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Sent Via Email

Re: *Global settlement offer in John and Jane Doe No.1, et al v. Bethel Local School District Board of Education, 23-3740 (6th Cir.) - Subject to Rule 408*

Dear Lynnette:

I'm writing to propose a mutually beneficial resolution to this dispute. To that end, I hope you will provide this letter, along with the enclosures, to your clients for their review.

As you know, our clients want access to communal intimate facilities separated by sex and oppose allowing students to use communal restrooms and locker rooms designated for students of the opposite sex. The previous Board of Education was unwilling to adopt a written policy segregating these spaces by sex. But after the elections in November, a majority of the Board is now composed of members who have publicly endorsed segregating bathrooms and locker rooms by sex. Thus, assuming your clients told the truth during their campaigns, the Board now agrees with the plaintiffs as to the correct policy.

Given the campaign positions of the new Board members, it is surprising no written policy has yet been proposed. If the Board believes Title IX forbids such a policy, it is mistaken.

As the *en banc* Eleventh Circuit rightly held, Title IX permits segregating bathrooms by sex without regard to "gender identity."¹ This follows from the language of Title IX itself. Title IX commands that no one, "on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."² This language does not require educators to take a sex-blind approach to their students. Instead, Title IX requires educators to ensure that no person's sex prevents her from enjoying educational benefits. And sex-segregated bathrooms help accomplish that goal. People have innate "privacy interests in using the bathroom away from the opposite sex and in shielding [one's] bod[y] from the opposite sex."³ That is why, as the Ohio Attorney General has recognized, societies have segregated these areas by sex for

¹ *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812-13 (11th Cir. 2022) (*en banc*).

² 20 U.S.C. §1681(a).

³ *Adams*, 57 F.4th at 804

millennia.⁴ If students cannot obtain this privacy, they will eschew, or receive only impoverished versions of, educational opportunities available to others. To prevent that, schools separate bathrooms by biological sex: doing so *accommodates* the sexes, thus ensuring that no student is denied the ability to participate in an educational program because of her sex.

If the Board's lawyers are concerned about the Sixth Circuit's decision in *Dodds v. Department of Education*,⁵ they ought not be. As our brief (and Tennessee's and Kentucky's) explained, *Dodds* never resolved the issue.⁶ Thus, as we explained in our brief, and as the Attorneys General of Tennessee and Kentucky explained in the *amicus* brief they filed with the Court in our case, *Dodds* provides the Board with no excuse for refusing to segregate bathrooms by sex. (The brief from Tennessee and Kentucky is enclosed with this letter.)

While Title IX at least permits sex-segregated bathrooms, the Ohio Constitution *requires* Bethel to abandon its current approach to bathrooms. The Ohio Attorney General even said so in another *amicus* brief filed in our case. (The Ohio Attorney General's brief is also enclosed with this letter.)

In the end, the plaintiffs have a very real opportunity to prevail in this litigation. If they do, they will be entitled to obtain not only attorneys' fees incurred so far, but also additional fees that continue to accumulate as we progress toward the Supreme Court. And they would also be entitled to damages.

Given the current Board's alignment with the plaintiffs' position, now is the time for a mutually agreeable solution. The plaintiffs propose the following: we will dismiss our appeal and agree not to seek any additional attorneys' fees if the Board adopts a written policy segregating intimate facilities by biological sex (including communal restrooms, locker rooms, and lodging during overnight trips) in the school district. The Board will also agree to pay us the plaintiffs' attorneys' fees we incurred at the trial level: \$218,421.00. We will waive our appellate attorneys' fees which are currently around \$70,000.00 and will only increase from here. Finally, we have also discussed the matter with counsel in the open meetings act case currently pending in state court, Mr. Hartman, who is included on this communication. In an effort for global resolution, the plaintiff in that case is willing to dismiss the same for the sum of \$15,000.00 in attorney's fees and a statement from the current Board that, to the extent the previous Board improperly acted to change school policy regarding its intimate facilities, that change is invalid and superseded by the aforementioned policy.

All of the foregoing allows the Board to resolve the instant dispute, conserve school resources, and respect the expressed will of the voters.

In sum, if the Board's new members do what they said they would do while running for office, they will spare the school district from the risk of an adverse decision that will embarrass the district and cost it a lot of money. And in doing so, the Board will be complying with the opinion of the Ohio Attorney General—the chief law enforcement officer of their State—as

⁴ See Op. of Ohio Att'y Gen., No. 2023-0006 (May 26, 2023), <https://perma.cc/E7TT-WSP5>; accord W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol'y Rev. 227, 229 (2019).

⁵ 845 F.3d 217, 221 (6th Cir. 2016) (*per curiam*).

⁶ *Id.* at 221.

well as the prevailing opinion of state attorneys general within the Sixth Circuit whose public institutions—like the school district—receive federal funds under Title IX.

Sincerely,

Ashbrook Byrne Kresge LLC



Ben Flowers

cc: John Podgurski, Esq.; Curt Hartman, Esq.; Nicolas Barry, Esq.; Joseph P. Ashbrook, Esq.; Julie Byrne, Esq.

Enclosures