Dear

I write to you on behalf of [redacted]. For the reasons summarized below, your decision to bar [redacted] from the [redacted] cross-country running team is discriminatory and unlawful. This letter is an attempt to educate you regarding the discriminatory nature and impacts of your actions and provide you with a chance to resolve this matter without the need for costly litigation.

[redacted] is a seventh grade student-athlete at [redacted]. [redacted] is non-binary and does not identify or present as a girl, despite being assigned female at birth. In short, [redacted] is not a girl. This fall, [redacted] joined [redacted] cross-country running team, a non-contact sports team that is open to all cisgender seventh graders without an athletic tryout. [redacted] loves running and loves the team; being part of it has been a crucial aspect of their adjustment to seventh grade and to their new school. Their mother, [redacted], has described cross-country running as "bringing a new light into [redacted] life." [redacted] has been running with the boys during practices, consistent with their gender identity and with their coach's support, and this has been working very well. But [redacted] was informed that at meets, they would only be permitted to run with the girls' team. They do not feel comfortable with that and that is not an option for them, because they are not a girl. After attempting to participate with the boys' team, [redacted] now has been banned from attending any more away meets, effectively suspending them from the cross-country team.

Blocking [redacted] from participating in middle school athletics in accordance with their gender identity is discriminatory and violates [redacted] constitutional and statutory rights. Even if there were a school or district policy directing that [redacted] be banned from the boys' cross-country team—which there is not—there is no legitimate government interest that could justify such a restriction. The Kenai Peninsula Borough School District's ("KPBSD" or "District") choice to discriminate against Rubis based on their gender identity violates its own policies, the Equal Protection Clauses of the United States and Alaska Constitutions, the Alaska Constitution's privacy clause, and Title IX of the Education Amendments of 1972. Each of these sources of law require that [redacted] be permitted to participate in middle school athletics on the boys' team, consistent with their gender identity. In addition [redacted] suspension from the team without a hearing has violated both district policy and their due process rights.

District policy does not allow for sex-segregated cross-country running teams at [redacted] and does not require or permit discrimination based on gender identity. [redacted] mother has

been informed that District policy does not permit [redacted] to run with the boys' team, but KPSSD's written policies do not support this assertion. Middle school sports in the District are governed by the Kenai Peninsula School Activities Association (KPSAA). KPSAA bylaws provide that the KPSAA manages and governs all school sports and activities "subject to the restraint of the ASAA bylaws, Regions II and III bylaws, KPSAA bylaws and KPBSD board policy."[1] Although the ASAA's (Alaska School Activities Association) bylaws and policies apply statewide to member schools' high school-level sports and activities, ASAA Bylaws make clear that ASAA does not regulate athletics at the *middle school* level: "ASAA does not currently govern middle or junior high Schools."[2] Thus, no statewide ASAA policy applies to [redacted] Rather, KPBSD/KPSAA policies govern all athletics at [redacted], including the cross-country running team. Any belief by the District that their hands are tied by ASAA policy in [redacted] case is false.

The District has issued a Middle School Handbook containing the bylaws and policies that do govern its middle school athletics. The Kenai Peninsula District Borough School District Middle School Handbook SY 2023-24 ("Handbook") does not contain any specific policies regarding transgender or non-binary student athletes. It does *not* require that athletes participate on sex-segregated teams corresponding to their gender identities as assigned at birth. In fact, it does not even authorize [redacted] to have gender-segregated teams for cross-country running at all: The Handbook provides that "[s]eparate teams for each sex are permissible" only in "contact sports or where selection for teams is based on competitive skill. Contact sports include wrestling, ice hockey, football, basketball, and any other sport 'the purpose or major activity of which may involve bodily contact.'"[3] Cross-country running is not a contact sport under this (or any) definition, and [redacted] team is open to all cisgender seventh-graders without a tryout or other screening based on competitive skill. Since neither provision applies, it does not appear that this policy allows [redacted] to have gender-segregated cross-country running teams at all—let alone to bar [redacted] or anyone else from participating in cross-country running based on their sex and/or gender identity.

The District's Choice to discriminate against [redacted] violates the Equal Protection Clause of the United States and Alaska Constitutions. Although no policy requires or allows it, KPBSD has

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1 Bylaws of the Kenai Peninsula School Activities Association, Art. IV, Sections 1, 4.

2 Bylaws of the Alaska School Activites Association, Note About Article 17, found in 2023-24 ASAA Handbook, at 61.

3 Handbook at Appendix M p. 70.

nevertheless made the decision to ban [redacted] from the boys' cross-country team. This action violates [redacted] Equal Protection rights. Just last month, the United States Court of Appeals for the Ninth Circuit affirmed the decision to block an Idaho statute banning transgender girls from participation on girls' sports teams. The Ninth Circuit held that "discrimination on the basis of transgender status is a form of sex-based discrimination" subject to heightened legal scrutiny, a demanding standard that requires the government to demonstrate that its actions are supported by an "exceedingly persuasive" justification and that the means it chose are substantially related to those important objectives.[4] It did not believe that Idaho's transgender girl sports ban could meet that standard because banning transgender girls was not substantially related to the government's stated objectives of ensuring fairness in girls' athletics and full and equal opportunities for girls in sports.[5] Ninth Circuit law applies to Alaska.

Like Idaho did, governments attempting to ban transgender girls from sports typically rely on arguments that transgender girls' participation in girls' sports is unfair to cisgender girls and may decrease their opportunities to participate and succeed in sports due to perceived physiological advantages of persons assigned male at birth. Courts have rightly rejected these claims as rooted in misinformation and found that those interests are insufficient to justify discriminatory treatment against transgender girls. But even if these concerns about transgender girl athletes were well-founded, they would not apply here. Barring [redacted] from the boys' cross-country running team does nothing to increase athletic opportunities for cisgender girls, because [redacted] would not be competing against cisgender girls. Throughout many discussions with [redacted] mother, in fact, no school or District official has been able to articulate *any* non-discriminatory government interest in excluding [redacted] from the team. Cross-country running is not a contact sport, so there is no basis for a safety concern about injuries that could result from mixed-sex participation. [redacted] running team is open to all cisgender students and does not require a tryout, so there is also no basis for a concern that allowing

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[4] *Hecox v. Little*, 2023 WL 5283127, at *12 (9th Cir. Aug. 17, 2023) (citing *Bostock v. Clayton Cnty., Ga.*, —— U.S. ——, 140 S. Ct. 1731, 1741, (2020) (holding in the Title VII context that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex")).

[5] *Hecox*, 2023 WL 5283127 at *3; *see also Roe v. Utah High School Activities Ass'n*, No. 220903262, 2022 WL 3907182, at *1 (Utah Dist. Ct. Aug. 19, 2022) (granting a preliminary injunction against a categorical ban under the Utah Constitution's equivalent of an equal protection clause).

transgender or nonbinary athletes would decrease opportunities for cisgender girls to participate on the girls' team or in girls' sports generally. Given the lack of a non-discriminatory government interest, it should come as no surprise that there are no published court decisions anywhere in the country approving of a ban on transgender boys or non-binary student athletes from participation on boys' teams. The District's actions are unconstitutional. Alaska's Constitution also guarantees the right to Equal Protection, and it provides even more protection than does the federal constitution, so the District's action is also unconstitutional under the Alaska Constitution.

The District's actions violate [redacted] privacy rights. Alaska's constitutional right to privacy also is implicated here. A person's transgender status is "private, sensitive personal information" that is entitled to constitutional protection.[6] A government action that "outs" a person by making public the difference between their gender identity and their sex as assigned at birth violates that right because it is a forced government disclosure of the transgender person's private medical information and transgender status.[7] Such is the case here. [redacted] does not present or identify as a girl; the fact that they were assigned female at birth and now do not identify as female is their personal and private information to share if and how they want—not the District's. Forcing them to participate on a girls' team would out [redacted] as transgender in violation of their constitutional privacy rights.

Title IX bars KPBSD from excluding [redacted] from the boys' cross-country team. Nor does federal statutory law allow the District to exclude [redacted] The Handbook requires that "KPBSD will comply with the provisions of Title IX of the Education Amendments of 1972" and that, as commanded by Title IX, "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any activities regulated by the District." KPBSD unquestionably must comply Title IX as required both by federal law and by explicit KPBSD policy. Interscholastic sports at KPBSD public schools are educational programs that receives federal financial assistance, and individuals may not be excluded from such programs on the basis of sex. But Title IX does not allow [redacted] to discriminate against [redacted] based on their gender identity by excluding them from the boys' running team. Courts addressing the issue have concluded that a ban of transgender students (in those cases, transgender girls) from interscholastic athletic teams in accordance with their gender identities are

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6 *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles***,** 2012 WL 2685183 (Alaska Super. March 12, 2012) at *5-*6 (unreported decision).

7 *Id.*

likely to be unlawful under Title IX.[8]

We understand that the federal Office of Civil Rights already is actively investigating this matter.

Suspending [redacted] from the participating in away meets without a hearing appears to have violated [redacted]s Due Process Rights as well as District policy. [redacted]'s treatment of [redacted] also appears to violate the due process protections spelled out in the KPSAA Middle School handbook. Section III of the handbook provides that before they are suspended from a team, student-athletes have a due process right to notice of the charges against them, an explanation of the evidence against them, and the right to present their view of the events leading to suspension from the team. Due process must be provided "[p]rior to any disciplinary action taken," and a hearing must be held "as soon as knowledge of a violation is known to the school."[9] The school's post-hearing decision must also be provided in writing to parents to enable them to appeal. The school has followed none of these procedures in connection with [redacted] suspension from away cross country meets, violating its own written policies and denying [redacted] due process. Although [redacted] has been told that they may attend home meets, their exclusion from away meets appears to be a disciplinary sanction. But no hearing was offered or provided, nor was [redacted] offered any chance to defend themself before being banned from attending meets. Under the policies laid out in the Handbook, furthermore, the student-athlete has a right to continue to participate in the sport until a hearing is held and a school official makes a formal decision.[10] This policy too has been ignored and violated, with [redacted] being banned from the away meets without a hearing. At a minimum, then, due process requires that [redacted] be immediately reinstated on the team and allowed to attend meets until they receive the due process protections to which they are entitled.

Your choice to bar [redacted] from cross-country running is not only discriminatory and illegal but also unnecessary and unkind. This is a non-contact middle school team that is open to all cisgender students who wish to participate. There are no competitive team spots being competed for or college scholarships at stake. Every middle school child in the District

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8 *See A.M. by E.M. v. Indianapolis Pub. Sch.*, 617 F. Supp. 3d 950, 966 (S.D. Ind. 2022), *appeal dismissed sub nom. A.M. by E.M. v. Indianapolis Pub. Sch. & Superintendent*, No. 22-2332, 2023 WL 371646 (7th Cir. Jan. 19, 2023).

9 Handbook at 8.

10 *Id.*

deserves to have the benefit of being a full and equal participant in athletics on the same terms as other kids. Being barred from the team, singled out for discriminatory treatment, and denied the opportunity to participate in a sport they love as the person they are is actively harming this child on an ongoing basis by negatively impacting their mental health and their happiness at school.

We urge you to reconsider your decision, immediately reinstate [redacted] to the team, and allow them going forward to participate on the boys' team consistent with their gender identity. [redacted] also wishes to participate in additional athletics at [redacted] this year, including cross-country skiing and track & field; they should also be permitted to participate on those teams according to their gender identity from the start of the season. It would be preferable for all parties to resolve this matter quickly and without costly litigation. Time is of the essence because of the ongoing damage that the District's actions are doing to [redacted]. Please have your counsel contact us to discuss this matter by Friday, September 22 to see whether we will be able to avoid court proceedings. We look forward to your prompt reply.