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VIA FAX AND E-MAIL TO AVOID DELAY

October 10, 2013

Brian Schipper, Principal

Florence High School

2006 Highway 67

Florence, Colorado 81226

Fax: (719) 784-2727

E-mail: bschipper@re-2.org

RE: Student privacy issues at FHS

Dear Mr. Schipper,

Pacific Justice Institute has been contacted by parents of students currently enrolled at Florence High School (FHS). These parents are greatly concerned about the apparent disregard for the constitutional privacy rights of their minor children at FHS. Compounding the problem, they point to a growing climate of hostility toward themselves and their students for seeking to even address these serious issues with you and your staff. We have therefore been asked to remind you of your significant legal obligations to protect the privacy and expressive rights of all students—not just a select few.

It is our understanding that the current conflict erupted after students—including freshman girls—encountered a biological male student in the female restroom. This student does not consistently identify with either gender and has allegedly made sexually harassing comments toward the girls with whom he seeks to share a restroom. It is our further understanding that, instead of investigating the

serious concern that this type of sexual harassment is taking place in campus bathrooms, you met yesterday with some of the students who have raised these concerns and proposed that they avoid using the girls' locker room and limit themselves to a staff bathroom that is far from their classes and is not open during the after-school sports in which they participate. We find this approach woefully inadequate and legally risky. Should you disagree with our summary of the facts and allegations that have prompted these parents' concerns, please indicate to us immediately what you believe the relevant facts to be.

Much confusion has arisen across the nation as to the respective rights of students who identify with the opposite biological sex, and conversely the vast majority of students who are not gender confused and do not want to share intimate spaces with members of the opposite sex. Due to a handful of high-profile controversies, schools may wrongly conclude that they have no choice but to allow any student who self-identifies with the opposite sex to access all sex-segregated facilities. Not so.

What appears to have been lost in the approach to these conflicts is a recognition that students retain significant privacy and expressive rights when they are on campus. Among the most basic of privacy rights is choosing not to undress or be in a state of full or partial nudity in the presence of members of the opposite biological sex. To this end, federal courts have recognized that anti-discrimination laws which ostensibly would give individuals no discretion in sharing intimate spaces such as bathrooms with the opposite sex must yield to higher privacy considerations and common sense. *See, e.g., Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008). Indeed, respect for the bodily integrity and privacy needs of students have led the courts to place limits on drug testing in schools, *Vernonia Sch. Dist. 47J V. Acton*, 515 U.S. 646 (1995). In the same vein, the Supreme Court has limited the authority of schools to conduct invasive strip searches, even when such searches would serve the important interests of combating the spread of illegal drugs on campus. *Safford Unified Sch. Dist. No. 1 V. Redding*, 557 U.S. 364 (2009).

The parents we represent have been alarmed by the dismissive attitude of FHS and District leadership toward their students' sacrosanct constitutional privacy rights. These families demand assurance that their minor daughters will not be forced to share intimate spaces such as bathrooms and locker rooms with teenage boys who may self-identify as female but are anatomically, biologically and chromosomally male. They and we are also greatly concerned by reports that FHS staff have threatened students with penalties ranging from charges of hate crimes to dismissal from school sports for even vocalizing their reasonable expectations of privacy. Such threats likely implicate federal law barring retaliation against whistleblowers who report sexual harassment under Title IX.

Such threats would also implicate the First Amendment. You are undoubtedly familiar with the admonition of *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) that students and teachers do not shed their constitutional rights at the schoolhouse gate. It is important to remember that *Tinker* arose in the explosive atmosphere of the Vietnam War, certainly a more volatile period of national unrest than we are experiencing today. Even then, the Supreme Court rebuked school officials for attempting to quell a controversy by stifling student expression. To date, FHS has not shown that it understands or upholds these bedrock constitutional principles.

It has been posited to parents that FHS has no choice in allowing students to self-identify with the opposite sex for purposes of sharing intimate spaces. This is simply not the law. No controlling precedent creates such a one-sided regime that ignores the privacy rights of the vast majority of students. In fact, a number of courts have held the opposite.

In the most authoritative case to address attempted transgender use of opposite-sex bathrooms, which would be controlling in Colorado federal courts, *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007), a male-to-female transsexual was terminated by the UTA for entering women's public restrooms while on the job. In the ensuing unlawful gender discrimination suit, the Tenth Circuit ruled in favor of the UTA, stating that requiring employees to use restrooms that match their biological gender is not discriminatory.

Similarly, in *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001), a male-to-female transgender resigned from and then sued West Group after not being allowed to use the women's restroom. The Court held that West Group's policy of requiring employees to use the restroom assigned to their biological gender, rather than their self-image gender, was not discriminatory, stating that "the traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender."

Even stronger rationales support protecting the privacy interests of minor students than adults. In *Doe v. Clenchy*, (Maine Superior Court, November 20, 2012) (unpublished), the court ruled that a school district did not act discriminatorily by assigning a third grade male-to-female transgender student to use a faculty restroom rather than the female student restrooms.

A variety of options are available to FHS to protect the privacy of all students. Pacific Justice Institute recently presented testimony to the California Legislature on AB 1266, the unprecedented legislation to open sex-segregated facilities to transgender students. As such, we are very familiar with all of the arguments for and against going this direction, and we recognize FHS' approach as being based in common misperceptions about this issue. For instance, one of the most radical school districts in the nation, San Francisco Unified (SFUSD), embraces transgender rights but still takes precautions to prevent abuse. SFUSD testified to the Legislature that they require students to consistently and exclusively identify with one gender for the entire school year—a common-sense precaution that does not appear to have been implemented at FHS. Ardent proponents of this bill also acknowledged the need for schools to offer accommodations that balance the rights of all students. Since Colorado law and local board policy are not nearly as far-reaching as California or SFUSD, there is even less justification for treating some students as second-class when it comes to their privacy rights.

In light of these principles, we are requesting, within the next five calendar days, a response from you and/or the District that does all of the following: (1) acknowledges the significant privacy rights of FHS students to not be forced to share bathrooms and locker rooms with members of the opposite biological sex; (2) offers proposed accommodations that are reasonable and do not involve students foregoing access to locker rooms or most bathrooms as a condition of maintaining their privacy rights; (3) affirms the expressive rights of students to discuss matters of public concern, including all sides of current LGBT issues and the students' own constitutional privacy rights; (4) explains in detail any factual allegations

that you consider to be disputed; and (5) identifies the process you are undertaking to better educate FHS staff of student constitutional rights.

We look forward to hearing from you. I can be reached by phone at (916) 857-6900 ext. 208, as well as via e-mail at mmcreynolds@pji.org.

Sincerely,



Matthew B. McReynolds

Staff Attorney

Pacific Justice Institute

CC: Superintendent Rhonda Vendetti, rvendetti@re-2.org

Local, state and national media