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April 19, 2016

Dr. Sue Savaglio-Jarvis, Superintendent  
Kenosha Unified School District  
3600 52nd Street  
Kenosha, WI 53144  
VIA EMAIL AND REGULAR MAIL

Dear Dr. Savaglio-Jarvis:

Transgender Law Center writes this letter on behalf of our client, Ashton Whitaker, and his mother, Melissa Whitaker. Ashton is a 16-year-old transgender boy<sup>1</sup> and a junior at Tremper High School in the Kenosha Unified School District. He has understood himself to be a boy since middle school, and has been known and accepted as a boy by his peers and teachers—who refer to him by male pronouns and his new name, Ashton—since at least his sophomore year.

For the first seven months of the 2015-16 school year, Ashton exclusively used the boys' restrooms on campus without incident. In late February, however, school administrators abruptly changed course and informed his mother that he would now only be permitted to use either the girls' restrooms or the staff restroom in the office. Because those alternatives were unacceptable and would have subjected him to scrutiny and potentially harassment from his peers, Ashton continued using the boys' restrooms. Several weeks later, he was pulled out of class by administrators who threatened "disciplinary" action if he continued to use the boys' restroom. Later he also learned that school security guards had all been instructed to notify administrators if they spotted Ashton using the boys' restroom.

Finally, on Wednesday, April 6, the school offered a further temporary "accommodation": Ashton would be permitted to use one of two single-user restrooms located on the far opposite sides of campus. Those restrooms had previously been available for any student's use, but now new locks were installed and Ashton alone was given a key to open them. In order to avoid the scrutiny and embarrassment that would result from visibly using a restroom separate from all his peers, he has resorted to avoiding all restroom use during the school day as much as possible.

The District's policy that denies transgender students like Ashton access to facilities consistent with their gender identity is unlawful, discriminatory, and harmful. Singling him out with a policy that excludes him from the facilities used by all other boys is humiliating to Ashton, subjects him to serious risk of harassment and bullying, violates his right to privacy by revealing his transgender status to others without his consent, and has placed him in serious emotional distress, physical discomfort, and risk of physical health problems.

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<sup>1</sup> A transgender boy is a young person whose sex assigned at birth was female, but who is actually a boy. Similarly, a transgender girl is a young person whose sex assigned at birth was male, but who is actually a girl.

## *Background*

Gender identity is a person's deeply held understanding of their own gender. For most people, gender identity matches the sex they were assigned at birth. A transgender person is someone whose sex at birth is different from the gender they know they are.

It is widely recognized that many transgender students regularly face severe and unrelenting harassment, violence and discrimination in schools.<sup>2</sup> As a result, a significant number of states and school districts have adopted nondiscrimination laws and/or policies, modeled on robust federal nondiscrimination protections that allow transgender students to use facilities consistent with their gender identity. School districts have found that the adoption of such inclusive policies has created a safe and welcoming environment that enhances the educational experience for all students.<sup>3</sup>

Conversely, requiring transgender students to use facilities that correspond with their assigned sex at birth, or segregating them into single-user facilities, is profoundly harmful. Excluding transgender students from facilities used by other students that share their gender identity singles out transgender students and sends a message to the school community that transgender students should be treated differently. As a result, transgender students experience worsened educational outcomes due to missed school, lower grades, and higher drop-out rates.

Besides being in the best of interest of transgender students as well as the entire school community, denying transgender students use of facilities consistent with their gender identity also violates federal antidiscrimination law, as explained below.

## *Legal Analysis*

Title IX of the Education Amendments of 1972 ("Title IX") prohibits discrimination "on the basis of sex" in any education program, such as a public school, that receives federal financial assistance. Rulings from numerous federal courts have made clear that sex-discrimination laws, including Title IX, protect students from discrimination based on their gender identity, gender nonconformity, or transgender status.<sup>4</sup>

The Department of Education has also repeatedly made clear that Title IX requires schools to allow transgender students to use sex-segregated facilities consistent with their gender identity.<sup>5</sup> The Department of Education and the Department of Justice have not hesitated to investigate schools for

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<sup>2</sup> See Gay, Lesbian and Straight Educational Network (GLSEN), 2013 National School Climate Survey, *available at* <http://www.glsen.org/article/2013-national-school-climate-survey>.

<sup>3</sup> See *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 Cnty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015), *available at* <https://acluva.org/wp-content/uploads/2015/06/School-Admin.-Amicus-Brief.pdf>.

<sup>4</sup> See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rumble v. Fairview Health Serv.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); *Finkle v. Howard County, Md.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

<sup>5</sup> See, e.g., *Tooley v. Van Buren Public Schools*, No. 2:14-cv-13466 (E.D. Mich.), Statement of Interest of the United States (Feb. 24, 2015).

failure to comply with Title IX in this context, and have entered into binding settlement agreements requiring school districts to allow transgender students to use restrooms and other sex-segregated facilities that correspond to their gender identity—just like all other boys and girls.<sup>6</sup>

In a case very similar to the present matter, the Fourth Circuit Court of Appeals recently held that Title IX requires schools to give transgender students access to facilities that match the student’s gender identity.<sup>7</sup> In that case, a transgender boy, G.G., was told he could no longer use the boys’ restroom pursuant to a recently-adopted policy requiring that transgender students use facilities consistent with their “biological sex” or an alternative private facility. The Fourth Circuit held that courts must defer to the Department of Education’s interpretation of Title IX that transgender students are entitled to use sex-segregated facilities consistent with their gender identity.

In this way, Title IX parallels numerous other federal antidiscrimination laws and policies. Federal agencies including the U.S. Department of Housing and Urban Development,<sup>8</sup> the U.S. Department of Justice,<sup>9</sup> the U.S. Department of Labor,<sup>10</sup> the U.S. Equal Employment Opportunity Commission,<sup>11</sup> and the U.S. Occupational Health and Safety Administration,<sup>12</sup> all have specifically interpreted similar sex-discrimination laws to require that transgender people must be allowed to use restrooms and other facilities consistent with their gender identity.

Finally, in addition to violating federal nondiscrimination law, excluding transgender students from the same restrooms used by other students of the same gender violates the right to Equal Protection under the Constitution.<sup>13</sup> A school can allow any student who feels uncomfortable using a shared facility—whether because of modesty, embarrassment, or any other reason—to use separate private

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<sup>6</sup> Resolution Agreement, Township High School District 211, OCR Case No. 05-14-1055, at 2 (Dec. 2, 2015), *available at* <http://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf>; Resolution Agreement, Downey Unified School District, OCR Case No. 09-12-1095, at 1 (Oct. 8, 2014), *available at* <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>; Resolution Agreement, Arcadia Unified School District, OCR Case No. 09-12-1020, DOJ Case No. 169-12C-70, at 3 (July 24, 2013), *available at* <http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf>.

<sup>7</sup> *G.G. v. Gloucester County School District* (4th Cir. Apr. 19, 2016), slip op. *available at* <http://www.ca4.uscourts.gov/Opinions/Published/152056.P.pdf>.

<sup>8</sup> U.S. Dep’t of Hous. & Urban Dev., Notice CPD-15-02: Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities (Feb. 2015), *available at* <https://www.hudexchange.info/resources/documents/Notice-CPD-15-02-Appropriate-Placement-for-Transgender-Persons-in-Single-Sex-Emergency-Shelters-and-Other-Facilities.pdf>.

<sup>9</sup> Attorney General Memorandum, Dec. 15, 2014, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964*, *available at* <https://www.justice.gov/file/188671/download>.

<sup>10</sup> U.S. Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program (May 1, 2015), *available at* [https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi\\_14\\_31.pdf](https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf).

<sup>11</sup> *Lusardi v. McHugh*, EEOC Appeal 0120133395, 2015 WL 1607756, at \*7-8 (EEOC Apr. 1, 2015) (employer discriminated against transgender woman by requiring her to use single-user restroom and not women’s restrooms);

<sup>12</sup> U.S. Occupational Safety & Health Admin., *A Guide to Restroom Access for Transgender Workers* (2015), *available at* [www.osha.gov/publications/OSHA3795.pdf](http://www.osha.gov/publications/OSHA3795.pdf).

<sup>13</sup> *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (holding that discrimination against transgender person constitutes sex discrimination in violation of Equal Protection Clause).

or curtained-off facilities if they choose.<sup>14</sup> But schools cannot force transgender students to use separate facilities because some people might feel uncomfortable with them.<sup>15</sup> This kind of unequal treatment of a minority group is precisely what the Constitution's Equal Protection Clause prohibits.

### *Protecting Transgender Students' Privacy*

Revealing a student's transgender status to others without the student's consent violates the student's constitutional right to privacy. Actions that could reveal a student's transgender status to others include explicitly notifying other students, parents, or administrators that the particular student is transgender, or segregating a transgender student from their peers into unisex facilities clearly distinct from other facilities, inviting others to view the student with scrutiny and draw the conclusion that the student is transgender.

The Supreme Court has long recognized that the federal constitutional right to privacy not only protects the individual's right to control the nature and extent of highly personal information released about them.<sup>16</sup> This right to informational privacy restricts a government agency's ability to disclose information about an individual's sexual orientation or gender identity.<sup>17</sup> Because transgender people face such high rates of discrimination, harassment, and violence, courts have recognized that revealing a person's transgender status without their explicit and voluntary consent is plainly prohibited.

For example, one federal court held that the disclosure of a person's transgender status to others without consent violated the constitutional right to privacy, noting the widespread "hostility and intolerance" transgender people face, as well as the "excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, [which] is really beyond debate."<sup>18</sup> Another court recently considered a state policy that prevented many transgender people from changing the gender marker on their driver's licenses, and thereby "outed" many transgender people to others who could conclude that the person was transgender because their "lived sex" was inconsistent with the gender marker on the ID.<sup>19</sup> The court recognized the fact that transgender people face widespread discrimination and even violence, and held that "the Policy creates a very

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<sup>14</sup> Letter from Adele Rapport, Regional Director, Office of Civil Rights, U.S. Dep't of Educ., OCR Case No. 0514-1055 (Nov. 2, 2015), available at <https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf>. Cf. *Cruzan v. Special Sch. Dist. # 1*, 294 F.3d 981 (8th Cir. 2002) (non-transgender woman teacher had no claim for discrimination or violation of her privacy due to transgender woman teacher's use of women's restroom).

<sup>15</sup> *G.G. v. Gloucester* (4th Cir. Apr. 19, 2016) (Davis, J., concurring) ("[A]ll students have access to the single stall restrooms. For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students.").

<sup>16</sup> *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

<sup>17</sup> See, e.g., *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) ("It is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity."); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) ("Publicly revealing information [about sexuality] exposes an aspect of our lives that we regard as highly personal and private."); *Eastwood v. Dep't of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) (right to privacy "is implicated when an individual is forced to disclose information regarding sexual matters.").

<sup>18</sup> *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999).

<sup>19</sup> *Love v. Johnson*, -- F.Supp.3d --, No. 15-11834, 2015 WL 7180471, at \*4 (E.D. Mich. Nov. 16, 2015).

real threat to Plaintiffs' personal security and bodily integrity" and thereby implicated "their fundamental right to privacy."<sup>20</sup>

This right to informational privacy extends to students in a school setting. Students have the right to share or withhold information about their sexual orientation or gender identity, and it is against the law for school officials to disclose, or compel students to disclose, that information. Even when a student appears to be open about their sexual orientation or gender identity at school, it remains the student's right to limit the extent to which, and with whom, the information is shared.<sup>21</sup>

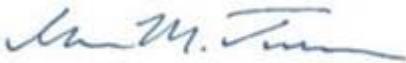
### *Conclusion*

Denying transgender students the ability to use the same facilities as other students violates Title IX and impairs their ability to learn, grow, and thrive. Research shows that denying transgender people access to facilities that correspond to the gender they live every day holds serious consequences for them, negatively impacting their education, employment, health, and participation in public life.<sup>22</sup> Conversely, full acceptance of a student's gender identity—including allowing them access to gender-appropriate facilities—goes a long way toward providing a welcoming environment and ensuring a positive educational experience.

As this letter has made clear, the situation is pressing both as a matter of Ashton's civil rights and his physical health. In addition, the District must act promptly to put in place a policy that permits all transgender students to use facilities consistent with the student's gender identity.

Please contact me to confirm that you will act immediately to rescind the new rule requiring Ashton to use single-user restrooms only and instead to permit him to return to using the general boys' restrooms like any of his peers. You may reach me by email at [ilona@transgenderlawcenter.org](mailto:ilona@transgenderlawcenter.org) or by phone at 415-865-0176 ext. 304. If we do not receive such confirmation by April 26, 2016, we will evaluate all legal options, including filing a complaint with the U.S. Department of Education Office for Civil Rights and filing a lawsuit in federal court.

Sincerely,



Ilona M. Turner  
Legal Director  
Transgender Law Center

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<sup>20</sup> *Id.* at \*5 (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1060 (6th Cir.1998)).

<sup>21</sup> *C.N. v. Wolf*, 410 F. Supp. 2d 894, 903 (C.D. Cal. 2005) (“[T]he fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of that information to others.”).

<sup>22</sup> Jody L. 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 65 (Spring 2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-GenderedRestrooms-and-Minority-Stress-June-2013.pdf>.