AMERICAN CIVIL LIBERTIES UNION of LOUISIANA
FOUNDATION

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Via email and regular mail

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Dear Mr. Broussard, Ms. Roark, and Mr. Christman:

It has come to our attention that Delhi Charter School operates a Student Pregnancy Policy (hereinafter referred to as the "Policy") that is in clear violation of federal law and the U.S. Constitution. The Policy, which is attached, states in relevant part:

> If an administrator or teacher suspects a student is pregnant, a parent conference will be held. The school reserves the right to require any female student to take a pregnancy test to confirm whether or not the suspected student is in fact pregnant. The school further reserves the right to refer the suspected student to a physician of its choice. If the test indicates that the student is pregnant, the student will not be permitted to attend classes on the campus of Delhi Charter School.
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> If a student is determined to be pregnant and wishes to continue to attend Delhi Charter School, the student will be required to pursue a course of home study that will be provided by the school. . . Any student who is suspected of being pregnant and who refuses to submit to a pregnancy test shall be treated as a pregnant student and will be offered home study opportunities. If home study opportunities are not acceptable, the student will be counseled to seek other educational opportunities.

The Policy is in clear violation of Title IX of the Education Amendments of 1972 and its implementing regulations, as well as the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, and also raises serious concerns of vagueness in violation of the First Amendment.

I. The policy violates Title IX and its implementing regulations because it excludes students from educational programs and activities on the basis of sex.

Delhi Charter School's Student Pregnancy Policy violates Title IX of the Education Amendments of 1972, the federal civil rights law that prohibits discrimination on the basis of sex in education programs and activities, in all schools that receive federal financial assistance. 20 U.S.C § 1681. The statute provides in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Discrimination on the basis of pregnancy is a violation of Title IX. *See* 34 C.F.R § 106.40; *see also* 34 C.F.R § 106.21(c)(2); 34 C.F.R § 106.57(b). Federal Title IX regulations specify that a school receiving federal funds "shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom." 34 C.F.R. § 106.40(b)(1). Furthermore, Title IX prohibits schools from excluding pregnant students from extracurricular activities, sports, or educational programs, whether or not they are directly operated by the school, and requires schools to apply the same policies for participation in programs or activities to pregnant students as it does to other students; for example a school may only require medical documentation that the student is able to participate in an activity only if it requires similar documentation from other students with medical conditions. 34 C.F.R. § 106.40(b)(1), (2).

Furthermore, while Title IX permits the provision of separate programs for pregnant and parenting students, such as home instruction or tutoring, the law mandates that participation in such alternative educational services must be completely voluntary and comparable to those offered to non-pregnant students. 34 C.F.R. § 106.40(b)(1), (3).

The Policy is in violation of Title IX and its implementing regulations because it singles out students suspected of being pregnant for forced medical testing and excludes them from attending school on the same terms as other students, on the basis of sex and actual or suspected pregnancy. If applied according to its terms, the Policy subjects all female students – and only female students – to the possibility of mandatory pregnancy testing, based on a subjective "suspicion" that they might be pregnant, at the risk of being barred from attending school with their peers. Male students who might also have engaged in sexual activity or be expecting children are not subjected to this risk. Students confirmed to be pregnant – or students suspected of being pregnant who refuse to submit to the pregnancy test – are excluded from attending school during the course or presumed course of their pregnancy, and forced to participate in an alternative program – home-study – if they wish to continue their education. The Policy thus violates the plain terms of Title IX by excluding students, on the basis of sex and actual or suspected pregnancy, from participation in school on the same terms as other students, denying them the benefits of attending school, and subjecting them to facially disparate treatment. It further violates the terms of Title IX's implementing regulations, which prohibit excluding pregnant students from educational programs and activities, treating them differently than other students, or mandating their participation in alternative programs (in this case, home-study). 34 C.F.R. §§ 106.36(a)(b), 106.40(b)(1).

We remind you that in addition to Title IX's mandate that pregnant students are entitled to an education free from discrimination, Title IX also imposes affirmative obligations on schools receiving federal financial assistance. Delhi Charter School, to be in compliance with Title IX and its regulations, must excuse absences for medical reasons related to pregnancy and childbirth for as long as a student's medical doctor deems necessary, allow a pregnant student to make up her work, and reinstate her to the status she held before her pregnancy-related absences.34 C.F.R. § 106.40(b)(2), (5).

II. The Policy violates the Equal Protection Clause of the U.S. Constitution, because it treats female students differently than male students and because it relies on impermissible sex stereotypes linked to sex

The Policy violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution because it constitutes disparate treatment on the basis of sex. The Policy mandates that girls suspected of being pregnant – but not boys who may be suspected of having engaged in similar sexual activity – submit to mandatory pregnancy testing or risk being barred from attending school, and that any student who is confirmed to be pregnant (or who refuses to take the test) be excluded from classes and pursue home-study; boys who are expecting children – or who are suspected of having engaged in sexual activity – are not similarly treated. In other words, the Policy singles out for punishment expectant girls or girls suspected of having engaged in sexual activity. This constitutes disparate treatment on the basis of sex meriting heightened scrutiny under the Equal Protection Clause.

The Policy's discrimination on the basis of pregnancy also constitutes *per se* sex discrimination, thus meriting heightened scrutiny under the Equal Protection Clause, because it relies on impermissible stereotypes linked to sex and pregnancy. The Supreme Court has recognized that for purposes of Equal Protection analysis, categorical distinctions involving pregnancymay be "mere pretexts designed to effect an invidious discrimination against the members of one sex or the other." *Geduldig v. Aiello*, 417 U.S. 484, 496-97 & n.20 (1974); *c.f. also Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 731, 730, 734 n.6 (2003) (recognizing that sex stereotypes regarding pregnancy, maternity leave, and "the allocation of family duties" remain key barriers that continue to hinder women's advancement in the workforce, and constitute a permissible basis on which to abrogate states' immunity from suit under the Family Medical Leave Act).

Delhi Charter School's deprivation of students' rights to attend school solely because of actual or suspected pregnancy is a pretext for sex discrimination, because it is based on the archaic and pernicious stereotype that a girl's pregnancy sets a "bad example" for her peers—i.e. that in having engaged in sexual activity, she has transgressed acceptable norms of feminine behavior. Furthermore, mandating home-study for pregnant and suspected pregnant girls may also reflect the stereotypes that girls who become pregnant will be unable or unwilling to continue attending classes on the same terms as other students. As such, the Policy's discrimination on the basis of pregnancy constitutes *per se* sex discrimination because it relies on impermissible sex stereotypes linked to sex and pregnancy, meriting heightened scrutiny.

Under the Equal Protection Clause, sex-based classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).This means that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action," and gender-based classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *U.S. v. Virginia*, 518 U.S. 515, 531-32 (1996). Delhi Charter School cannot meet this high burden. There is no justification, substantial or otherwise, that would be served by excluding girls who are pregnant or suspected of being pregnant from attending school,

III. The policy violates the substantive Due Process right to procreate, and to decide whether to continue or terminate a pregnancy.

The Supreme Court has recognized that the right to procreate is "fundamental to the very existence and survival of the race," and is thus protected by the Due Process Clause of the Fourteenth Amendment; governmental restrictions on that right are subjected to the most searching judicial review. *See Skinner v. State of Okl. ex rel. Williamson* , 316 U.S. 535, 541 (1942) (applying strict scrutiny to invalidate state statute mandating sterilization of certain criminals); *see also Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"). "Where a decision as fundamental as whether to bear or beget a child is involved, [the state restriction] imposing a burden on it may be justified only by compelling state interests and must be narrowly drawn to express only those interests." *Cary v. Population Servs.*, 431 U.S. 678, 686 (1977); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (noting that the decision in *Roe v. Wade* "has been sensibly relied upon to counter" attempts to interfere with a woman's decision to become pregnant or to carry her pregnancy to term).

The Court has held on numerous occasions that the fundamental right to privacy extends to minors as well as adults. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority") (holding that the blanket parental consent requirement for minors in a Missouri abortion statute was unconstitutional as it violated the minor's right to privacy); *Bellotti v. Baird*, 443 U.S. 622, 633, 643-44(1979) ("A child, merely on account of his minority, is not beyond the protection of the Constitution") (finding that a Massachusetts statute requiring a pregnant minor seeking an abortion obtain parental consent or to obtain judicial approval following notification to her parents was unconstitutional).

The Dehli Policy infringes upon these fundamental rights by conditioning continued school attendance on not being pregnant. This can have the effect of pressuring girls into terminating their pregnancies in order to fully enjoy their right to free public education on the same terms as other students. Delhi Charter School will be unable to demonstrate that this policy is narrowly tailored to the achievement of a compelling state interest. The Policy is thus in violation of students' right to procreate, and to decide to carry a pregnancy to term.

A second component of the right to privacy is protection against disclosure by the government of information of a confidential nature. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing that the Due Process Clause protects two distinct privacy interests, "[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions"). *See alsoFadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981) ("[T]he right to privacy consists of two interrelated strands... Both strands may be understood as aspects of the protection which the privacy right affords to individual autonomy and identity...The first strand, however, described by this circuit as "the right to confidentiality," ... is broader in some respects."). Information relating to pregnancy and abortion are squarely within the personal information that is protected by the right to privacy. *See Fadjo, 633 F.2d* at 1175 ("The privacy right has been held to protect decisionmaking when the decision in question relates to matters such as 'marriage, procreation, contraception, family relationships, and child rearing and education.'... Matters falling outside the scope of the

decisionmaking branch of the privacy right may yet implicate the individual's interest in nondisclosure or confidentiality.") (citations omitted)). A student's pregnancy status "falls squarely within the contours of the recognized right of one to be free from disclosure of personal matters as outlined in *Whalen v. Roe.*" *Gruenke v. Seip,* 225 F.3d 290, 303 (3rd Cir. 2000) (athletic coach who revealed athlete's pregnancy by having her teammates conduct pregnancy test and by discussing the pregnancy with his colleagues violated her right to informational privacy). Disclosure of personal information may occur only to advance "a legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest." *Fadjo, 633 F.2d* at 1176.

The Delhi policy violates students' informational privacy rights in that it requires students to disclose their private health information to school-designated medical staff, who then reveal that information to school officials. The policy may also result in their pregnancy status becoming known by their classmates, once they are banned from attending school and are forced to accept home instruction instead. Again, the Delhi Charter School will be unable to articulate any legitimate interest that is served by requiring students to reveal this information that outweighs the threat to the students' privacy interests.

IV. The Policy violates the Due Process Clause of the Constitution by imposing an irrebuttable presumption that pregnant students are unable to continue to attend classes.

The Policy violates the Due Process Clause of the Constitution by imposing an "irrebuttable presumption" that pregnant girls will be unable to complete a normal course of on-campus study because of pregnancy. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). In *LaFleur*, the Court struck down forced leave policies for pregnant employees, finding that the Due Process Clause guards against states making the assumption that a pregnant woman is incapable of working, without affording her an opportunity for an individualized determination of her capacity, based on her actual medical situation.

The Policy imposes an automatic, blanket rule of imposing mandatory home-study on students who are pregnant or suspected of being pregnant, without providing the option of demonstrating that they are willing and able to continue attending school on the same terms as other students. The Policy presumes that a pregnant girl will be unable to continue her classes at Delhi Charter School and must be home-schooled, without affording her an individualized determination based on her medical situation. It thus imposes the same "irrebutable presumption" held impermissible under *LaFleur* under the Due Process Clause of the Constitution. Moreover, it goes even further by imposing that presumption upon mere suspicion of pregnancy, leaving *all* female students (and not just those confirmed to be pregnant) subject to its terms at the sole discretion of Delhi administrators. This renders the policy even more arbitrary.

V. The policy on speech and conduct raises serious concerns of vagueness in violation of the First Amendment.

In addition, the Policy raises significant First Amendment concerns, as it is impermissibly vague. A law is facially invalid if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391(1926). As the Court has explained, "standards of permissible statutory vagueness are strict in the area of free expression…Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Keyishian v. Board of Regents of University of State of N. Y.*, 385 U.S. 589, 684 (1967). This is because "[t]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [individuals] what is being proscribed."[i]

The Delhi Policy states, "[t]he Delhi Charter School curriculum will maintain an environment in which all students will learn and exhibit acceptable character traits that govern language, gestures, physical actions, and written words." This provision, which clearly trenches on protected speech and expression, fails to define "acceptable character traits," leaving students of "common intelligence [to] necessarily guess at its meaning." *Connally*, 269 U.S. at 391. Uncertainty regarding the policy's application doubtless results in a chilling effect on "language, gestures, physical actions, and written words." The Policy fails to regulate First Amendment freedoms "with narrow specificity," rending it impermissibly vague in violation of the First Amendment.

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Based on these significant legal concerns, we therefore request that you immediately revise your Policy to bring it into compliance with the U.S. Constitution and federal law, that you suspend the Policy for the upcoming school year pending these revisions, and that you notify parents and students of the policy change. . If you do not agree to this request, we will consider taking further legal action, including filing a lawsuit and/or a complaint with the appropriate state or federal enforcement agencies. We look forward to your prompt response.

Sincerely,

Marjorie R. Esman
Executive Director

Cc: Eva Dawson
Marilyn Loftin
Mike Martin
Jannie Nelson
James Strong
Tiwanna Stubblefield
Elizabeth Watts

[i] The Supreme Court has held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," although schools have latitude to regulate student speech that would disrupt the educational process. *See Tinker v. DesMoines*, 393 U.S. 503, 506 (1969).