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Reply to: Orlando

February 18, 2016

Via Email Only – ziegler.andy@brevardschools.org
Mr. Andy Ziegler, School Board Chairman
Brevard County Schools
2700 Judge Fran Jamison Way
Viera, FL 32940

Re: Improper "gender identity" and "sexual orientation" policy proposals

Dear Chairman Ziegler:

By way of brief introduction, Liberty Counsel is a non-profit litigation, education, and policy organization with an emphasis on constitutional law, with offices in Orlando, Florida, as well as Lynchburg, Virginia, and Washington, D.C. Liberty Counsel provides *pro bono* legal representation to individuals, groups, and government entities, such as school districts, with a particular focus on religious liberty and other First Amendment issues.

We write at the request of concerned community members and parents of students within the Brevard County Schools ("the District"), regarding the inappropriate proposed additions of "sexual orientation" and "gender identity or expression" to District non-discrimination policies, including Policy 3362 - Anti-Harassment," and "Policy 2260.01 - Nondiscirmination Grievance Procedure," which would cover students, and the changes proposed to "Policy 3122 - Equal Employment Opportunity" which would cover District employees. The District should refuse to add "sexual orientation" and "gender identity" to District nondiscrimination policies.

In rejecting these particular categories, the District should maintain the common-sense position that objective biological sex – male and female – is (and should remain) the determining factor for access to gender-appropriate public school facilities and programs, not subjective mental "identity" claims or beliefs that one is the opposite sex, or subjective sexual attractions. As set forth below, **there is no legal authority** mandating addition of these improper categories to District policies.

There is no state-wide Florida law recognizing "sexual orientation" or "gender identity" as protected classes, because they are not like others protected by law. They are

subjective, behavior-based categories, rather than federally-recognized immutable characteristics like race, color, sex, national origin, or constitutionally-protected fundamental rights, like religion. Since the addition of "sexual orientation" and "gender identity" is the primary goal of Draft Policy proponents, the proponents of these additions have provided other newly-added categories to serve as camouflage – in this instance, prohibiting purported acts of "pregnancy," "age," and "genetic information" or "reprisal for protective activity [sic]" "discrimination," despite no showing that discrimination on these grounds is occurring in the District.

Federal laws known as "Title VII"[1] (covering employees) or "Title IX"[2] (in the education context, covering students) already prohibit discrimination based on "sex" (including pregnancy), but they only prohibit discrimination between males and females. Neither statute requires or supports the idea that males *are* females, or the recognition of "sexual orientation" or "gender identity or expression," as claimed by agencies such as the U.S. Department of Justice ("DOJ"), Equal Employment Opportunity Commission ("EEOC"), and Department of Education's Office of Civil Rights ("OCR").

Proponents have surely by now cited OCR's much-vaunted "Questions and Answers on Title IX and Sexual Violence"[3] as support for the Draft Policies, but this document **cites no legal authority** - **case law or statutory** - for the claim that Title IX now applies to students claiming to be the opposite sex for purposes of access to the opposite sex's restrooms and locker rooms. To be sure, OCR's legal bullying has resulted in some school districts needlessly settling an OCR "complaint," but a federal agency *ipse dixit* does not make Title VII or Title IX apply to concepts (or create definitions) not within the intent of Congress when a given law was passed.

You should also know that despite the baseless positions of the ACLU, DOJ and OCR, and their attempts to strong-arm school districts around the country, a federal court in Virginia recently **rejected** the ACLU and OCR positions and the DOJ's "statement of interest" when it **dismissed** a Title IX claim nearly identical to that claimed in the well-known Palatine, Illinois example. *See G.G. v. Gloucester County School Board,* 2015 WL 5560190 at *9 (E.D. Va. 2015). Liberty Counsel has filed an Amicus Brief to the Fourth Circuit Court of Appeals[4] in that case, and has also recently filed a lawsuit **against** a school district in Fairfax County, VA for adding "gender identity" as a protected class, without legal authority to do so, based on a claimed mandate by the U.S. Department of Education.

In addition to these cases with Liberty Counsel involvement, and in addition to the lack of reported cases for OCR's position, a federal judge in *Johnston v. Univ. of Pittsburgh*[5]

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[1] Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, as it appears in volume 42 of the United States Code, beginning at section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.
[2] Title IX of the Educational Amendments of 1972, 20 U.S.C. § 168 1(a).
[3] http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf
[4] https://lc.org/PDFs/Attachments2PRsLAs/2015/113015GloucesterBriefAmicus.pdf
[5] *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.,* No. CIV.A. 3:13-213, 2015 WL 1497753 (W.D. Pa. Mar. 31, 2015).

held in March 2015 that a "policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, **does not violate Title IX's prohibition of sex discrimination."** (Emphasis added.)

The decisions in *Gloucester* and *Johnston* are consistent with how numerous other courts have dismissed cases of alleged "discrimination" brought by "transgender" individuals claiming "gender identity" access to private facilities. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir.2007); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir.1995); *Braninburg v. Coalinga State Hosp.,* No. 1:08–cv–01457–MHM, 2012 WL 3911910, at *8 (E.D.Cal. Sept.7, 2012); *Jamison v. Davue*, No. S–11–cv–2056 WBS, 2012 WL 996383, at *3 (E.D.Cal. Mar.23, 2012); *Kaeo–Tomaselli v. Butts*, No. 11–cv–00670 LEK, 2013 WL 399184, at *5 (D.Haw. Jan.31, 2013); and *Lopez v. City of New York*, No. 05–cv–1032–NRB, 2009 WL 229956, *13 (S.D.N.Y. Jan.30, 2009) (explaining that because such individuals are not a protected class for the purpose of Fourteenth Amendment analysis, claims that a plaintiff was subjected to "discrimination" based on his status as a transvestite are subject to rational basis review).

Thus, it is mystifying how the proposed Draft Policy 3362, for instance, can possibly make the bold (and legally incorrect) claim that "discrimination" "against an individual **because of gender identity, including transgender status, or because of an individual's sexual orientation** is discrimination because of sex and **may be a violation of Title VII of the Civil Rights Act of 1964**." (Emphasis added). In fact, this is as accurate as saying "the First Amendment may be violated by churches speaking out against bad government policy proposals." So there is no doubt, neither statement is accurate.

However, by adding "gender identity" as a protected class, Draft Policy 3362 will serve as the basis for allowing boys and men claiming a female "gender identity" to enter and use the restrooms, locker rooms, and other areas previously affording privacy to girls and women. The inclusion of "sexual orientation" and "gender identity" in other school districts has led to a chilling effect upon students expressing a religious or moral viewpoint on the subject of sexuality. Instances of students and teachers being subjected to punishment or retaliation for voicing their beliefs to others, in person, or online, in social media, are readily available. Some school districts have even required other students (or teachers) to address gender-confused students or employees by incorrect names, and inaccurate pronouns, regardless of the First Amendment implications for appropriate use of language.

Draft Policy 3362 contains additional problems: it has taken the previous policy's relatively clear terminology, with language derived from federal legal standards, and replaced it with unclear terminology and definitions from elsewhere, that are significantly longer, more complex, and confusing. Students will be unable to read, understand, and order their behavior based on this rewrite. To the extent a child of reasonable intelligence would be confused, the policy draft is unconstitutionally vague as applied to students.

Draft Policy 2260.01 "Nondiscrimination Grievance Procedure" adds "sexual orientation" and "sexual identity" (rather than "gender identity") as protected classes, which

may not "be excluded from participation in, or denied the benefits of" "any program or activity in the District." While it is generally best for clarity's sake to use consistent terms when referring to the same things, if "sexual identity" in this draft means "gender identity," then the same concerns expressed above apply.

Draft Policy 3122 "Equal Employment Opportunity" purports to add "sex (including sexual orientation and gender identity)," "pregnancy" (which is already covered by Federal law), and "genetic information," and the curiously-named "reprisal for protective [sic] activity" to the District's EEO policy. Beyond "sexual orientation" and "gender identity," the other categories are window-dressing for the proponents' actual goal of adding "sexual orientation" and "gender identity" as protected classes. If "sexual orientation" and "gender identity" are added, the same concerns for students' First Amendment and privacy rights apply to District employees who express appropriate objections to homosexuality or cross-dressing, or who object to sharing lockers, showers, and restroom facilities with members of the opposite sex.

Conclusion

The City of Palm Bay recently rejected similar proposals to add homosexuality ("sexual orientation") and cross-dressing ("gender identity" or "gender expression") as protected classes to its ordinances. The District should likewise refuse to impose on children the bad policy additions that the Palm Bay City Council rejected for all citizens on February 1, 2016.

The District in particular should respect the privacy rights of students and concerns of parents, by refusing to permit gender-confused (or attention-seeking) students to inappropriately use restrooms and facilities reserved for the opposite sex, under the guise of banning "gender identity" discrimination. No school district has ever lost federal funding for maintaining gender-appropriate facilities, despite the claims of activists.

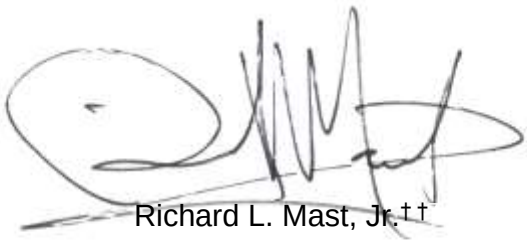
A student with gender confusion who *truly* believes he or she is the opposite sex should be treated with care, compassion, and kindness, but must not be officially affirmed in his or her confusion, no matter how sincerely-held. Such a student may be accommodated with a private, single-user restroom or changing area, but that student is not free to override biology, as well as the safety, privacy, and religious concerns of other students by being given access to opposite-sex restrooms, lockers or programs.

Liberty Counsel is therefore prepared to assist the Brevard County Schools if it rejects the proposed additions of "sexual orientation" and "gender identity or expression" to Policies 3362, 3122, and 2260.01. If the District enacts these misguided changes, and instead violates the First Amendment rights of other students and teachers, Liberty Counsel stands prepared to advocate on their behalf against the District.

Should you have questions about any of the points contained in this letter, please don't hesitate to contact us at 407-875-1776.

Sincerely,

Roger K. Gannam†



Richard L. Mast, Jr.††

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