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April 11, 2017

Thomas M. TenBrink, Superintendent
Jenison Public Schools
8375 20th Avenue
Jenison, Michigan 49428

RE: School District Transgender Policy Jenison High School

Dear Mr. TenBrink:

I am the staff attorney for the ACLU of Michigan's LGBT Project. I am contacting you with regards to today's article in the Grand Rapids Press, M-Live, "Transgender Bathroom Policy Earns Criticism for Jenison High School," where you are quoted as saying that "transgender students have the option of using a gender-neutral restroom installed last summer for all students, the bathroom that corresponds to the gender assigned to them at birth, or one of three unisex staff bathrooms." We believe that such a policy is harmful to transgender students in that it stigmatizes them and impairs their ability to participate fully at school and to enjoy a safe learning environment. We also believe that permitting transgender students to access restrooms at the high school in accordance with the gender that they live with every day not only is in the best interests of these students, but is required by both federal anti-discrimination law and the constitution.

Background

A transgender person is someone whose gender identity is different from the sex they were assigned at birth. For example, a transgender boy is a person who was assigned the sex female at birth, but his gender identity is male. Gender identity is a person's deeply held sense of their own gender. Medical opinion is unequivocal that gender identity is not a choice. Many people in school, or even before they reach school age, have and express a clearly established gender identity that is different from the sex they were assigned at birth.¹

Requiring transgender students to use separate single-user restrooms is profoundly harmful. Excluding transgender students from the same restrooms used by other students that correspond with their gender identity sends a message to transgender students and their peers that

¹ See World Professional Association for Transgender Health ("WPATH"), *WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.* at 1-2 (June 17, 2008), http://www.wpath.org/uploaded_files/140/files/Med520Nec%20on%20on%202008%20Letterhead.pdf (citing American Academy of Pediatrics). For individuals with Gender Dysphoria-distress associated with the incongruence between one's gender identity and assigned sex at birth- there is a medical consensus that appropriate treatment includes living in accordance with one's gender identity in all aspects of life, known as social role transition.

transgender students should be treated differently and that their mere presence in the same facilities used by their peers is unacceptable. When transgender students are required to use separate facilities, it does not go unnoticed by other students or staff at school. Being separated from students in this way is harmful for transgender children. Transgender students are at a heightened risk of stress and victimization by other children and adults, and those stressors can lead to problems in adulthood, including post-traumatic stress disorder, depression, anxiety, and suicidality.²

In addition, requiring transgender students to use single-user restrooms can cause a host of problems because the facilities may be far away from classrooms, causing a student to be late for class after using a restroom. Students often try not to use the restroom, even though they need to, leading to painful urinary tract infections or other problems, to avoid being tardy, or to avoid being singled out as needing a “special” restroom. Jenison’s policy requiring transgender students to use a separate restroom disregards both the standards of medical care for transgender people and violates federal anti-discrimination law, as explained below.

Title IX Protects Transgender Students from Discrimination in Public Education.

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in any education program that receives federal financial assistance.³ Federal courts have held that Title IX’s prohibition of sex discrimination protects students from discrimination based on their gender identity, gender nonconformity, or transgender status.⁴ Almost all of these cases have been in the context of access to bathrooms.

In the well-known case of *G.G. v. Gloucester County School Board*,⁵ the Fourth Circuit Court of Appeals gave legal deference to the Department of Education’s interpretative guidance of Title IX as requiring that a school treat transgender students in accordance with their gender identity. Although those guidelines have been withdrawn by the Trump Administration, there still remains case law precedent that transgender students are protected under sex non-discrimination laws, such as Title IX. In *Whitaker v. Kenosha Unified School District*, the Court held that a transgender student, who was denied the right to restroom facilities in accordance

² See e.g., Sari L. Reisner et al., *Mental Health of Transgender Youth in Care at an Adolescent Urban Community Health Center*, 56 J. Adolescent Health 274 (Mar. 2015), <http://www.jahonline.org/pb/assets/raw/Health%20Advance/journals/jah/feature.pdf>.

³ 20 U.S.C. §1681 (a).

⁴ See, e.g., *G.G. ex rel, Grimm v. Gloucester County School Board*, 822 F. 3d. 709 (4th Cir. 2016) cert granted, 136 S. Ct. 2442 (2016); *Board of Education of Highland Local School District v. U.S. Dept. of Education*, et al. 2016 WL 5372349 (Sept. 26, 2016) (appeal filed in 6th Circuit); *Whitaker v. Kenosha Unified School District*, 2016 WL 5239829 (Sept. 26, 2016) (appeal filed in 7th Circuit); *Pratt v. Indian River Cent Sch. Dist.*, 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F Supp. 2d 1081, 1090 (D. Minn. 2000).

⁵ *G.G. v. Gloucester County School Board*, 822 F. 3d. 709 (4th Cir 2016) vacated and remanded by the United States Supreme Court to consider whether Title IX covers transgender students in light of Trump Administration rescission of guidelines. 2017 WL 855755 (March 6, 2017).

with his gender identity, was discriminated against due to gender stereotyping, which is a prohibited form of sex discrimination under Title IX.⁶ Rather than relying solely upon the Department of Education’s guidance regarding Title IX, the Court credited the existence of the legal argument regarding gender stereotyping, which has its roots in Title VII related to sex discrimination.⁷ Here, the student presented sufficient evidence that the school district discriminated against him because he did not fit stereotypes of females (the sex that the district insists is his) and the trial judge found this to be a plausible legal path to victory at trial.⁸ The 1st, 9th, 11th and, most importantly, the 6th Circuit Court of Appeals (which covers Michigan), have all held that transgender persons are protected against sex discrimination (on the basis of gender stereotyping) under Title VII.⁹

Discrimination Against Transgender Students Violates the Equal Protection Clause.

Switching focus from Title IX to the Equal Protection Clause of the federal Constitution, a U.S. District Court Judge in Pennsylvania awarded a preliminary injunction to three high school students who challenged a school board resolution that bars them from using sex-segregated restrooms that are consistent with their gender identities. *Evancho v. Pine-Richland School District*, 2017 WL 770619 (February 27, 2017). The Court, in applying the “intermediate” constitutional standard used in sex discrimination cases, found that 1) transgender people have historically been subject to discrimination or differentiation; 2) that they have a characteristic that frequently bears no relation to an ability to perform or contribute to society; and 3) that as a class they exhibit immutable or distinguishing characteristics that define them as a distinct group and that as a class, they are a minority with relatively little political power (2017 WL 770619 at 17-18*) In singling out transgender students for discriminatory treatment

⁶*Whitaker v. Kenosha Unified School District*, 2016 WL 5239829 (September 22, 2016).

⁷Perhaps the most notable case relating to sex stereotyping is *Price Waterhouse v. Hopkins*, 490 U.S. 28 (1989). In *Price Waterhouse*, Ann Hopkins argues that one of the reasons she was not selected for partnership was because she failed to conform to what the (almost overwhelmingly male) partners thought a woman “should be.” The Court determined this to be essentially judging Hopkins on the basis of stereotypes about a woman’s appearance, behavior, and demeanor in the workplace, and it found that this violated Title VII. *See also, Hively v Ivy Tech Community College of Indiana*, April 4, 2017, 2017 WL 1230393 (7th Cir.) (a person who alleges employment discrimination on the basis of sexual orientation has put forth a case of sex discrimination for Title VII purposes).

⁸*Whitaker*, 2016 WL 5239829 at *4.

⁹See, e.g., *Glenn v. Brumby*, 663 F. 3d. 1312, 1317 (11th Cir. 2011) (in employment discrimination case under Equal Protection Clause, “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination”); *Smith v. City of Salem*, 378 F.3d. 566 (6th Cir. 2004)(Title VII of the Civil Rights Act of 1964); *Barnes v. City of Cincinnati*, 401 F. 3d. 729 (2005); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d. 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 214 F. 3d. 1187 (9th Cir. 2000)(Gender Motivated Violence Act); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII).

regarding bathroom usage, the Court held that the public school district's policy was not substantially related to an important governmental interest. (*Id.* at 20-21*)

There is no important governmental interest- or *any* interest that justifies this differential treatment of transgender students based on their gender identity. Jenison can satisfy its Title IX obligations as well as protect potential or actual privacy interests by allowing students to use the restrooms that correspond to their gender identity. To the extent that any student feels uncomfortable using a facility, because of modesty, embarrassment, discomfort with the presence of a transgender student, or for any other reason, private facilities can be made available for them to use if they choose. But what schools cannot do is force transgender students to use separate facilities because some people might not feel comfortable being in the same rest room with them.¹⁰

Michigan State Board of Education Policy

In September 2016, the Michigan State Board of Education approved guidance for Michigan public school districts regarding LGBT students in public schools, including restroom facilities. "Students should be allowed to use the restroom in accordance with their gender identity. Alternative and non-stigmatizing options, such as an all-gender or single-user restroom (e.g. staff bathroom or nurse's office), should be made available to all students who request them. While gender-neutral bathroom facilities are often the solution that works best for all students, including transgender students, *districts are reminded that current interpretation of federal civil rights laws protect the right of transgender students to use the bathroom of their gender identity if they so choose.*"(emphasis added)¹¹

Resolution

The refusal to allow transgender students to use the same restrooms used by other students in accordance with their gender identity violates Title IX and impairs students' ability to learn, grow, and thrive in the school environment. Research shows that denying transgender people access to restrooms that correspond to the gender they live every day has a serious impact on transgender people, impacting their education, employment, health and participation in public

¹⁰ See e.g., *City of Cleburne, Tex. V Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (deference to community discomfort with a group is not a legitimate basis for government's unequal treatment of that group).

¹¹ http://www.michigan.gov/documents/mde/Item_D_J_Memo_and_Guidance_LGBTQ_8-30-16_533504_7.pdf

life.¹² Conversely, full acceptance of a student's gender identity, including allowing them access to gender-appropriate restrooms, can promote a positive educational experience.¹³

In closing, we quote Judge Davis, in his concurrence in the *G.G. v Gloucester School Board* case¹⁴:

G.G.'s case is about much more than bathrooms. It's about a boy asking his school to treat him just like any other boy. It's about protecting the rights of transgender people in public spaces and not forcing them to exist on the margins. It's about governmental validation of the existence and experiences of transgender people, as well as the simple recognition of their humanity. His case is part of a larger movement that is redefining and broadening the scope of civil and human rights so that they extend to a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected.

We hope that this letter has given you a firm understanding of why Jenison should and must allow transgender students to use school restrooms that correspond to their gender identity and we are requesting the District change its present policy of requiring transgender students at the high school to use designated single-user and staff bathrooms, or restrooms in accordance with the gender assigned to them at birth. We would appreciate your response to the concerns raised in our letter.

Sincerely,



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¹² Jody Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol'y (Spring 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf>.

¹³ See *Mathis*, Charge No. P20130034X at 13; see also *Amici Curiae Brief of School Administrators from California, District of Columbia, Florida, Illinois, Kentucky, Massachusetts, Minnesota, New York, Oregon, Washington and Wisconsin in Support of Plaintiff-Appellant, G.G. ex rel. Grimm v Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015).

¹⁴ *G.G. v Gloucester County School Board*, April 7, 2017, 2017 WL 1291219 (4th Cir.).