

March 26, 2021

Roger Eastep  
Chief Building Official  
City of Upper Arlington  
Building, Planning & Zoning Department  
3600 Tremont Rd.  
Upper Arlington, OH 43221

RE. Upper Arlington City School District

Tremont Elementary School – Permit No. 19-883  
Greensview Elementary School – Permit No. 19-882  
Wickliffe Elementary School – Permit No. 19-234  
Barrington Elementary School – Permit No. 19-881  
New High School – Permit No. 19-440

Dear Mr. Eastep,

We are resubmitting selected drawings for the above referenced projects for review and approval. This submission is in response to your “Notice of Inspection” letter dated March 1, 2021, directed to Chris Potts with the Upper Arlington City School District, identifying items not in conformance with the submitted and approved plans. Specifically, we request that the following restrooms be considered for use by all genders and therefore be identified as “All Gender” in each of their room name designations as well as their respective interior signage designations:

- Tremont Elementary School: See Bulletin 49 attached.
- Greensview Elementary School: See Bulletin 36 attached.
- Wickliffe Elementary School: See Bulletin 39-WK attached
- Barrington Elementary School: See Bulletin 66-BA attached.
- New High School: See CCD-110 attached.

Other than those identified above, previously identified gender specific restrooms will remain as labeled on the previously approved plans for each of these buildings. This resubmission will provide a mix of male, female, and gender neutral toilet facilities in each of the school buildings.

To provide some background for the proposed change, the plans originally approved by the City contemplate single-occupant toilet rooms with floor-to-ceiling walls and solid, full-frame, lockable doors in certain locations that are identified for use by a specific sex. With this request, the School Board is requesting the City to approve that some of these toilet rooms, as identified in the enclosed plans, be re-labeled as “All Gender” at the noted locations. This change is requested pursuant to Federal Title IX, due process rights to privacy, and for the below referenced policy reasons. We also believe that the proposed design change is a fair interpretation or application of the Ohio Building Code.



## **Title IX and the Right to Privacy**

Title IX of the Education Amendments Act of 1972, 20 U.S.C. 1681(a), applies to public school districts in Ohio, and it requires gender equity for all students in educational programs. Title IX states that:

“No person in the United States shall, 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.” (Emphasis added.)

An Ohio federal court has held that Title IX protects transgender students in Ohio public schools with regard to their access to the bathrooms of the sex with which they identify. See *Board of Education of the Highland Local School District v. U.S. Department of Education*, 208 F.Supp.3d 850, 865 (S.D. Ohio 2016), which states:

[A]ccess to a communal school bathroom constitutes an ‘aid, benefit..., or service...’ or a ‘right, privilege, advantage, or opportunity.’ Access to the bathroom is thus an education program or activity under Title IX. (Emphasis added.)

The Court further stated:

[T]he Court finds no merit in Third-Party Defendants' argument that other students would be harmed by allowing Jane to use the bathroom consistent with her gender identity, as other students already do. The balance of equities tips especially sharply in Jane's favor because the injunction she seeks is narrowly tailored to permit her to use the girls' restroom and does not even implicate locker rooms or overnight accommodations at the middle- and high school levels. Moreover, ‘it is always in the public interest to prevent the violation of a party's constitutional rights.’ [...] Similarly, ‘the overriding public interest lay[s] in the firm enforcement of Title IX.’

*Id.* at 878 (citations omitted) (emphasis added).

Therefore, pursuant to *Highland*, under Title IX, public school students are not restricted by the sex-based signage placed at the entrance of restroom facilities when determining which restroom facility they wish to use.

Additionally, another Ohio Federal Court has recently found that transgender individuals have an inherent due process right to privacy, preventing them from being forced to disclose their transgender status. In *Stacie Ray, v. Stephanie McCloud, Director, Ohio Department of Health*, Case No. 2:18-cv-272 (S.D. Ohio 2020) the Southern District of Ohio, agreeing with Second Circuit Court of Appeals, found that “forced disclosure of a transgender individual’s status as transgender was highly personal information that was protected by the due process clause’s information right to privacy.”

Here, the intent of the proposed bathroom configuration is to address the concerns raised by the court in *Highland* by permitting all genders access to communal bathrooms in the identified locations. Further, the proposed bathroom configuration creates an environment which avoids improperly forcing the disclosure of protected personal information, as noted in *Stacie Ray*, where students will not need to identify a gender prior to using the restroom facility, and will thus curtail opportunities for discrimination based on an individual’s chosen gender identity. As a result, the proposed bathroom configuration is expressly permitted under and protected by Federal Title IX and the substantive due process right to privacy.



In addition to the protections offered under Federal Title IX and the substantive due process right to privacy, a gender neutral restroom design has a tremendous amount of justification and support in the school design industry. Specifically, restrooms in the school setting have historically been a source of anxiety for students and a difficulty for teachers and administrators. Providing a gender neutral option alleviates most, if not all these underlying issues including the following: eliminating “potty parity” if the line for one sex is longer than the other; mitigating the difficulty in assisting a disabled student of a different gender; enhancing safety and privacy in order to minimize the opportunity for bullying and abuse in the restrooms; and avoiding the need to classify students based on gender in order to promote equality and curtail reinforcement of negative stereotypes and other biases.

Moreover, I understand from your testimony at the Board of Building Appeals hearing for the Windermere School, regarding the variance sought for gender neutral bathrooms, that you do not oppose this bathroom configuration for safety reasons, when you stated:

[W]e are not opposed to it, but because we do not feel it is a safety issue and we do not want to place our self in the place of an educator where I'm not educated to be an educator, I'm educated to build safe buildings, I do not believe this would be a safety issue for this building and, therefore, the City is not opposed to this variance.

Thus, given that there is no safety issue, and that this issue is, instead, governed by Federal Title IX, the School Board requests the City to defer to the requirements of Federal law.

In the end, the School Board is seeking to emulate the City's own stated policy of providing an inclusive atmosphere to all. At his first State of the City address on January 27, 2020, City Manager Steve Schoeny discussed the ongoing commitment of City leadership to promote the perception of Upper Arlington as a welcoming community. Mr. Schoeny stated that “today, talented, educated, successful, caring, community-oriented young people are actively seeking inclusive communities and they shun communities that are perceived as rejecting anyone.” Mr. Schoeny further stated that “[t]he heart and soul of this community is welcoming to everyone. The residents of Upper Arlington are now and have long been at the forefront of supporting diversity and inclusion around the Columbus region.” Moreover, Mr. Schoeny stated that “with care and attention, I am confident this effort will help us redefine Upper Arlington's reputation as a community that welcomes and embraces everyone. It will not be easy, and it will feel uncomfortable at times. But it will be rewarding and is what we must do to remain the community that is the home of Ohio's leaders.” Mr. Schoeny's eloquently stated sentiments are echoed by the School Board and its administration. The decision to provide gender neutral bathrooms is done in part to comply with the mandates of federal law, but just as importantly, to make the design of the School Board's new facilities welcoming and inclusive to everyone.

### **OBC 2902.1.2**

I also note that the proposed bathroom configuration is consistent with a fair interpretation or application of the Ohio Building Code, as these restrooms qualify as single-user toilet facilities under 2902.1.2; which provides that “[s]ingle-user toilet facilities and bathing rooms ... shall be identified for use by either sex.” (Emphasis added.)

In other words, these toilet facilities are not water closet compartments contained in communal restrooms. This is demonstrated by, among other things, the interplay of two OBC provisions. Section 2901.1 states that “[t]oilet and bathing rooms shall be constructed in accordance with Section 1210.” Which is then clarified by exception 1 to Section 1210.3.1, which states that “[w]ater closet compartments shall not be required in a single-occupant toilet room with a lockable door.” Thus, the Ohio Building Code expressly acknowledges that a “single-occupant toilet room” is distinguishable from a typical “water closet compartment” contained in a communal bathroom.



Additionally, the fact that the lavatory is not located within the toilet room does not change the “single-user” status of the toilet facility. Specifically, “toilet facility” is defined in Section 202 as “[a] room or space that contains not less than one water closet and one lavatory.” (Emphasis added.) By including the words “or space” in the definition of “toilet facility,” the Ohio Building Code acknowledges that the lavatory does not need to be physically inside the toilet room; only within the “space.” Here, the toilet rooms are “single-occupant” and the communal lavatories are within the “space” just outside the door.

Moreover, Table 2902.1 does not distinguish between male and female when identifying the total minimum number of plumbing fixtures for an educational facility. As a result, the proposed bathroom configuration qualifies as a single-user toilet facility and can therefore be labeled for use by either sex.

### **OBC 2902.2 Inapplicable**

It is also noteworthy that the general provision contained in Section 2902.2 calling for separate facilities for each sex is inapplicable here. Specifically, Section 2902.2 provides that, generally, “[w]here plumbing fixtures are required, separate facilities shall be provided for *each sex*.” Pursuant to Ohio Revised Code Section 1.51, however, “[i]f a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision....” Therefore, because Section 2902.1 is special, in that it relates to single-user toilet facilities, Section 2902.1.2 constitutes an exception to the more general provision in Section 2902.2.

Moreover, under the Supremacy Clause in the Federal Constitution, federal law takes precedence over, or “preempts,” state law. Thus, Federal Title IX laws permitting gender neutral bathrooms governs over state building codes that may otherwise restrict access to bathrooms by sex in some way. As a result, even if OBC 2902.2 was applicable to this restroom configuration (which it isn’t), it would still be preempted by federal law.

### **International Building Code**

Finally, it is additionally noteworthy that Section 2902.2 of the International Building Code, on which the Ohio Building Code is based, was amended to reinforce that Section 2902.1.2 is an exception to 2902.2, which brings it into alignment with Federal Title IX. Specifically, the amendment states: “Separate facilities shall not be required to be designated by sex where single-user toilet rooms are provided in accordance with Section 2902.1.2.” Ohio has drafted an amendment to the administrative rules to match this change, but the changes are not yet through the rule-making process.

In conclusion, for all of the foregoing reasons, the School Board respectfully requests the City to approve these proposed modifications.

Sincerely,



Steve Dzurani, AIA, LEED AP  
Project Manager/Senior Associate

