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April 4, 2025

Alpena Board of Education
c/o President Anna Meinhardt
2373 Gordon Road
Alpena, MI 49707

Superintendent David Rabbideau
Alpena Public Schools
2373 Gordon Road
Alpena, MI 49707

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Dear School Board Members and Superintendent Rabbideau:

The ACLU of Michigan recently became aware that the Alpena Public Schools Board of Education will consider some proposed policy changes at its April 7 meeting. One such policy discriminates against transgender students by requiring students to use restrooms and locker room facilities in accordance with gender they were assigned at birth. The other proposed policies would permit the public to bypass the district's established process and go directly to the Board to remove curriculum, instructional, media and library materials. The proposed policies raise serious civil liberties concerns and we urge the Board to reject them.

The proposed bathroom and locker room policy violates Michigan's civil rights laws, which explicitly protect transgender students from discrimination in education.

Requiring transgender students to use restrooms and locker rooms that correspond to the gender assigned to them at birth is profoundly harmful and discriminatory. Such policies force trans students to deny their gender identity, stigmatize them, segregate them, and require them to "out" themselves, putting them at risk for both harassment and physical harm by other students. 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.¹ Under these circumstances, transgender students

¹ 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>; 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>.

often try not to use the restroom out of fear for their own safety and well-being, even though they need to, which can lead to painful urinary tract infections or other medical problems.²

To address these harms, Michigan's Elliott-Larsen Civil Rights Act ("ELCRA") was amended in 2023, and declares that "the full and equal utilization of public accommodations, public service, and *educational facilities* without discrimination because of . . . sex, sexual orientation, *gender identity or expression* . . . is recognized and declared to be a civil right."³ Gender identity or expression means "having or being perceived as having a gender- related self-identity or expression whether or not associated with an individual's assigned sex at birth."⁴ Educational institutions, places of public service, and places of public accommodation may not deny a person the full enjoyment of goods, services, facilities, privileges, advantages, or accommodations because of that person's gender identity or expression.⁵ Thus, in addition to harming transgender students, a straightforward application of ELCRA shows that singling them out to deny them access to restrooms and other facilities that align with their gender identity violates the law.

We recognize that a board member has suggested that Alpena Public Schools should consider adopting the proposed policy in order to align with the Trump Administration's January 29, 2025 Executive Order, which directs federal agencies to develop plans that might eventually threaten to rescind federal funding from school districts that support the "social transition" of transgender students, which the administration defines as including permitting transgender students to access restrooms in accordance with their gender identity. It should be noted, however, that an Executive Order is not a law, is not self-executing, and is subject to judicial review by the courts. An Executive Order cannot supersede already established legal precedent regarding an issue, nor can it supplant the responsibility of a school district to comply with established laws, including state and federal civil rights laws.⁶ In sum, Alpena School District has a legal responsibility to follow Michigan civil rights laws. The Executive Order, which will ultimately lead to litigation in federal court, does not waive nor contravene that responsibility. Adopting a bathroom and locker room

² Tanya Albert Henry, *Exclusionary bathroom policies harm transgender students*, American Medical Association (Apr. 17, 2019), <https://www.ama-assn.org/delivering-care/population-care/exclusionary-bathroom-policies-harm-transgender-students>.

³ MCL 37.2012(1) (emphasis added).

⁴ MCL 37.2013(f).

⁵ MCL 37.301(a)-(b); 37.302(a) 37.402(a)

⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (The President's authority "must stem either from an act of Congress or from the Constitution itself."); *Myers v. United States*, 272 U.S. 52, 116 (1926) ("The Constitution's division of power among the three branches is violated where one branch invades the territory of another . . ."); *State v. Su*, 121 F. 4th 1, 16 (9th Cir. 2024) ("[P]olicy justifications cannot supersede statutory text."); *U.S. v. Rhode Island Dep't of Corrections*, 81 F. Supp.3d 182, 188 (D. Rhode Island, 2015), citing *Commerce of U.S. v. Reich*, 74 F.3d 1322, 1332-34 (D.C. Cir. 1996) ("[I]f an executive order conflicts with an existing statute, the executive order must fall.").

policy that blatantly singles out transgender students for discrimination would expose the District to costly legal liability.

Allowing the removal of educational and instructional materials, equipment, and media without appropriate safeguards carries serious First Amendment implications.

Currently Alpena's process for complaints regarding curricular, educational, media and library materials is as follows: if a parent, guardian, or community member has an issue with instructional materials or resource materials (including library books), they can first try to informally resolve the matter with the appropriate staff person.⁷ If the matter cannot be informally resolved, there is a formal process by which the principal convenes a review committee that includes the complainant. If the complainant disagrees with the review committee's written decision on materials or library books, they can appeal to the superintendent, who then brings the matter to the Board, along with all written material related to the matter. Consistent with longstanding First Amendment jurisprudence, the current policy also advises that "no challenged material may be removed solely because it presents ideas that may be unpopular or offensive to some. Any Board action to remove material will be accompanied by the Board's statement of its reasons for removal."⁸

Despite the pedagogical and constitutional soundness in the current policy, the Board will consider a proposed amendment to the policy at its April meeting. The proposed amendment provides an option for a complainant to skip the established process and to go directly to the Board to request removal of instructional materials and library books. The Board can then decide to remove such materials by a majority vote. The rationale for this proposed policy change is that some community members may find the current process to be too cumbersome and may discourage members from challenging materials. However, the Board acknowledged at its last meeting that there had been no challenges to any materials.

It is very important that school districts have an established open, detailed and transparent process, such as the one provided in the existing policy, for reviewing challenges to instructional materials and library books. Transparent policies with review help to prevent the unconstitutional censorship of ideas and concepts simply because some community members do not approve of them. In contrast, bypassing the existing procedures will create opportunities for unconstitutional attacks on educational materials, which have been shown to disproportionately harm LGBTQ+ people and people of color. For an example, one needs to look no further than the recent rise in challenges to library books. In 2024, books challenged in libraries across the United States reached the highest level ever documented.⁹ Data shows that this harmful trend disproportionately affects people of

⁷ Public Complaints and Grievances, Alpena School Board Policy 9130, last revised Apr. 14 (2003), <https://go.boarddocs.com/mi/alpena/Board.nsf/Public#>.

⁸ *Id.*

⁹ Jo Yurcaba, *More than half of books banned last year featured LGBTQ characters or people of color; report finds*, NBC News (Feb. 27, 2025), <https://www.nbcnews.com/news/nbcblk/banned-books-lgbtq-transgender-black-people-of-color-pen-america-rcna193879>.

color and LGBTQ+ people, as 36% of the books banned in the last school year featured characters of color and 25% included LGBTQ characters or people.¹⁰ As a result, LGBTQ+ people and people of color do not see their lives reflected in the library's offerings, and they feel the stigma attached to their stories. Restricting students' access to books and other instructional materials limits their opportunity to be introduced to new ideas and information, to learn about themselves and about people who are different from themselves, and to become active and informed citizens in their communities. To the extent that some individual parents wish to insulate their children from exposure to ideas that might make them uncomfortable or conflict with their personal values or religious beliefs, such an objective does not justify culling the school library's collection or curriculum to deny all students access to books and other materials that some parents dislike.

It has long been recognized that removing books from school libraries is a serious threat to the First Amendment rights of students and their families. The Supreme Court held over 40 years ago that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982). "[T]he special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students." *Id.* at 868. "[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Id.* "[I]n light of the special role of the school library as a place where students may freely and voluntarily explore diverse topics," a school district's "non-curricular decision to remove a book well after it had been placed in the public school libraries evokes the question whether that action might not be an unconstitutional attempt to 'strangle the free mind at its source.'" *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 190 (5th Cir. 1995) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

The policy that the Board is considering, if adopted, would create a situation that is strikingly similar to the facts of *Board of Education v. Pico*, where school board members removed books from the library shelves after obtaining a list of "objectionable" books from a "politically conservative organization of parents." *Pico*, 457 U.S. at 857. Although the school board in that case had been able to cherry-pick excerpts from many of the disfavored books containing vulgar or sexually explicit language, the Supreme Court held that the school board violated the First Amendment insofar as they "intended by their removal decision to deny [students] access to ideas with which [the board members] disagreed." *Id.* at 871. The proposed policy here, too, opens the Board up to liability under the First Amendment.

Removing controversial materials from schools removes students' ability to think for themselves.

In debating whether to provide materials that are perceived to be controversial to students, it is easy to lose sight of the overarching function of our schools: to train young people to think for themselves. Many years ago, the Supreme Court explained the essential role our schools play in helping young people to develop into the reflective and critical citizens that a democracy needs to survive and flourish: "The Nation's future depends upon leaders trained through wide exposure to

¹⁰ *Id.*

[a] robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.” *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (internal quotation marks and alterations omitted). Indeed, students in a diverse society will thrive only if a diverse array of literature and informational material are available to them—from literature by and about LGBTQ+ people, to religious texts of all faiths, to books about science, art and history written from traditional as well as non-traditional perspectives. By contrast, when school officials attempt to create a “sanitized” learning space by eliminating controversial texts from school libraries, they undermine this critical function of public education. And when materials can be removed based on parents’ complaints about the author’s message or point of view, it paves the way for an unending series of attempts by one group or another to cleanse a school of material based on what a vocal faction finds objectionable. In the end, schools become another arena for political warfare, rather than a space of learning for our youth. Neither students nor their communities are well served by this practice.

While school districts have broad discretion in the management of school affairs including curriculum, curricular decisions must be based on legitimate pedagogical interests and not be an attempt to suppress ideas in violation of the First Amendment. That is why it is so important that school districts have an open, thorough and robust process for reviewing complaints about instructional materials—to ensure that materials are not being removed because of the ideas that they contain, and to provide school boards with important and significant information regarding materials being challenged. This includes information from staff regarding why instructional materials have been selected for the curriculum and or why a book was selected for the school’s library collection, including the book’s relative merits. Circumventing this process for purported efficiency reasons runs the risk of suppressing ideas and violating the constitutional rights of students to be able to receive information.

Conclusion

Denying students access to restrooms that align with their gender identity is not only harmful to their well-being, it also violates the law. Additionally, allowing a vocal minority to dictate what instructional materials are provided to students paves the way for First Amendment violations, exposing the district to liability. Further, such a practice undermines the public education system’s goal of helping students become members of society who can digest information and think for themselves. We therefore urge you to reject the proposed policy changes regarding access to bathrooms and locker rooms, as well as any effort to short-circuit the formal review process for handling complaints regarding instructional materials and library books.

SIGNATURES FOLLOW ON THE NEXT PAGE