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Delivered via email to travispadget@gmail.com and callaghanb@newtoncsd.org

February 24, 2017

Re: Rights of Students to First Amendment Protections and Nondiscrimination on the Basis of Gender Identity

Dear President Padget and Superintendent Callaghan:

I am writing to you on behalf of [REDACTED], a sophomore at Newton High School (“Newton High”), regarding recent events that call into question Newton High’s policies regarding students’ freedom of speech as well as insensitivity on the part of some of Newton High’s staff regarding transgender students. [REDACTED] and his family are concerned that some of the Newton High staff are misinformed about or misunderstand the First Amendment and the civil rights of students to nondiscrimination on the basis of gender identity.

I. Background

On November 14, 2016, [REDACTED]’s physical education teacher, Brian Smith, observed [REDACTED] drawing on his arm and said, “don’t be drawing on yourself, girl.” [REDACTED] had written “love trumps hate” on his arm and had begun to draw a rose. [REDACTED] thought Mr. Smith was joking at first because Newton High School has been very supportive of [REDACTED] since he came out as a boy two years ago. Unfortunately, Mr. Smith was apparently not kidding, because he repeated the comment. [REDACTED] understood Mr. Smith’s tone and pointed way of calling him “girl” as showing his intention to insult [REDACTED] based on his gender identity. Another student even pointed out to Mr. Smith that [REDACTED] is a boy, and at that point the classroom environment became tense, but Mr. Smith did not retract or apologize for his comment. Mr. Smith then told [REDACTED] to go into the hall.

In the hall, after looking at the “love trumps hate” drawing on [REDACTED]’s arm, [REDACTED] offered to wash his arm, but Mr. Smith said he did not know if [REDACTED] would be required to wash it off and, instead, escorted him to the Assistant Principal’s office. The Assistant Principal, Dave Kalkhoff, told [REDACTED] he would have to wash it off or leave school grounds. Rather than face discipline as a result of truancy, [REDACTED] decided to wash the message off his arm.

Mr. Kalkhoff further stated to [REDACTED] that as Assistant Principal, he does not talk to students about politics, and students should not talk about politics either. This misrepresented both students’ free speech rights at school and the facts. Numerous teachers at the school have expressed political views. For instance, Mr. Smith has openly talked to students in class about being a Republican and about his personal political views. Students also express their political views at school. Unfortunately, however, as in [REDACTED]’s case, the school’s response to student speech appears in some instances to be based on the viewpoint expressed in that speech and whether the administrators involved agree or disagree with those views.

In [REDACTED]’s case, [REDACTED] had written and drawn on his arms on several previous occasions; never before had he been told that he was not allowed to write on his arms. Nor has he been asked to wash the drawings off his arms. In fact, [REDACTED] wrote “peace” and “love” on his arm the very next day and no one asked him to stop or to wash it off, including the Principal, who was aware [REDACTED] had again written on his arm. There does not appear to be a school policy against students writing on their arms.¹

On November 15, 2016, approximately sixty students planned a walk-out and protest, with the intent to communicate a message of support of love, diversity, and inclusivity. They planned a time and discussed the walk-out with their Global Studies teacher. Other teachers threatened that if students participated they would not be given varsity letters for their jackets. As a result of this threat of negative consequence for participation in the walk-out, many students decided not to participate.

Later, during the walk-out, two students stood outside of class but inside the school holding signs that were pro-Trump. The pro-Trump students were also missing class.

The next day, facing concerns from parents, the Principal released a statement which appropriately provided that both anti-Trump and pro-Trump students had the right to walk out, and would face no additional discipline beyond that normally imposed for any other absence.

II. Law

In *Tinker v. Des Moines Independent Community School District*, the United States Supreme Court defined how the pure speech of students in public schools is protected by the First Amendment. 393 U.S. 503 (1969). In *Tinker*, students protested the Vietnam War by wearing black arm bands to school; they were suspended for their actions and sued the school district. *Id.* The Supreme Court held that “[i]n the absence of a specific showing of

¹ Indeed, such a policy would also be challengeable under the First Amendment as a form of content based discrimination.

constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.” *Id.* at 511. The Court in *Tinker* articulated the fundamental and enduring idea that students do not simply “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Id.* at 506; *see also Morse v. Frederick*, 551 U.S. 393, 406 (2007); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (also acknowledging that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”)

Thus, under *Tinker*, students have the right to express their views—political and otherwise—so long as they are not doing so in a manner that, in a specific and articulable way, “materially and substantially” disrupts classes, other school activities, or the rights of other students. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (quoting *Tinker v. Des Moines Indep. Comm. School District*, 393 U.S. 503, 511 (1969)).

A school also may not single out speech for disfavored treatment simply because it disagrees with the viewpoint expressed by the student. *See Good News Club v. Milford Central School*, 121 S. Ct. 2093 111-12 (2001); *see also Bd. of Edu., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (under the First Amendment, public schools can’t remove books from their libraries just because of the viewpoints and ideas in those books). In one instructive recent case brought by the ACLU, *PFLAG v. Camdenton R-III School District*, a federal court ordered the school district to cease using an internet filter for student internet use because the filter used a viewpoint-discriminatory ‘sexuality’ category that blocked all LGBT-supportive information, while allowing students to view anti-LGBT sites. In March 2012, the school district agreed in a settlement to stop blocking pro-LGBT sites, submit to monitoring for 18 months to confirm compliance and pay \$125,000 in legal fees and costs. Indeed, a school may not restrict speech simply because others might disagree with the speaker’s message, even if that message is abhorrent to some or all others at the school.

Since *Tinker*, two Supreme Court cases have identified situations in which the constitutional rights of students in public schools are different from those of adults in terms of content and viewpoint discrimination. The Court in *Bethel* found that the school did not violate free speech when it regulated speech that was lewd and offensive, stating that it was a “highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.” *Id.* at 683. Second, in *Morse v. Frederick*, the Court held that students’ First Amendment rights could be restricted when it “is reasonably viewed as promoting illegal drug use.” 551 U.S. at 403.

The writing on [REDACTED]’s arm, “love trumps hate,” is protected speech, and the school seems to have engaged in both content discrimination—which was not justified under these facts by a specific concern about substantial and material disruption to school—and viewpoint discrimination, which is never permissible outside of specific instances of the promotion of illegal activity or violating the rights of others (such as being slanderous, libelous, bullying, harassing, vulgar, or obscene). The message on [REDACTED]’s arm was none of those things; to the contrary, it was a message of love and acceptance. Further, it did not “materially and substantially disrupt the work and discipline of the school.” *Tinker* at 512. [REDACTED]’s speech, because it contained a political message, was “at the core of what the

First Amendment is designed to protect.” *Virginia v. Black*, 538 U.S. 343, 365 (2003). Simply put, the school may not restrict his speech based on its political nature, or his specific viewpoint that “loves trump hate.” Therefore, [REDACTED]’s speech was protected by the First Amendment and he had the right to display such messages on his arms.

[REDACTED] is also protected under state and federal law from discrimination, including harassment and bullying, on account of his gender identity. At the time Mr. Smith harassed [REDACTED] in his physical education class by repeatedly and intentionally mis-gendering him, he was covered by the Iowa Civil Rights Act, federal Title IX, and the state anti-bullying and anti-harassment law.

Chapter 216 of the Iowa Code is known as the Iowa Civil Rights Act of 1965 (“ICRA”). ICRA provides protection against various forms of discrimination. Among other things, ICRA prohibits discrimination on the basis of sexual orientation and gender identity, which were added as protected classes in 2007. ICRA defines “gender identity” as “a gender-related identity of a person, regardless of the person’s assigned sex at birth.” ICRA also prohibits discrimination based on the perception that someone possesses a characteristic.

Iowa Code section 216.9 makes it illegal for any educational institution to discriminate in any program or activity on the basis of gender identity. This includes, but is not limited to, any academic, extracurricular, research, occupational training, or other program; denial of comparable opportunities in intramural and interscholastic athletic programs; and employment in educational institutions. The protections apply to students, teachers, other school employees, and volunteers.

Federal law also requires that public schools protect students from discrimination or harassment based on race, color, religion, sex, national origin, or disability. *See, e.g.*, Titles IV and VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation of 1973, Titles II and III of the Americans with Disabilities Act, and the Individuals with Disabilities Education Act. Schools receiving federal funding may not discriminate on the basis of a student’s sex, which includes a student’s gender identity. When a school is informed that a student is transgender and will identify as a gender different than that of which the school was previously informed, the school must treat the student consistent with the student’s gender identity. Therefore, purposefully mis-gendering transgender students in an attempt to harass or demean them violates Title IX.

School officials may not simply turn a blind eye to bullying and harassment of transgender students (or any students). Schools can be held liable for failure to protect students from bullying and harassment. *See, e.g. Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996); *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130, 1134-35 (9th Cir. 2003). School officials must take seriously the claims of harassment and fully and effectively resolve them. *See Flores* at 1135-36 (“Failure to take any further steps once he knew his remedial measures were inadequate supports a finding of deliberate indifference.”). School districts may violate these federal civil rights statutes and the Department’s implementing regulations when peer (or more egregiously, teacher) harassment based on race, color, national origin, disability, or sex—which

includes gender identity—is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees. 34 C.F.R. parts 100, 104, and 106. Some schools that have failed to protect students have had to pay hundreds of thousands of dollars in damages. Districts and employees are also prohibited from retaliating against or taking adverse action against students who have asserted or exercised their rights and must not retaliate against others who have supported these students’ rights.

State anti-bullying law provides seventeen areas specifically addressed as protected for students. Iowa Code § 280.28 (2015). They are: real or perceived age, color, creed, national origin, race, religion, marital status, sex, sexual orientation, gender identity, physical attributes, physical attributes, physical or mental ability or disability, ancestry, political party preference, political belief, socioeconomic status, or familial status. *Id.*

Students whose civil rights have been violated may file complaints with the Iowa Department of Education, the U.S. Department of Education, the U.S. Department of Justice, the Iowa Civil Rights Commission, or in courts of law, but it is far preferable for schools to prevent bullying and harassment through education and training of school staff, teachers, and students, as well as addressing issues that do arise swiftly and in accordance with law.

III. Required Remedy

The First Amendment and civil rights of all students must be protected at school.

Rather than rush to pursue litigation, our clients would like to first try to work with your school toward informal resolution of these issues in the manner that best protects [REDACTED] and all students.

To that end, in light of the serious nature of the violations, we demand that Newton High School, together with all faculty and staff, immediately refrain from impeding students’ First Amendment rights. To ensure that those rights are protected, it is important that faculty and staff are properly instructed on the First Amendment rights of students and that internal school policies are reviewed and understood, in addition to working to help empower students to know their rights are protected at school, and assuring [REDACTED] directly that his rights will be protected at school moving forward. Therefore, we request the following be done by May 1, 2017:

1. The school should provide required training to all teachers regarding the First Amendment rights of students and the related internal policies of Newton High School. This type of instruction could be done with minimal resources and time on the part of the administration, and could be completed as a one- or two-hour session within a single in-service teacher training day.
2. To counteract an environment that chills their protected expression, students themselves should be educated about their First Amendment rights at school. To assist you in this process, we have a very well regarded free guide for students setting out basic information in a kid-friendly way, which you can download and distribute freely from

this link: <https://www.aclu-ia.org/en/student-handbook>. Depending on our availability, we would also be willing to talk to all the students about their rights at schools at a school assembly.

3. School staff should be instructed to refer to students who identify as transgender by their chosen gender identifiers and pronouns. We request that the school provide and require training for understanding and interacting with transgender students in an appropriate, inclusive way.
4. Finally, we ask that the school issue a formal letter of apology to [REDACTED] for asking him to remove the writing from his arm as well as for Mr. Smith's insensitivity in referring to [REDACTED] as "girl." That would go a long way to helping [REDACTED] feel welcome and safe at his school.

Please let me know by **Monday, March 6, 2017** whether you will comply with these four requests. If you have any questions, please contact me directly at (515) 207-0567 and rita.bettis@aclu-ia.org.

Very truly yours,



Rita Bettis
Legal Director