



September 30, 2014

Minnesota State High School League
Board of Directors
2100 Freeway Boulevard
Brooklyn Center, MN 55430-1735

Re: Proposed MSHSL Policy Regarding Participation of Transgender Students

Dear Members of the MSHSL Board of Directors:

It has come to our attention that you are considering adopting a new policy that would require MSHSL member schools to allow transgender students to participate in opposite-sex sports teams, use opposite-sex locker rooms, and share hotel rooms with students of the opposite sex. We write to reaffirm the commonsense proposition that forcing students to share locker and hotel rooms with members of the opposite sex violates their right to bodily privacy and would not only lead to potential legal liability for MSHSL, its member schools, and their employees, but also violate religious schools', students', and parents' fundamental rights.

By way of introduction, Alliance Defending Freedom is an alliance-building legal organization that advocates for the right of people to freely live out their faith. We are committed to ensuring that religious schools, students, and faculty are free to exercise their First Amendment rights to speak, associate, and learn on an equal basis with other members of the school community.

MSHSL Is a State Actor Subject to Suit in State or Federal Court

“The Minnesota State High School League is a voluntary, nonprofit association of public and private schools ...” MSHSL, About MSHSL, *available at* <http://www.mshsl.org/mshsl/aboutmshsl.asp?page=1> (last visited Sept. 29, 2014). “Because statewide athletic associations are almost entirely comprised of and governed by government entities and representatives, the Supreme Court has deemed these associations to be state actors.” *McGee v. Va. High Sch. League, Inc.*, No. 2:11-CV-00035, 2011 WL 4501035, at *3 (W.D. Va. Sept. 28, 2011) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001)). In keeping with this holding, the United States Court of Appeals for the Eighth Circuit, which has jurisdiction over the State of Minnesota, has held that MSHSL is a state actor subject to suit under 42 U.S.C. § 1983. *See Brenden v. Indep. Sch.*

Dist. 742, 477 F.2d 1292, 1295 (8th Cir. 1973). That holding has been reaffirmed by the United States District Court for the District of Minnesota, see *H.R. v. Minn. State High Sch. League*, No. 13-16, 2013 WL 147416, at *3 n.3 (D. Minn. Jan. 14, 2013); *W.D. v. Minn. State High Sch. League*, No. 12-2892, 2012 WL 5985514, at *4 (D. Minn. Nov. 29, 2012), as well as by Minnesota state courts, *G.H. v. Minn. State High Sch. League*, No. 2-02-462, 2002 WL 31165068, at *2 (Minn. App. Oct. 1, 2002). MSHSL's policies are thus clearly subject to review under the state and federal constitutions, in addition to general principles of state law.

The Proposed Policy Will Endanger Students' Safety and Privacy and Subject MSHSL and Its Member Schools to Potential Legal Liability

MSHSL's proposed policy violates students' right to bodily privacy. Forcing students into vulnerable interactions with members of the opposite sex in secluded locker and hotel rooms disregards basic notions of personal dignity, which federal courts have recognized in a variety of contexts. See, e.g., *Sommers v. Budget Mkt., Inc.* 667 F.2d 748, 750 (8th Cir. 1982) (finding that a transgender individuals' use of a women's restroom threatened a female employees' privacy interests); *Rosario v. United States*, 538 F. Supp. 2d 480, 497-98 (D.P.R. 2008) (finding that a reasonable expectation of privacy exists in a "locker-break room" that included a bathroom); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122, 1132 (S.D. W. Va. 1982) (holding that a female would violate a male employee's privacy rights by entering a men's restroom while the male was using it). As the United States Court of Appeals for the Ninth Circuit has explained, "[s]hielding one's unclothed figure from the view of strangers, particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (emphasis added). The proposed policy utterly fails to respect that right.

MSHSL and its member schools also have a common law duty to maintain school "property free of unreasonable risks of harm." *Renswick v. Wenzel*, 819 N.W.2d 198, 207 (Minn. Ct. App. 2012). If any harm comes to a female student in a boys' locker or hotel room, a jury could readily find that MSHSL and its member school were negligent in permitting such interactions in the first place. Indeed, a jury might even find that creating such obviously unsafe conditions shows deliberate indifference to student's physical safety in violation of the Due Process Clause of the Fourteenth Amendment. See *Scott v. Baldwin*, 720 F.3d 1034, 1037 (8th Cir. 2013) (explaining that, in situations where "deliberation [beforehand] is practical," "deliberate indifference" simply requires the "reckless disregard of [a] known risk" (quotations omitted)).

The Proposed Policy Ignores the Fundamental Right of Religious Schools and Students to Live in Accordance with Their Faith

It is our understanding that MSHSL has a significant number of private

school members, many of which are religious schools. Both the United States and Minnesota Constitutions protect the fundamental right of religious schools and religious students to live in accordance with their faith. "Religious liberty is a precious right. The people of [Minnesota] have always cherished religious liberty." *Edina Cmty. Lutheran Church v. State*, 745 N.W.2d 194, 203 (Minn. Ct. App. 2008). In fact, that right is addressed in the state constitution "even before any reference to the formation of a government." *Id.* Whereas the First Amendment to the United States Constitution prevents government from "*prohibiting the exercise of religion*," the state constitution "precludes even an *infringement* on or an *interference* with religious freedom." *Id.* "Thus, government action that is permissible under the federal constitution because it does not prohibit religious practices but merely infringes on or interferes with religious practices, may nonetheless violate the Minnesota Constitution." *Id.*

It is unlikely that a court would uphold the proposed transgender policy's interference with religious freedom. Most, if not all, religious schools regard facilitating the denial and rejection of one's God-given sex to be a grave sin. And religious students are precluded by basic modesty principles from sharing locker or hotel rooms with members of the opposite sex. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (noting that students do not "shed their constitutional rights ... at the school house gate"). MSHSL's proposed policy would thus make religious schools' and religious students' participation in high school athletics effectively impossible. Government actors are forbidden from demonstrating such "a pervasive bias or hostility to religion, which ... undermine[s] the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995). Furthermore, there is no real argument that MSHSL's proposed policy would hurdle the "compelling state interest balancing test" applied by Minnesota courts because there is no compelling interest in forcing members of the opposite sex to share locker and hotel rooms and there are numerous less restrictive means of furthering any legitimate goals MSHSL seeks to promote. *Edina Cmty. Lutheran Church*, 745 N.W.2d at 203.

The Proposed Policy Interferes with Parents' Fundamental Rights

Parents have the fundamental right to control their children's education and upbringing and MSHSL's proposed policy utterly fails to respect that right. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 66 (2000) (holding that the Constitution "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights...to direct the education and upbringing of one's children"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing "[t]he fundamental liberty interest of natural parents in the care, custody, and

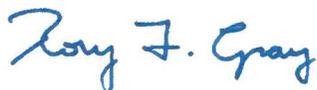
management of their child”); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (recognizing “the liberty of parents and guardians to direct the upbringing and education of children under their control”).

Indeed, MSHSL’s programs encompass students enrolled in public, private, and home schools. Many parents, regardless of their religious beliefs, will be fundamentally opposed to endangering their children’s emotional and physical well-being by having them share locker and hotel rooms with members of the opposite sex. That level of intimate interaction and knowledge is obviously inappropriate for teenagers. MSHSL’s proposal treats children as guinea pigs fit for social experimentation and seriously compromises parents’ rights to make decisions regarding their children’s care by forcing them to trade their children’s essential right to dignity and physical privacy for participation in high school sports. Because students may well have “a legitimate claim of entitlement to athletic eligibility under Minnesota law,” *W.D.*, 2012 WL 5985514, at *4, MSHSL’s proposed policy may also unlawfully interfere with parents’ and students’ property rights. *See also J.K. ex rel. Kaplan v. Minneapolis Pub. Sch.*, 849 F. Supp. 2d 865, 877 (D. Minn. 2011) (noting there is “a strong argument that, under Minnesota law, [the] property interest in an education extends to participation in interscholastic sports”).

Conclusion

Forcing students to share locker and hotel rooms with students of the opposite sex would seriously endanger the physical privacy of students, infringe private schools’ and students’ religious liberty, undermine parental authority, and extinguish a school environment conducive to learning. Indeed, the dangers inherent in this scenario are so clear-cut that adopting the proposed policy would clearly expose MSHSL—and its member schools—to tort liability. We therefore urge you not to adopt the proposed MSHSL policy regarding the participation of transgender students.

Sincerely,



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