GENDER JUSTICE

December 19, 2016

VIA EMAIL

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Re: David and Hannah Edwards v. Nova Classical Academy - No. A-5376

Dear Mr. Yang and Mr. Fletcher:

Because some months have passed since the submission of our July 8, 2016, rebuttal letter, we thought it might be helpful to submit a brief update.

First, as the Edwardses stated in our recent meeting with Mr. Yang, they believe the issues raised by their Human Rights charge are more critical now than ever. It is important to them to press forward for a number of reasons. For one, they have observed that the events at Nova last year continue to have a significant negative impact on their daughter, H.E. They would like to find a resolution that helps make her whole. Just as importantly, they know that Nova's actions and policies continue to affect current and future Nova students and the community at large. The Edwardses would like to find a resolution that makes the community whole and helps ensure equal educational opportunity for all students.

The Edwardses stand by the analysis of the law and the facts laid out at length in their July 8 letter. Subsequent legal developments remain consistent. For example: courts have continued to recognize that laws barring discrimination "because of sex" protect transgender people, and that those protections must include appropriate access to bathroom and locker room facilities. *See, e.g., Roberts v. Clark Cnty Sch. Dist.*, No. 2:15-cv-00388-JAD-PAL, 2016 U.S. Dist. LEXIS 138329 (D. Nev. Oct. 4, 2016) (granting plaintiff, a transgender male police officer, partial summary judgment on his employment discrimination claims).

The fact that the Supreme Court will be issuing a decision next year in *Gloucester County School Board v. G.G.,* a case involving a transgender high school student, might seem to introduce uncertainty in the Department's review of the Edwardses' charge. *See Gloucester Cnty. Sch. Bd. v. G.G.*, 196 L.Ed.2d 283 (U.S. 2016) (granting cert. of the Fourth Circuit's decision in *G.G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. Apr. 19, 2016)). In fact, however, the Supreme Court's decision in *Gloucester County* should have no bearing on the outcome here. The most obvious reason for this is the independence of the City of Saint Paul Legislative Code. To be sure, in recent years, Title IX, the Minnesota Human Rights Act, and the Code have been largely in alignment. But even if the Supreme Court were to undo recent Title IX precedent, eliminating federal protections for

transgender students, the protections under the MHRA and the Code would stand. There would be no direct impact of divergent (and regressive) federal law, since Title IX does not preempt stronger state or municipal protections, and there would be no occasion for an indirect effect, since the protections under the MHRA and the City of Saint Paul Legislative Code, unlike those under Title IX, do not arise out of a judicial interpretation of the phrase "discrimination because of sex"; rather, they arise from express statutory protections against discrimination on the basis of gender identity or expression.[1]

The best analog for the Edwardses' charge may be the claim brought forward several years ago by a young transgender girl in *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014). That girl, now known to the world as Nicole Maines, brought suit under the Maine Human Rights Act to challenge her school's insistence that she use a segregated staff bathroom. 86 A.3d at 603-04. In a landmark decision, the Maine Supreme Judicial Court found for Nicole – a transgender student who just wanted the right to attend school as her authentic self. *Id.* at 606-07. It did so by applying the rights guaranteed to her under state law, independent of any court's analysis of Title IX. The Department has a similar opportunity here: to decide what is correct under the City of Saint Paul Legislative Code.

A decision that protects educational opportunity for all students, regardless of gender identity, will benefit Saint Paul schools. *See* Ex. U to our July 8 letter (MediaMatters Report) (reporting on its investigation into 17 school districts with model policies: "Years after implementing [these] antidiscrimination policies, none of the schools have experienced any problems."). And it will benefit H.E., who deserves every chance to thrive. Here again, Nicole Maines's story provides a positive model. She was successful in school and has turned into an amazing young woman – in large part because her rights were protected under Maine's human rights law. Her story is worth hearing first hand – for example, in this recent interview with Terry Gross of *Fresh Air*, http://www.npr.org/2016/12/05/504428457/11-transgender-americans-share-their-stories-in-hbos-the-trans-list.

The Edwardses believe that a similar happy ending can happen here, and they look forward to working further with the Department to achieve it.

Sincerely,

Jill R. Gaulding

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[1] Also of note: the Supreme Court may not even reach this broad question of the meaning of "because of sex" under Title IX, since *Gloucester County* actually presents a much narrower issue of federal law, namely, whether courts should give "*Auer* deference" to the Department of Education's interpretation of a Title IX regulation, 34 C.F.R. § 106.33. *See* 822 F.3d at 719-24 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)).