



September 26, 2014

President Scott McCready
600 East 6th Street
St. Charles MN 55972

RE: Draft Policy "Regarding Participation of Transgender Students"

Dear President McCready,

I am writing to provide our commentary for your review and consideration regarding the Minnesota State High School League (MSHSL) draft policy "Regarding Participation of Transgender Students." Our Policy Director wrote Mr. Stead regarding this matter in July. In light of the fact that we have received no response and that the proposed policy has gone through two revisions since then, I write again—to each Board Member of MSHSL, posing many of the same concerns and inquiries.

I believe there are many principles upon which we can agree. First, Minnesota Family Council supports the privilege of participating in high school athletics for all students, including those who identify as transgender. The participation in competitive athletics is widely known to be a healthy, character-building pursuit for youth, and the pursuit of athletic participation for all students should be encouraged. However, the ability of students who identify as transgender to participate in athletic programs should not be dependent upon their ability to select the team (and corresponding restrooms and showers, changing facilities, overnight accommodations, and uniforms and practice attire) that does not correspond with their biological sex.

Further, Minnesota Family Council shares the belief that the medical information of all students, including students who identify as transgender, should be kept confidential in accordance with applicable local, state, and federal laws.

Minnesota Family Council's concerns regarding the policy are many; I've included a few of them below. For the following reasons, we strongly urge MSHSL *not* to adopt the proposed policy.

No Law Requires MSHSL to Adopt This Policy Regarding Participation of Transgender Students in Athletics

According to Title IX of the Education Amendments of 1972, "[n]o 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." 20 U.S.C. § 1681. Title IX was enacted with the purpose of eliminating discrimination on the basis of sex against

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women in the field of education.¹ No court has ever interpreted Title IX to require schools to adopt the type of policy regarding transgender student athletic participation that MSHSL is suggesting.

Indeed, Title VII (similar to Title IX) cases further confirm this point. Courts interpreting Title VII have repeatedly interpreted Title VII to allow employers to require employees to use restrooms and changing areas that are consistent with their biological sex. For example, the Tenth Circuit held that “an employer’s requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes.”²

We are also unaware of any provision in Minnesota law that would require schools to adopt a policy like the one proposed by MSHSL for transgender students. In fact, the Human Rights chapter of the Minnesota statutes specifically creates an exemption from the discrimination laws within the context of education and athletic teams. The exemption states: “it is not an unfair discriminatory practice for an educational institution or a public service to operate or sponsor separate athletic teams and activities for members of each sex or to restrict membership on an athletic team to participants of one sex, if this separation or restriction meets the requirements of section 121A.04.”³ Implicit within this exemption is the notion that creating separate athletic teams based on sex is founded upon the inherent physical and biological differences between males and females, allowing members of both sexes to compete fairly and safely in physical competitions with their peers, and ensuring that members of the female sex have a chance to compete. Section 121A.04 states this principle more directly: “Each educational institution or public service shall provide equal opportunity for members of both sexes to participate in its athletic program.”

There is a recognition in our legal precedent that there are two distinct sexes, distinguished by physical and biological differences. No provision in federal or state law requires schools to allow students who have a gender identity or expression that differs from their biological sex to participate on athletic teams and access changing areas opposite those of their biological sex.

The MSHSL Transgender Policy Fails to Address the Large Number of Religious Schools Within Its Membership

MSHSL member schools include a large number of private, religious schools. Adherence to the proposed transgender policy would violate the sincerely held religious beliefs of these schools and their staff, students, and parents. Yet, despite repeated requests for accommodations (or at least clarification) on this point, the proposed policy continues to remain silent regarding these schools and raises a number of questions. Chiefly, will private religious schools that cannot comply because of the requirements of their faith be forbidden from being members of MSHSL, thereby disqualifying their students from competing in state high school athletics? This would be a tragic outcome for thousands of students in Minnesota.

¹ “Title IX began its congressional life in earnest when an amendment was introduced in the Senate by Senator Birch Bayh of Indiana, who explained that its purpose was to combat “the continuation of corrosive and unjustified discrimination against women in the American educational system.” 118 Cong. Rec. 5803 (1972). During debate, Senator Bayh stressed the fact that economic inequities suffered by women can often be traced to educational inequities. In support of the amendment, Senator Bayh pointed to the link between discrimination in education and subsequent employment opportunities.” Title IX Legal Manual, U.S. Dep’t of Justice–Civil Rights Div., available at <http://www.justice.gov/crt/about/cor/coord/ixlegal.php>.

² *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222-1225 (10th Cir. 2007). See also *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001) (a Minnesota case on the subject).

³ Minnesota Statutes, 363A.22, Subd. 2.

To this point, if MSHSL pursues this policy without addressing its private religious schools, these schools may have a First Amendment claim against MSHSL if the courts determine that MSHSL is deemed a “state actor” (a highly likely outcome).

The MSHSL Transgender Policy Could Subject Minnesota Schools to Civil Liability for Violating the Rights of Students and Parents and Creates an Environment Not Conducive to Healthy Competition and Learning

1. Students’ right to bodily privacy

The latest draft of the proposed policy states that member schools must “[e]nsure reasonable and appropriate restroom and locker room accessibility for students” under “Areas of Awareness for Member Schools.” This is an ambiguous statement where there is no need for ambiguity. Is this a mandate upon member schools or not? Will MSHSL challenge that which a school determines is “reasonable and appropriate”?

The important point here is that students (and their parents) have a right to expect their schools to protect their right to privacy. Accordingly, when students’ privacy rights are violated at school, the school may be subject to liability. The proposed MSHSL transgender student policy likely endangers the privacy rights of students and threatens schools with the potential for liability.

Students have a right to bodily privacy. The Ninth Circuit has stated: “Shielding one’s unclothed figure from the view of strangers, particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”⁴

The MSHSL proposed policy likely places schools in the position of disregarding elementary notions of self-respect and personal dignity by forcing students into vulnerable interactions with opposite-sex students in a secluded restroom, shower or changing facility, locker room, or overnight accommodation. Students’ privacy rights are violated when they risk exposure to the opposite sex in these locations.⁵ Indeed, courts have determined that even prisoners have privacy rights—should not our minor students have an even greater degree of protection when it comes to their privacy rights?⁶

The proposed policy leaves MSHSL member schools vulnerable to tort liability, while intentionally creating an unhealthy environment for high school athletics.

2. Parents’ right to control the extent of their children’s knowledge about and exposure to the differences between sexes

Besides violating students’ privacy rights, the proposed policy also encourages schools to violate parents’ right to control the extent of their children’s knowledge about and exposure to the differences between the sexes.⁷

⁴ *Michensfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988).

⁵ See *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (concluding that a transgender individual’s use of the women’s restroom threatened the privacy interests of female employees); *Brooks v. ACF Industries, Inc.*, 537 F. Supp. 1122, 1132 (S.D. W. Va. 1982) (concluding that a female would violate the privacy rights of a male employee by entering the men’s restroom while he male was using it).

⁶ See, e.g., *Arey v. Robinson*, 819 F. Supp. 478, 487 (D. Md. 1992) (concluding that a prison violated prisoners’ right to bodily privacy by forcing them to use bathrooms viewable to members of the opposite sex).

⁷ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (recognizing “the liberty of parents and guardians to direct the upbringing and education of children under their control”).

Interaction between males and females in locations such as the restroom, shower or changing facility, locker room, or overnight accommodation will necessarily result in students' exposure to the anatomical differences between the sexes. The proposed policy purports to require "reasonable and appropriate restroom and locker room accessibility for students." This will likely place many schools in the position of allowing students who identify as transgender and are approved as such by the school to access the team, locker room, shower, and toilet facilities of the gender with whom they identify, regardless of their biological and anatomical sex.

The bottom line is parents have a right to control the extent of their children's exposure to the anatomical differences of the opposite sex and that the proposed policy likely encourages schools to undermine parental authority. The undermining of parental rights exposes MSHSL member schools to tort liability.

3. The right of female students to be free from discrimination while at school

As noted above, Title IX prohibits sex discrimination at educational institutions. Specifically applied to the school athletic context, Title IX was created to make sure that girls would have equal opportunity to participate in girls' sports programs. The proposed policy creates a situation in which the entire purpose of Title IX may be violated—again, opening up MSHSL member schools to liability under a Title IX claim brought by a biological female student.

Under the proposed policy, biological females stand the risk of losing a potential spot on a team, a scholarship, an award, or some other type of recognition for athletic achievement to a biological male who identifies as a transgendered female. Further, there might be boys who do *not really* identify as transgender, but who for various reasons desire to participate on the girls' teams. If these boys claim they are transgendered females, they may add even further to the number of girls who are disadvantaged with regard to athletic opportunities. Is this really the type of environment the MSHSL wants to create for the female students in its member schools?

Serious Concerns Regarding the Process of Research and Development of the Proposed Policy

We also have some serious concerns regarding the process by which this proposed policy was researched and developed. We have become aware that MSHSL worked closely with OutFront Minnesota in the development of this policy. As the state's largest LGBT advocacy organization, they clearly represent one viewpoint on this issue. Were other viewpoints or organizations represented in the research and development of this policy? It appears not, at least not adequately.

There are clearly concerns for private, religiously-affiliated schools, as well as for religious and homeschooled students who participate in private and public school athletics. Why have these concerns remained completely unaddressed in three drafts of this proposed policy? Have any private schools, private school organizations, or home school organizations been consulted in the research and development of this policy? Again, it appears not.

Have public and private school athletic directors been made aware of the proposed policy?

Despite multiple requests for clarification and offers to assist MSHSL representing another viewpoint, these requests and offers from our organization and others have gone unanswered. Furthermore, it has been extremely difficult for our organization, as well as several parents and private school staff we represent, to gain information about this proposed policy from MSHSL. Why has there been a lack of transparency and will there continue to be a lack of transparency on this issue?

Conclusion

The proposed MSHSL policy has been developed in such a way that only one viewpoint is strongly represented and has left many concerned parents and schools in the dark about its inception. The policy contravenes the religious freedom rights of its member schools, violates the rights of parents and students, and leaves its member schools vulnerable to civil liability. It also creates an environment in which the purposes of Title IX are undermined and girls are disadvantaged. We strongly urge MSHSL to *not* adopt the proposed policy regarding participation of transgender students in high school athletics.

If you have any questions regarding this matter, please do not hesitate to contact me. I would be happy to speak with any member of the MSHSL staff or board and to offer any assistance we can provide.

Sincerely,



John Helmberger, CEO
Minnesota Family Council

