.html>

bullying and ensure that students are not put at risk from those actions. NMSA 1978, §§ 22-35-1 to -5 (2019). It is entirely reasonable to expect that outing and banning transgender students from participation in school activities would result in reasonable fear for their safety, cause a substantial detrimental effect on their physical or mental health, interfere with their academic performance or attendance, or *substantially interfere with a student's ability to participate in or benefit from services, activities or privileges provided by an agency, educational institution, or grantee*. NMSA 1978, § 22-35-2. (emphasis added). Adopting a policy that would inevitably put students at risk would violate not only the spirit of this law, but the duties imposed upon the school board to proactively establish anti-bullying policies.

## **II. POTENTIAL LIABILITY FOR THE PROPOSED POLICY**

The proposed policy prohibiting transgender children from participating in sports in line with their gender identity likely violates both federal and New Mexico law. Title IX requires school districts that receive federal funding to not discriminate on the basis of sex. 20 U.S.C. 38 § 1681. As explained above, the US Department of Justice considers discrimination against transgender people as sex discrimination. If the School Board were to enact this policy, you could face liability under federal law including regulatory actions and/or private litigation, monetary and injunctive relief, punitive damages, interest, and attorneys' fees, or even loss of federal funding.

The proposed policy also violates New Mexico law. The NMHRA bans discrimination on the basis of gender identity. The proposed policy could cause the district to face penalties under state law like payment of damages to any harmed party, payment of attorney's fees, and regulatory action and compliance enforcement by the New Mexico Human Rights Commission. *See* NMSA 1978, § 28-1-11.

The proposed policy would also likely result in APS and the Board's non-compliance with the School Athletic Equity Act and the Safe Schools for All Students Act.

## **III. DISCRIMINATION AGAINST TRANS PEOPLE AND THE SEVERE CONSEQUENCES TRANS YOUTH ENDURE FROM SUCH DISCRIMINATION**

No one should be denied a job, a place to live, or access to a public place or business simply because of who they are. Unfortunately, these kinds of rejection are all too common for transgender people. And for trans youth, who already face high rates of family rejection, violence, and discrimination, they can be deadly. Trans youth should never have to fear going to school or participating in a meaningful activity just because of who they are. Young people should have the freedom to be open (or not) about their identity in school and be taught in a safe environment - and trans-inclusive policies do no harm to cisgender youth.

Beyond the potential legal consequences this proposed policy invites, it also generates an environment of fear that significantly and meaningfully impacts the lives of trans children that live in your district. Although your athletic director admits he is not aware of any trans athletes currently out

in the district,<sup>2</sup> this does not mean there are no trans children living in your district. Often, most people do not know when a child is transgender. Policies like the one at hand make life harder for trans children, but also for all trans people trying to live a life of dignity within your district.

Beyond the harms this potential policy could create for young people in the APS system, by denying trans children from participating in sports aligned with their gender identify, they would be denied the documented benefits organized sports provide for young people. Organized sports have become an important part of many children and adolescents' lives and have proven health and wellbeing benefits including: lower suicide risk; greater feelings of safety; students are less likely to skip school or experience victimization or harassment; high grades and lower rates of depressive symptoms; and myriad other health benefits that teamwork, leadership opportunities, and physical fitness provide.<sup>3</sup>

Right now, trans people across the nation are facing a concerted assault on our rights to healthcare, to employment, to partners who love us, and to our participation in the activities that make us happy. Most vicious of all is the widely reported law passed in Arkansas. This law bans all gender-affirming healthcare for minors and criminalizes its provision by doctors or parents; even worse, it does not contain a grandfather clause. We will not mince words—the law in Arkansas is an act of violence and its passing has made trans people across the country mourn for the kids affected by it. We also fear the consequences imposed on children from elected officials and policymakers who follow their lead and enact similarly vicious policies. Indeed, the passage of the law has contributed to a spike in suicide attempts by trans children in Arkansas.<sup>4</sup>

The Board should take this horrifying phenomenon seriously and consider the deep harm this proposed policy would have not only on trans children, but on their loved ones and friends. Trans children lead lives difficult enough given the coordinated attacks on their very existence and continued discrimination they face at almost every turn. You might claim, or genuinely believe, you are “protecting” women and girls with policies like the one proposed. You are not. You are ensuring that a subset of women and girls, already subject to discrimination, come under attack by the public institutions around them. This will have dire consequences, up to and including, the unnecessary deaths of children. This is unacceptable.

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<sup>2</sup> “Alamogordo schools to discuss transgender policy,” Kyle Land, *Albuquerque Journal*, accessed at [yahoo.com](https://autos.yahoo.com/alamogordo-schools-discuss-transgender-policy-140400760.html) (April 2021). <https://autos.yahoo.com/alamogordo-schools-discuss-transgender-policy-140400760.html> [Kyle Land, *Alamogordo schools to discuss transgender resolution* (Apr. 18, 2021), <https://autos.yahoo.com/alamogordo-schools-discuss-transgender-policy-140400760.html>]

<sup>3</sup> Shoshana K. Goldberg and [Theo Santos](#), Fact Sheet: The Importance of Sports Participation for Transgender Youth, Center for American Progress, March 18, 2021, available at

<sup>4</sup> “Rash of Teen Suicide Attempts After Arkansas Adopts Trans Care Ban,” Trudy Ring, *Advocate*. <https://www.advocate.com/transgender/2021/4/19/rash-teen-suicide-attempts-after-arkansas-adopts-trans-care-ban> [Trudy Ring, *Rash of Teen Suicide Attempts After Arkansas Adopts Trans Care Ban* (Apr. 19, 2021),

<https://www.advocate.com/transgender/2021/4/19/rash-teen-suicide-attempts-after-arkansas-adopts-trans-care-ban>

#### IV. RECOMMENDATIONS TO THE BOARD

The ACLU of New Mexico requests the Alamogordo School Board take the following actions in order to avoid legal liability and redress any harms potentially already done by proposing the policy:

1. Immediately pull this proposed resolution and make public that this has been done;
2. Make clear in a public form that the resolution was ill-advised and illegal;
3. Publish a document, signed by the School Board, clarifying that the district welcomes, supports, and affirms trans students of all kinds; and
4. Engage in trans-specific sensitivity training as a Board, and make this training available to district staff as well.

These measures will help any trans people, but particularly children, in your district know that the School Board is dedicated to their safety and inclusion, and affirms their value as community members. Additionally, they will ensure that the district does not face potentially severe penalties under federal and state law. We understand that this proposal will be debated on **June 26, 2021** and would appreciate a response prior to this date.

Sincerely,

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