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REPLY TO FLORIDA

July 2, 2019

VIA EMAIL ONLY

Superintendent [REDACTED]

[REDACTED] District

[REDACTED]

[REDACTED], OH [REDACTED]

[REDACTED]

Re: Punishment of protected student speech

Dear Superintendent [REDACTED]:

By way of brief introduction, Liberty Counsel is a national non-profit litigation, education, and public policy organization specializing in constitutional law, with offices in Florida, Virginia, and Washington, D.C. As part of our work in the public interest, Liberty Counsel provides *pro bono* legal assistance to public school students in the area of protected First Amendment expression.

Liberty Counsel writes to the [REDACTED] ("District") regarding violations of student First Amendment speech rights. Liberty Counsel represents student [REDACTED]. (hereinafter, "[Client]"), who recently completed 6th grade at [REDACTED] School. [Client] was punished on May 14, 2019 by Assistant Principal [REDACTED] for supposedly "misgendering" another male student, and for sharing his opinion in response to multiple other students in conversation about cross-sex hormones and the removal of "male private parts" of a male student who claims transgender status. [Client] was punished for using the male pronoun "he" in reference to the male student, and for stating his opinion that "he is a boy, and not a girl," based on the student's biological sex.

I understand the following additional facts to be true: "[Boy A]" (pseudonym for the student in question) is a male¹ student at [REDACTED] School, and has publicly claimed to be female beginning in Spring 2019. Administrators at the school, including the assistant principal, the art teacher, and the music teacher, all refer to [Boy A] by female pronouns such as "she" and "her." Administrators have told other students that [Boy A] "is a girl," and that the students must call [Boy A] "she" and other female pronouns, and consider him a female.

[Client] considers [Boy A] a friend, and while he appreciates and accepts [Boy A] as a

¹ For purposes of consistency and clarity in this letter, "male" means a person of the male sex; "female" means a person of the female sex. Male pronouns are used to refer to individuals of the male sex, and female pronouns for individuals of the female sex. No disrespect is intended.

person, [Client] does not consider [Boy A] female. [Client] also would not purposefully say anything to offend [Boy A]. In fact, [Client] has given at least one personal gift to [Boy A], along with a personal note. Regardless of whether [Boy A] *actually believes* he is or sincerely *wants to be* a girl, however, [Client] understands [Boy A] is male.

[Boy A]'s claim to be female has been heavily discussed at school, particularly by a group of girls ([Girl A], [Girl B], and [Girl C]) in [Client]'s classes. These girls enthusiastically agreed with the claim that [Boy A] is a girl. They began calling [Boy A] "she" early in the year, and would eagerly discuss issues of transgenderism and "transition" with [Boy A], often during art class at the table immediately behind [Client]. [Client] was subjected to conversations about these issues constantly, on at least a weekly or semi-weekly basis.

On May 13, 2019, this group of girls was again talking in art class about [Boy A] being "a girl." The girls began talking about [Boy A]'s "taking girl hormones" and eventually having his "male private parts removed," and that this would "make him a girl." [Client] disagreed as a factual matter [and as a matter of [Boy A]'s safety], and spoke up to correct their error. [Client] said to the girls, "No, he [meaning [Boy A]] is a boy, and not a girl." Another boy, [Boy B], agreed with [Client], that sex is biologically determined, stating "Yes, you are what you're born with." [Client] recalls a third boy at his table, [Boy C], may have said something to a similar effect.

[Client] is adamant that he did not say "he is a boy, not a girl" in a mocking or teasing fashion. He said it sincerely, as what he truly believes, after being subjected to the conversations of the girls all semester. The art teacher overheard a portion of the conversation with [Client] and the other boys expressing disagreement about the claim that [Boy A] is female, and broke up the conversation. The art teacher reported to AP [REDACTED] that [Client] and the other boys were "bullying" [Boy A], and that one boy, [Boy C], called [Boy A] a "flaming homosexual." [Client] is adamant that [Boy C] did not call [Boy A] a "homosexual" or "flaming homosexual," or anything similar in the art class conversation, and that none of the boys were "bullying" [Boy A]; they were participating in a conversation. Regardless, [Client] himself said nothing improper.

Assistant Principal [REDACTED] called [Client] to the office on Tuesday, May 14, 2019. Ms. [REDACTED] asked [Client] what happened, and he told her. Ms. [REDACTED] said, "you can have your own beliefs, but [Boy A] wants to be called a girl," and "there might be consequences" because [Client] used the male pronoun and said "he is a boy, not a girl." Consequences came at 1:00 PM. Assistant Principal [REDACTED] went to PE, and told [Client] he was not allowed to participate. She brought him back to the principal's office. [Client] felt shame and embarrassment at being pulled out of gym class in front of his friends. Based on his conversation with Ms. [REDACTED], [Client] understands that he must refer to [Boy A] as a girl and with female pronouns, going forward, or that he will be punished. [Client] also learned that the other boys received in-school suspension on May 14, and out-of-school suspension on May 15, 2019.

In addition, Assistant Principal [REDACTED] called [Client]'s mother on May 14, 2019, to inform her about the conversation in art class, and [Client]'s punishment. Ms. [REDACTED] told [Client]'s mother that she "did not believe that [Client] was bullying," that "he happened to be there with two other boys that were," but he still said what he said, and that is why "[Client] received a lesser punishment" of "only" being suspended from gym class. Subsequently, [Client]'s parents contacted Liberty Counsel for assistance.

[Boy A]'s claim or belief that he "is a girl" is a subject of significant student discussion at [REDACTED] School. It will potentially lead to medically harmful results for [Boy A], and those results have been discussed by [Boy A] and other students in class. If students

are permitted to discuss their opinion of whether [Boy A] “is a girl,” which they are, or whether castration is a good thing for [Boy A], which they have, the District may not silence students who respectfully disagree with those claims.

[Client] cannot in good conscience encourage [Boy A] in the false belief that he is a girl, through the use of false pronouns, or otherwise through agreement with the claim, because it would encourage [Boy A] in a fiction that may lead him to take harmful cross-sex hormones, and to seek non-medically necessary castration and removal of his “male private parts.” [Client] believes in telling the truth, especially where a friend believes something that is not true, and that false belief stands to seriously harm the friend’s health, as castration and cross-sex hormones would seriously and irrevocably harm [Boy A]’s health.

The First Amendment protects a student’s right to hold his own views, and to respectfully share them, where the issues of transgenderism, cross-sex hormones, and “having male private parts removed” are raised by others in conversation during school time where students may talk, and are otherwise permissible subjects of discussion. This is especially true where the student shares his views in response to conversations to which he is repeatedly subjected by others against his will.

Moreover, the government may not take one side in a cultural or scientific debate, and turn classrooms into enclaves of totalitarianism. It is clear that if [Client] had said, “she [meaning [Boy A]] is a girl,” in response to the girls’ conversation, [Client] would never have been punished. He would have been praised and applauded.

Students do not shed their constitutional rights at the schoolhouse gate. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). District policies or practices may not prohibit students from politely expressing in an age-appropriate manner the commonly-held, mainstream, factual view that sex is in[Client]; is biologically determined; and does not change based on subjective mental perceptions or claims. For the record, it is scientific fact there are more than 6,500 unique differences at the DNA level between males and females, in addition to the “XY” and “XX” chromosomal differences. None of these DNA differences between males and females change as a result of hormones, surgery, or castration. If [Boy A]’s parents have him castrated, he will grow up as a sadly mutilated boy.

Where, as here, the student speech in question is not attributable to the District, and is neither disruptive, obscene, lewd, sexually explicit, nor regarding illegal drug use, it may not be punished, prohibited or subjected to discriminatory treatment. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Morse v. Frederick*, 551 U.S. 393 (2007). *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 260 (4th Cir. 2003); *Griggs ex rel. Griggs v. Ft. Wayne Sch. Bd. et al*, 359 F.Supp.2d 731 (N.D. Indiana 2005).

Nothing in Policy 5517 Anti-Harassment (addressing harassment and bullying) applies to [Client]’s expression in this situation. Moreover, Policy 5780 Student Rights explicitly recognizes that students retain “many of **the rights of citizenship**” including the “**constitutional right to ... free expression...**as appropriate for the school environment.” (Emphasis added). If discussion of “cross-sex hormones” and surgical castration of a boy involving the removal of “male private parts” is permitted and appropriate in the school environment, then respectful disagreement with the claim (that [Boy A] “is a girl”) underlying that position is also appropriate to the school environment, and may not be punished.

Public schools simply may not favor or suppress the speech of students expressing a particular viewpoint on a permissible subject in a permissible manner. Schools must remain neutral regarding hot-button issues, and may not establish an “orthodoxy” regarding

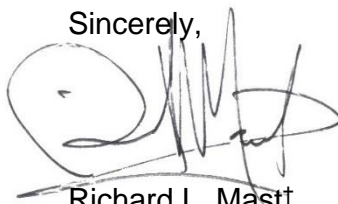
transgenderism. If “there is any fixed star in our constitutional constellation, it is that **no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.**” *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). (Emphasis added).

[Client]’s statement to the girls that “he [[Boy A]] is a boy, not a girl” was in response to the latest in numerous unwelcome conversations within his earshot by [Girl A], [Girl B], and [Girl C] about [Boy A]’s sex. [Client] is entitled to share his views, where school officials permit the subject of transgenderism to be discussed repeatedly and openly by other students. [Client]’s speech does not fall into any prohibited category under school policy; and therefore constitutes protected First Amendment expression. [Boy A] may ask others to call him by female pronouns, but government may not force others to adopt his viewpoint about his sex, or use false pronouns in reference to him, or face punishment.

For these reasons, I am requesting that you **please respond in writing to Liberty Counsel on behalf of the District, by July 29, 2019**, confirming that 1) [Client]’s record has been expunged of any discipline; 2) that no student, including [Client], will be punished for expressing respectful disagreement on the subject of transgender claims by other students; and 3) that no student, including [Client], will be punished or subjected to official coercion for using pronouns consistent with male sex, in reference to other males; and consistent with female sex, in reference to females.

If I do not receive the requested response, Liberty Counsel will take further action to prevent irreparable harm to cherished First Amendment liberties. Thank you for your prompt attention to this matter.

Sincerely,



Richard L. Mast[†]

CC
Via Email

██████████ Board of Education
██████████, Board President
██████████, Board Vice President
██████████, Board Member
██████████, Board Member
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