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JOHN H. ASHLEY, EXECUTIVE DIRECTOR

TO: Members, Assembly Committee on Education  
FROM: Dan Rossmiller, Government Relations Director  
RE: Opposition to Assembly Bill 469, Relating to the Use of Changing Rooms by Pupils  
DATE: November 19, 2015

Before I begin my remarks, I want to thank Rep. Kremer for reaching out to our association as he developed this bill. It was helpful for us to be able to address his questions and to comment on the proposal. We very much appreciate his willingness to work with us, and we invite other legislators to do the same.

I am here today speaking in opposition to this bill for three main reasons, which I will explain in greater detail later in my testimony:

1. This bill, in its present form, negates local control in favor of rigid a “one size fits all” approach imposed on local districts by the state;
2. This bill, should it pass in its present form, would place school districts in the difficult and untenable position of having to choose between following a state law directive and the current interpretation of federal antidiscrimination statutes by the federal agencies charged with enforcing those federal statutes;
3. This bill contains highly unusual, if not unprecedented, provisions that could encourage students and parents to sue their local school districts.

I want to emphasize that our opposition to this bill should in no way be interpreted to mean that we endorse the equally rigid position that appears to have been adopted by the Office of Civil Rights of the U.S. Department of Education and the U.S. Department of Justice that all students must in all cases be entitled to the unfettered use of the changing room facilities of the sex with which they identify. With that being said, we cannot ignore that the current interpretation of federal Title IX just described and further described later, is being aggressively advanced by the Office of Civil Rights (OCR) in its efforts to “ensure equal access to education... through vigorous enforcement of civil rights.”

Our opposition to the bill stems from a concern that the bill, as introduced, will not only negate local efforts to fashion local solutions but will likely create new legal concerns for schools.

**Local Control:** A number of Wisconsin school boards have adopted district policies specifically addressing transgender status of students, including gender identify, gender nonconformity and gender expression.

These policies address a variety of topics including discrimination, bullying and harassment, the names and pronouns to be used, how students are to be referred to in official school records and student privacy concerns, participation in interscholastic athletics and restroom and locker room accessibility. You have heard from a number of these boards and districts here today.

In these school districts, school boards and communities have sought to accommodate the needs of individual students as well as the values of their community. Working on a case-by-case basis, these board have been able to develop reasonable local policies that work for their circumstances, their facilities, and most importantly, for their students.

The flexibility to adopt policy to meet local needs is important. Wisconsin has 424 public school districts, which operate over 2,000 school buildings of varying ages, construction, designs and security and privacy concerns.

We oppose a “one size fits all” approach in favor of one that would provide as much flexibility as possible for local school boards to fashion local policies that account for factors like the design of their particular facilities and their budget as well as the ages of the children involved in each particular school. In short, the message is that the local control is working.

**This Bill Puts School Boards and Districts in a Difficult Position:** This bill would essentially force a school district to limit a transgender student’s options to either: a) using changing room facilities designated for the sex the student was identified with at birth or by chromosomes; or b) using a single occupancy changing room. Either option would be seen by current federal authorities as discriminating against a transgender student.

Should this bill pass, a school board and district would face a choice to comply with the provisions of this bill, and risk being sued under federal law or not follow state law and risk being sued by a student or the parent or guardian of a student.

While this bill would change state law, it would not, and indeed cannot, change federal law. The relevant federal law is Title IX. Under Title IX, “[n]o 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.” 20 U.S. C. §1681(a).

Title IX creates a private cause of action that entitles parents and guardians of students to sue a school district for monetary damages on the basis that the school district has discriminated against a student on the basis of sex.

In addition, the Office of Civil Rights (or OCR) within the U.S. Department of Education, which enforces civil rights laws, such as Title IX, in public schools is authorized to bring enforcement actions under Title IX against school districts. The OCR is currently very active in targeting its resources on transgender students’ claims of discrimination. In the current enforcement action against a school district in Palatine Illinois, the

OCR has made it clear that it has the power not only to bring enforcement actions against school districts but to come after all federal funds received by a district found to be in violation of Title IX.

Nothing in this bill would protect or insulate a school district against becoming the subject of a lawsuit brought under either of these two avenues. Nothing in this bill would indemnify a school district for the costs of defending such a lawsuit or enforcement action. Nothing in this bill would indemnify a school district against any damages that might be awarded in such a lawsuit or against the loss of federal funding in such an enforcement action.

It is also important to note that nothing in this bill would require the state Attorney General or the state Department of Justice to defend a school district sued on the basis of discrimination on the basis of sex under a Title IX action.

**Provisions in this Bill May Encourage Students and Parents to Sue Their Local School Districts.** The bill permits a pupil or the pupil's parent or guardian to file a written complaint regarding a violation of the requirements in the bill, and requires the school board to investigate and attempt to resolve the complaint within 30 days. Further, if the complaint is not resolved to the satisfaction of the pupil or the pupil's parent or guardian who submitted a written complaint the bill permits them to bring a claim for declaratory relief, injunctive relief or monetary damages, including the reimbursement of reasonable attorney fees.

Such a provision is virtually unheard of in our state statutes governing school districts and school operations. This is especially troubling given that this bill places school boards in a situation where they risk a potential federal lawsuit by complying with state law as imposed by this bill and risk a potential state lawsuit under the provisions of this bill by complying with federal agency interpretations of federal law.

In short, we think this bill creates legal concerns for school district, including creating a bad precedent of expressly authorizing parents to sue school districts. Perhaps most importantly, this bill will not resolve these issues. Ultimately, they will be resolved by the federal courts.

Given that the Palatine Illinois case appears headed to court and given that the case arises within the Seventh Circuit of the U.S. Court of Appeals, any decision by that federal court on appeal would govern over Wisconsin schools and would either make this bill moot or unnecessary. We would further encourage the State's Department of Justice to work with the Office of Civil Rights to come forward with a mutually agreeable resolution of these issues.

For all of the cited reasons, the WASB *opposes* Assembly Bill 469.