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August 23, 2014

Steve Bradshaw, Superintendent
Sitka School Board Members
Sitka School District
300 Kostrometinoff Street
Sitka, AK 99835

Re: **Sitka, Alaska School District Proposed Policy Regarding Abortion Providers in Public and Charter Schools**

Dear Mr. Bradshaw and Board Members:

We are attorneys who have been asked by a parent whose children attend school in the Sitka School District, Mr. Ed Gray, to write to you regarding a proposed policy that Mr. Gray and other concerned Sitka parents asked SSD to adopt prohibiting abortion providers like Planned Parenthood of the Great Northwest from delivering or distributing either instruction or materials in Sitka's public or charter schools. The policy that the parents asked SSD to consider and adopt was neither novel nor unique. The proposed policy was in fact intended to be modeled after laws that have been adopted as statute and put into effect in both the States of Missouri and Lousiana. In Missouri, M.O.R.S. 170.015.1 went into effect in 2007. In Lousiana, just this year Governor Bobby Jindal signed H.B. 305 into law following the Bill's passage with overwhelming bipartisan support in the Lousiana Legislature.

We understand that SSD President Lon Garrison asked an attorney, Ann Gifford of the Faulkner Banfield law firm, to provide the District with legal analysis regarding Mr. Gray's proposed policy. We have reviewed Ms. Gifford's May 27, 2014, Memorandum and find its constitutional and legal analysis to be significantly deficient and incorrect. First, Ms. Gifford has misread and/or misunderstood the proposed policy. The proposed policy would not directly restrict or direct SSD employees or personnel with respect to curriculum or with respect to the teaching of health related matters to students as may already be contained within SSD curriculum. Nor would the proposed policy restrict the associational rights of teachers employed by SSD who happen to teach health related topics or subjects within the SSD curriculum.

If adopted to mirror the current Louisiana statute, the proposed policy would simply prohibit any "employee" or "representative" who is "*acting on behalf of an organization, individual, or any other entity that performs elective abortion*" from presenting or delivering instruction regarding health topics, sexuality, and/or family planning. The proposed policy would also prohibit such a person who is "acting on behalf of" an abortion provider, from distributing materials or media on the

above subjects if the materials or media "are created by or bear the identifying mark of an organization, individual, or any other entity, or an affiliate of . . . such . . . that performs elective abortion." The above prohibitions would only apply to:

1. A person who is "employed by" an abortion provider and who *when performing the prohibited acts* is "*acting on behalf of*" the abortion provider; and

2. A person who is a "representative" of an abortion provider and who *when performing the prohibited acts* is "*acting on behalf of*" the abortion provider.

The above prohibitions would not apply to SSD teachers who are teaching health related subjects within the SSD curriculum. SSD teachers who teach health related subjects already within the SSD curriculum would be acting on behalf of SSD and not on behalf of any abortion provider—this would be true regardless of whether the teacher might in their personal life, outside of their SSD employment, serve as a Planned Parenthood board member or other type of volunteer. Thus, the proposed policy most assuredly would not "prevent teachers from serving on the boards of organizations like Planned Parenthood."

Second, the proposed policy would not restrict any constitutional or legal right of persons or entities outside of SSD, such as Planned Parenthood. Persons and entities outside of SSD like Planned Parenthood have no constitutional or other legal right to speak or otherwise present information or materials to SSD students at SSD schools. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or any manner than may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981). In fact, it is well-settled law that public school districts have broad authority to determine their curriculum. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) ("States and local school boards are generally afforded considerable discretion in operating public schools"); *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002) ("[T]he curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere").

It is equally well-settled that a public school district's decisions over what materials are available to students within their schools and libraries are curricular decisions to which the courts owe substantial deference. *Board of Education, Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982) (applying the principle that "local school boards have broad discretion in the management of school affairs" in the library context); *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir. 1972) (same).

The notion that Planned Parenthood and/or its employees or representatives can claim some First Amendment right to access SSD classrooms so that they can speak on any topic is seriously misguided. It is certainly true as a matter of First Amendment free speech law that government

entities like a school district such as SSD can create a "forum" for protected speech, and that within such a "forum" the government entity cannot engage in "viewpoint discrimination." But, there is absolutely no legal authority to be found–not from any court of any jurisdiction in this Nation—that will support Ms. Gifford's novel idea that persons or entities outside of a school district can claim that a public school classroom is a First Amendment "forum" to which they are entitled to have access.

First Amendment forum analysis does not govern public schools and their classrooms. Hence, the cases that Ms. Gifford refers to do not govern in this situation because they apply First Amendment forum analysis. *See Searcy v. Crim*, 815 F.2d 1389, 1393–94 (11th Cir. 1987) (assuming that bulletin boards within a public school were nonpublic forums); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 526 (3d Cir. 2004) (finding that flyer posting, flyer distribution, and tabling forums in public schools are limited public forums). A public school or publically funded charter school is simply not a public forum. The United States Supreme Court has even concluded that public libraries are not open public forums. In 2003, when considering a challenge to mandated internet filters, the Supreme Court concluded that the principles of "forum analysis and heightened judicial scrutiny are incompatible . . . with the discretion that public libraries must have to fulfill their traditional missions." *United States v. Am. Library Ass'n (ALA)*, 539 U.S. 194, 205 (2003); *id.* at 215–16 (Breyer, J. concurring) ("[T]he plurality finds the "public forum" doctrine inapplicable. . . . I agree. . . ."). The Court repeatedly emphasized that a library—whether by collecting books or providing internet access (for the two are constitutionally equivalent)—"facilitates research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality"; it does not open a forum for private expression. See *American Library Association*, 539 U.S. at 206; *accord id*. at 209 n.4, 213 n.7.

Simply put, whether viewed through a pedagogical or library lens, forum doctrine does not govern the proposed policy to prohibit abortion providing organizations and their materials from public or charter schools. Indeed, it is the Sitka School Board that is responsible for determining the means for educating Sitka students to become productive members of their community and society as a whole and to behave responsibly.

Third, just as the First Amendment right of free speech in open public forums does not apply within the context of public schools, neither is there any constitutional infirmitiy with the proposed policy as related to the associational rights of teachers. An SSD employee is free to associate with Planned Parenthood or any other abortion providing organization as Planned Parenthood's employee or volunteer representative. However, when that SSD employee is acting in their capacity as an SSD employee, their speech can be limited. "[T]he government as employer indeed has far broader power than does the government as sovereign." *Waters v. Churchill,* 511 U.S. 661, 671 (1994) (plurality opinion). Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. *Connick v. Myers,* 461 U.S. 138, 143 (1983).

Courts employ the so-called *Pickering-Connick* test for public employee speech. *Pickering v. Board of Education,* 391 U.S. 563 (1968); *Connick,* 461 U.S. 138. When a public employer conveys its message through its employee, the employee's speech is not covered by the First Amendment. *Rust v. Sullivan,* 500 U.S. 173 (1991); *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819 (1995). Where a public school employee speaks pursuant to his or her work responsibilities, the employee's free speech interests are not implicated. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Indeed, "it is the educational institution that has a right to academic freedom, not the individual teacher; where a teacher speaks pursuant to official job duties, the teacher is not entitled to the protections of the First Amendment." *Evans-Marshall v. Bd. of Educ. Of Tipp Exempted Vill. Sch. Dist.,* 624 F.3d 332, 344 (6th Cir. 2010). *See also Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 312 (1978) (The "four essential freedoms" that constitute academic freedom have been described as the school's freedom to choose "who may teach, what may be taught, how it shall be taught, and who may be admitted to study.); *Meyer v. Monroe Cnty. Cmty. Sch. Corp.,* 474 F.3d 477 (7th Cir. 2007) (if employed to teach elementary school, for example, the teacher must teach the prescribed material and not discuss matters the teacher is told to avoid). If a public employee's speech is considered to involve a matter of public concern, a court would weigh whether the employee's interest in expression outweighs the employer's interest in workplace efficiency and avoiding disruption. *Connick v. Myers*, 461 U.S. 138*; Garcetti*, 547 U.S. 410 (ruling that public employee speaking pursuant to official duties is not speaking as private citizen, and First Amendment does not bar employer regulation of speech); *Nicholson v. Bd. of Educ., Torrance Unified Sch. Dist.*, 682 F.2d 858 (9th Cir. 1982) (ruling teacher's speech rights not infringed where interfered with smooth school operations). Thus, even assuming *that* those abortion provider employees *or representatives* who would be precluded from delivering instruction or materials to students in Sitk*a's* public schools could be considered *SSD* "employees," the First Amendment analysis, including forum analysis, that is presented *Ms. Gifford* in *her* memorandum to the *Board* simply does not apply.

Third, nothing within the proposed policy would cause SSD to take a "position" on abortion. In fact it is not at all clear how any reasonable person could understand the proposed policy to cause SSD to take a position on abortion, let alone a religious position or view on abortion. The policy would simply direct that abortion providers and their employees and representatives have no access to SSD students within the classroom. This proposed policy would take no position on the subject of abortion. SSD and SSD alone would continue to control its curriculum on any health related subject, including but not limited to sexuality, family planning, and abortion. Because the proposed policy takes no position on abortion it is inconceivable how Ms. Gifford concludes that perhaps the policy would run afoul of laws or constitutional mandates dictating that government entities remain neutral on the subjects of religion and religious doctrine.