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Reply to: Florida

September 26, 2018

VIA Electronic Mail

Lawrence A. Feinberg, President
Haverford Township School Board
50 East Eagle Road
Havertown, PA 19083
havschbd@haverfordsd.net

RE: Problematic Policy / Administrative Regulation 259

Dear Board President Feinberg:

By way of brief introduction, Liberty Counsel is a litigation, education, and public policy organization with an emphasis on First Amendment liberties. We have offices in Florida, Virginia, and Washington, D.C., and hundreds of affiliated attorneys across the nation, including Pennsylvania.

Liberty Counsel is writing to the School District of Haverford Township (“District”), to provide information about [Policy 259](#) and its [Administrative Regulation](#) (“Policy 259”), which the School Board does not appear to have considered, at the time Policy 259 was presented and adopted at the end of 2017.¹ Liberty Counsel has been contacted by concerned District community members, including District employees and teachers who are becoming increasingly concerned by the training associated with this policy, and its conflict with objective facts regarding sex, and the right of parents to know what is going on with their own children.

At the outset, both Liberty Counsel and our local contacts love all people yet we believe in lovingly speaking the truth. Our local employee contacts love working with students and desire to assist in their positive development. They would never “discriminate” against a child identifying as the opposite sex, but would at all times treat them with kindness and respect.

However, Policy 259 violates the First Amendment rights of students and their parents,

¹<https://www.haverford.k12.pa.us/cms/lib/PA01001043/Centricity/Domain/1335/SBM20171116.pdf>

and of District employees, and does so without legal authority.

Problems in Policy 259:

The problems in Policy 259 are many. Particularly troubling, Policy 259 permits school staff to create a social and medical “transition”² plan for gender-confused students, to “coordinate care” with “health care providers and licensed professionals,” to seek “Medicaid” funding, and file “health insurance claims,” all without informing their parents, until social or surgical “transition” is too late to reverse.³ Liberty Counsel is aware of at least one state-sponsored hysterectomy and double mastectomy performed on a gender-confused 17-year-old, without parental permission. The parent may be willing to speak with you privately, to share her story. Policy 259 allows that injustice to occur in Haverford.

The Policy permits opposite-sex rooming arrangements on overnight trips, with no notice to or consent by other students, or the parents of those other students.⁴

Policy 259 eliminates the privacy rights of people of one sex to be free from members of the opposite sex in restrooms, locker rooms, and showers.⁵ A girl’s right to privacy does not disappear based on the beliefs a boy has about his own gender, and vice versa.

Policy 259 coerces students and teachers, and imposes one person’s beliefs about the nature of gender on all other students and teachers who do not share those beliefs, but who instead ascribe to the scientific understanding of a sexual and gender binary.⁶

Policy 259 requires that employees and students abandon scientific beliefs about the binary nature of sex and gender,⁷ and instead **forces them to adopt** the beliefs of others about sex and gender, and **to speak** using only gender pronouns consistent with other people’s beliefs, instead of their own.⁸ All of these are highly improper.

No Title IX Authority:

The Board and the community should be aware that the U.S. Departments of Education (“DOE”), Justice (“DOJ”), Labor (“DOL”), the Equal Employment Opportunity Commission (“EEOC”), and various agency officials have been **enjoined** from asserting that Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities which match their “gender identity” rather than their biological sex. *Texas v. United States*, 201 F. Supp. 3d 810, 815–

² See Admin. Reg. 259, pg. 3, *Definitions*.

³ See Admin. Reg. 259, pg. 3, *Guidelines*, “In general, the prerogative to assert the rights of the gender expansive and transgender students **belong to the student and do not require additional parental/guardian consent**; *Guidelines*, A.1. “school personnel should not disclose information about a GET student’s gender identity and expression to others, **including the student’s parents/guardians**,” and A.6.

⁴ See Admin. Reg. 259, pg. 6, H. School Activities and Programs, para 3.

⁵ See Admin. Reg. 259, pg. 5, E. Restroom Accessibility; F. Locker Room Access.

⁶ See Admin. Reg. 259, All, particularly pg. 4., D. Names/Pronouns, particularly paras 1 and 4.

⁷ See Admin. Reg. 259, pg. 1, *Definitions*.

⁸ See Admin. Reg. 259, pg. 4, D. Names/Pronouns, particularly paras 1 and 4.

16 (N.D. Tex. 2016), *order clarified*, No. 7:16-CV-00054-O, 2016 WL 7852331 (N.D. Tex. Oct. 18, 2016), and *appeal dismissed*, No. 16-11534, 2017 WL 7000562 (5th Cir. Mar. 3, 2017). The injunction applies nationwide. The District has relied upon (and is using in its training materials provided by Karen Niefer, DCIU) the now-rescinded May 13, 2016, U.S. Department of Education “Dear Colleague” Letter and the document that the letter “encouraged [schools] to consult...for practical ways to meet Title IX’s requirements,” “Examples of Policies and Emerging Practices for Supporting Transgender Students.” The letter and the “Examples” were the subjects of the nationwide injunction. The same grounds for that injunction would apply to District application of Policy 259.

No Pennsylvania Legal Authority for Policy 259:

The Board and community should further be aware that Pennsylvania law **does not** recognize the numerous terms or categories listed in Policy 259, including “gender identity,” “gender expression,” “gender expansive,” “gender fluid,” “genderqueer/nonbinary,” “consistently asserted gender identity,” “cisgender;” “queer,” “questioning,” or “transgender” status; or a person’s “preferred name” or “pronoun,” as legally protected classes. The school should seek to reasonably accommodate a person who has a deeply held beliefs about their own gender or who wish to express their beliefs about gender by adopting stereotypes associated with the opposite sex, provided it does not otherwise violate the rights of others, just like religious students or students with disabilities should be accommodated. However, Policy 259 is patently unreasonable because it expressly permits one student’s beliefs to be imposed on others and requires others’ rights to be violated.

Policy 259 Violates Pennsylvania Law re “Sex” and “Religion:”

Pennsylvania recognizes a person’s biological “sex” and a person’s “religion” as protected classes. Policy 259’s newly-claimed, non-statutory terms and/or definitions inherently conflict with protections based on biological “sex” or “religion.”

In Pennsylvania, it is illegal to “expel, suspend, punish, deny facilities or otherwise discriminate against any student because of ... religion...[or] sex...” 24 Pa. Stat. Ann. § 5004. It is illegal for “any employer because of...religious creed [or]...sex...of any individual..., to refuse to hire or employ...or to bar or to discharge from employment such individual...or to otherwise discriminate against such individual...with respect to compensation, hire, tenure, terms, conditions or privileges of employment...” 43 Pa. Stat. Ann. § 955. Thus, Policy 259, to the extent it conflicts with Pennsylvania statutory protections for “sex” and “religion” or “creed,” violates the rights of District students and teachers. Contrary to Policy 259, “Guidelines,” page 3, parents also actually retain the right to know whether their child is asserting any of the Policy 259’s “identities” while at school. School officials should not deceive parents or hide from them that their child is doing at school, much less lifestyle changes or planned medical procedures.

The Truth, and Tying it All Together:

It is not “discrimination” or “harassment” for District staff to continue using gender pronouns consistent with binary sex rather than any given persons beliefs about the nature of gender. Government may not force others to call a person something he or she is not, in matters of conscience, religious belief, and biology. If “there is any fixed star in our

constitutional constellation, it is that **no official**, high or petty, **can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.**" *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). (Emphasis added). Instead of neutrality, Policy 259 is forcing conformity. Instead of accommodation, Policy 259 is violating the rights of others by imposing one person's beliefs about their own gender on everyone else.

It is not "discrimination" to maintain longstanding sex-appropriate accommodations for males and females, based on legitimate, unchangeable biological differences between the two sexes. It is not "discrimination" to respect safety and privacy rights based on biological sex; nor is it "discrimination" to respect parental rights to control the medical procedures performed on their minor children; and maintain safeguards against involuntary observation or molestation by members of the opposite sex, where children have a right to sex-based privacy protections.

The Supreme Court has acknowledged the lawfulness of sex-based standards that flow from legitimate biological differences between the sexes. These sex-based standards ensure fairness, equity, and safety; satisfy reasonable expectations of a constitutional right to privacy; reflect common practice in society; and promote core values of dignity and respect between boys and girls. Even Supreme Court Justice Ruth Bader Ginsburg has stated, "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy."⁹

The right to bodily privacy has long been recognized elsewhere in U.S. law. See, e.g., *Doe v. Luzerne County*, 660 F.3d 169, 177 (3d Cir. 2011) (holding that bodily exposure may meet "the lofty constitutional standard" and constitute a violation of one's reasonable expectation of privacy); *Brannum v. Overton County School Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (holding that a student's "constitutionally protected right to privacy encompasses the right not to be videotaped while dressing and undressing in school athletic locker rooms"); *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002) ("there is a right to privacy in one's unclothed or partially unclothed body"); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body."). Violations of the right to bodily privacy are most acute when one's body is exposed to a member of the opposite sex. See *Doe*, 660 F.3d at 177 (considering whether "Doe's body parts were exposed to members of the opposite sex" in deciding whether her reasonable expectation of privacy was violated); *Brannum*, 516 F.3d at 494 ("the constitutional right to privacy... includes the right to shield one's body from exposure to viewing by the opposite sex"); *York*, 324 F.2d at 455 (highlighting that the exposed plaintiff was female and the viewing defendant male); *Poe*, 282 F.3d at 138 (citing with approval the Ninth Circuit's emphasis on the different genders of defendant and plaintiff in *York*).

Because sex-based accommodations are based on legitimate biological differences between males and females, the only bright-line standard is that a person's physical biology

⁹ <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/09/prominent-feminist-bans-on-sex-discrimination-emphatically-do-not-require-unisex-restrooms/>

must dictate which accommodations are appropriate in District programs. Accommodations for biological females logically should be reserved for biological females, not biological males, and vice versa. Pennsylvania schools have long adhered to this straightforward and logical demarcation.

Assuming, for the sake of the argument, that biological sex can be “changed” or “reassigned” (which it cannot – there are more than 6,500 unique differences between males and females at the DNA level),¹⁰ Policy 259 does not just apply only to those “transgender” individuals who have altered their external biological characteristics to fully match that of their desired sex. Under this Policy, youth need not undergo “sex reassignment surgery,” or even cross-sex hormone therapy, in order to be recognized as, and thus entitled to, the accommodations and treatment associated with the opposite gender. A male who identifies as “female” could remain a biological male in every respect, and still must be treated in all respects as a “female.”

The subjectivity, variability and fluidity of “gender transition” undermines the legitimate purposes that justify different, biologically based, male-female accommodations. Allowing a biological male who retains male anatomy to use female overnight housing, or bathroom, locker room and shower facilities undermines the reasonable expectations of safety, privacy and dignity of female students. To the extent Policy 259 forbids a District staff member from obtaining parental consent before girls are forced into rooming and showering arrangements with males, it undermines parental rights, and violates such girls’ right to consent or not consent to forced intimacy with members of the opposite sex. Particularly on overnight trips, District students of the same biological sex are placed in extremely close proximity to one another when sleeping, undressing, showering, and using the bathroom. Reasonable expectations of privacy underscore the maintenance of separate housing, bathroom, and shower facilities for boys and girls. Policy 259 ignores all of this logic.

Contrary to Policy 259, the privacy rights of female student do not disappear or depend solely on the beliefs of a male student about his own gender. A girls’ rights are hers, and do not depend on a male’s beliefs. The same is true for the privacy rights of males as to females.

Finally, to the extent District decision makers intend to enforce Policy 259 to force one person’s belief about their gender on everyone else, regardless of the beliefs of other District employees and students, the Policy places at risk federal funding, and violates federal protections for religious freedom.

Liberty Counsel therefore urges the District to:

1. Repeal Policy 259 and its Administrative Regulation entirely; or

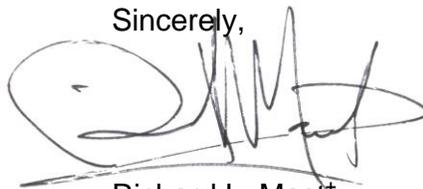
¹⁰ <https://wis-wander.weizmann.ac.il/life-sciences/researchers-identify-6500-genes-are-expressed-differently-men-and-women>

2. Strike all language permitting school staff to make social or medical sex “transition” arrangements for children, including arranging for “Medicaid,” without express parental knowledge and consent.
3. Eliminate multi-user locker rooms, showers, and bathrooms altogether, and create individual units so the privacy of all is respected. Policy 259 has *de facto* eliminated sex-separate facilities already.
4. Reasonably accommodate individuals identifying as “transgender” and wishing to use alternative names or false pronouns consistent with their own personal beliefs; and refrain from coercing students and staff who do not share that person’s beliefs about gender.
5. Confirm that no District student will be required to use false gender pronouns or terminology inconsistent with binary sex and gender, as a condition of participation or instruction at the school.
6. Confirm that no District employee will be required to use false gender pronouns or terminology inconsistent with binary sex and gender, as a condition of employment, and will be provided reasonable accommodations, such as using students’ last names in place of first names or false pronouns.
7. Confirm that statutorily protected classes of “religion” and “sex” will prevail when they conflict with non-statutory terms contained in Policy 259.

Liberty Counsel is prepared to vindicate First Amendment violations engendered by Policy 259, if and when they arise. However, we hope that the concerns expressed in this letter result in Board action to strike Policy 259 in its entirety, so that further action by Liberty Counsel proves unnecessary, and that the rights of parents and other students and staff in Haverford are protected.

Thank you for your consideration of these concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard L. Mast', with a large, stylized initial 'R' and 'M'.

Richard L. Mast[†]

Attachments

CC

Via Email

Haverford School Board

Kimberly Allen-Stuck, Ph.D., Vice-President

havschbd@haverfordsd.net

[†]Licensed in Virginia

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Researchers Identify 6,500 Genes That Are Expressed Differently in Men and Women

Genes that are mostly active in one sex or the other may play a crucial role in our evolution and health

03.05.2017 | Also in: Life Sciences, Biochemistry, Evolution and Development, Fertility, Genetics, Systems Biology



Men and women differ in obvious and less obvious ways – for example, in the prevalence of certain diseases or reactions to drugs. How are these connected to one's sex? Weizmann

Institute of Science researchers recently uncovered thousands of human genes that are expressed – copied out to make proteins – differently in the two sexes. Their findings showed that harmful mutations in these particular genes tend to accumulate in the population in relatively high frequencies, and the study explains why. [The detailed map of these genes \(https://bmcbiol.biomedcentral.com/articles/10.1186/s12915-017-0352-z\)](https://bmcbiol.biomedcentral.com/articles/10.1186/s12915-017-0352-z), reported in *BMC Biology*, provides evidence that males and females undergo a sort of separate, but interconnected, evolution.

Several years ago, [Prof. Shmuel Pietrokovski \(http://www.weizmann.ac.il/molgen/members/pietrokovski.html\)](http://www.weizmann.ac.il/molgen/members/pietrokovski.html) and Dr. Moran Gershoni of the Weizmann Institute's Molecular Genetics Department asked why the prevalence of certain human diseases is common. Specifically, about 15% of couples trying to conceive are defined as infertile, which suggested that mutations that impair fertility are relatively widespread. This seems paradoxical: Common sense says that these mutations, which directly affect the survival of the species by reducing the number of offspring, should have been quickly weeded out by natural selection. Pietrokovski and Gershoni showed that mutations in genes specific to sperm formation persist precisely because the genes are expressed only in men. A mutation that is problematic for only half the population, no matter how detrimental, is freely passed on to the next generation by the other half.

Harmful mutations in these particular genes tend to accumulate in the population in relatively high frequencies

In the present study, the researchers expanded their analyses to include genes that, though not necessary for fertility, are still expressed differently in the two sexes. To identify these genes, the scientists turned to the GTEx project – a very large study of human gene expression recorded for numerous organs and tissues in the bodies of close to 550 adult donors. That project enabled, for the first time, the comprehensive mapping of the human sex-differential genetic architecture.

Pietrokovski and Gershoni looked closely at around 20,000 protein-coding genes, sorting them by sex and searching for differences in expression in each tissue. They eventually identified around 6,500 genes with activity that was biased toward one sex or the other in at least one tissue. For example, they found genes that were highly expressed in the skin of men relative to that in women's skin, and they realized that these were related to the growth of body hair. Gene expression for muscle building was higher in men; that for fat storage was higher in women.

Yet another difference

The two then looked at tendencies to accumulate mutations, to see if natural selection puts more or less pressure on genes that are specific to men or women. That is, to what extent are harmful mutations weeded out or tolerated in the population? Indeed, the researchers found that the efficiency of selection is weaker in many such genes. "The more a gene was

specific to one sex, the less selection we saw on the gene. And one more difference: This selection was even weaker with men,” says Gershoni. Although they do not have a complete explanation for this additional difference, the researchers point to a theory of sexual evolution first proposed in the 1930s: “In many species, females can produce only a limited number of offspring while males can, theoretically, father many more; so the species’ survival will depend on more viable females in the population than males,” explains Pietrokovski. “Thus natural selection can be more ‘lax’ with the genes that are only harmful to males.”

Aside from the sexual organs, the researchers discovered quite a few sex-linked genes in the mammary glands – not so surprising, except that about half of these genes were expressed in men. Because men have fully fitted but basically nonfunctional mammary equipment, the scientists made an educated guess that some of these genes might suppress lactation.

To some extent, human evolution should be viewed as co-evolution

Less obvious locations included genes that were found to be expressed only in the left ventricle of the heart in women. One of these genes, which is also related to calcium uptake, showed very high expression levels in younger women that sharply decreased with age; the scientists think that they are active in women up to menopause, protecting their hearts, but leading to heart disease and osteoporosis in later years when the gene expression is shut down. Yet another gene that was mainly expressed in women was active in the brain, and though its exact function is unknown, the scientists think it may protect the neurons from Parkinson’s – a disease that has a higher prevalence and earlier onset in men. The researchers also identified gene expression in the liver in women that regulates drug metabolism, providing molecular evidence for the known difference in drug processing between women and men.

“The basic genome is nearly the same in all of us, but it is utilized differently across the body and among individuals,” says Gershoni. “Thus, when it comes to the differences between the sexes, we see that evolution often works on the level of gene expression.” Pietrokovski adds: “Paradoxically, sex-linked genes are those in which harmful mutations are more likely to be passed down, including those that impair fertility. From this vantage point, men and women undergo different selection pressures and, at least to some extent, human evolution should be viewed as co-evolution. But the study also emphasizes the need for a better understanding of the differences between men and women in the genes that cause disease or respond to treatments.”

Prof. Shmuel Pietrokovski’s research is supported by the Leo and Julia Forchheimer Center for Molecular Genetics; and the estate of Georges Lustgarten. Prof. Shmuel Pietrokovski is the incumbent of the Herman and Lilly Schilling Foundation Professorial Chair.