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Reply to: Virginia

December 3, 2014

Via Email and Facsimile - 507-932-4700

Mr. Scott McCready
President of the Board of Directors,
Minnesota State High School League
St. Charles HS
600 East 6th Street
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smccready@schs.k12.mn.us

Re: Proposed MSHSL Transgender Policy

Dear Board President McCready,

By way of brief introduction, Liberty Counsel is a non-profit litigation, education, and policy organization with an emphasis on religious liberty issues. We have offices in Orlando, Florida; Lynchburg, Virginia; Washington, D.C.; and Jerusalem, Israel, and hundreds of affiliate attorneys around the world, including Minnesota.

Liberty Counsel writes on behalf of concerned parents, students and school administrators regarding the Minnesota State High School League (MSHSL) proposed policy entitled "Gender Identity Participation in MSHSL Activities." Not only does this proposed policy threaten student privacy and safety, and full female participation in the high school athletic environment, it also impacts religious freedom.

Specifically, the proposed policy states,

When there is confirmation of a student's consistent and uniform gender-related identity or any other evidence that the gender-related identity is sincerely held as part of the person's core identity, the student will be eligible to participate in MSHSL activities consistent with the student's

gender-related identification for the balance of the student's high school eligibility.

In support of this proposed policy, David Stead's letter of November 28, 2014 to the MSHSL Board discusses both Title IX and Minnesota law. This letter contains significant errors, not the least of which is the statement that it is "well established that discrimination against transgender students is prohibited by Title IX."

In support of this proposition, Mr. Stead cites no legal authority, but merely references the "Federal Guidance document" from the U.S. Department of Education Office of Civil Rights ("OCR") "Questions and Answers on Title IX and Sexual Violence," **which in turn cites no authority** - case law or statutory - for the proposition that Title IX now applies to students claiming to be the opposite sex for purposes of high school athletics.

Moreover, Mr. Stead's letter glosses over the decision of the Minnesota legislature to enact Minn. Stat. Sec 363A.23 Subd. 2, which provided that "it is **not an unfair discriminatory practice** for an educational institution...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...**" (Emphasis added). Minnesota Statutes 121A.04 further provides that its purpose is to "provide an equal opportunity for **members of both sexes** to participate in athletic programs." (Emphasis added). As set forth below, the legislative purpose for Title IX and its Minnesota statutory analogue - equal opportunity for girls - would be gutted, if biological sex is now considered meaningless, and is discarded.

Proponents of this policy change assert that Title IX *requires* that Minnesota high schools permit a student athlete to participate on an opposite-sex athletic team consistent with his or her "gender identity," irrespective of anatomical sex and biology. This interpretation of Title IX is inaccurate; the scope of Title IX does not require Minnesota schools to adopt this novel and dangerous policy. Liberty Counsel urges Board members to vote against the proposed MSHSL "transgender" policy change.

Title IX (20 U.S. Code § 1681) prohibits educational programs or activities that receive federal funding from discriminating, excluding participation, or denying benefits "on the basis of sex." It does not extend protection "on the basis of being 'transgendered'." "Sex" has always been synonymous with "gender," and as passed by Congress in 1972, means "male or female." Congress has never amended Title IX to include the concepts of "transsexualism" or "transgenderism."

Therefore, nothing in Title IX justifies or allows a MSHSL policy requiring male students claiming they are girls (so-called "transgender" individuals) to participate on

girls' teams under the fiction that they are the opposite sex, or vice versa. Title IX requires, in general, equality in educational and athletic opportunities for *girls and boys*. Under Title IX, girls are to be afforded participation on boys' teams under certain circumstances, but never under the proposition that they "are" boys. In short, Title IX states that girls **are equal to** boys in terms of access to athletic opportunities, but Title IX does not state that girls **are** boys, and boys **are** girls. Such a statement, if true, would eliminate the need for Title IX.

Consistent with these basic biological concepts, courts apply Title IX's prohibition on discrimination on the basis of sex in the academic and athletic environment in a consistent manner with Title VII's prohibition of employment discrimination on the basis of sex. The Supreme Court, in *Price Waterhouse v. Hopkins*, held that *gender stereotyping* constituted discrimination on the basis of sex. It did not say there are no genders. The Court stated,

We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1791 (1989).

Also outside the school context, but instructive to it, the Ninth Circuit has held that employers may impose grooming standards that appropriately differentiate between the genders. *Jespersen v. Harrah's Operating Co, Inc.*, 444 F.3d 1104 (9th Cir. 2006). In *Jespersen*, the grooming standards of Harrah's Casino required women to wear some facial makeup, and did not permit men to wear any. The standards permitted women to have long hair, but they required men to have their hair cut short. The Court upheld the termination of a woman who refused to wear makeup, per the grooming policy. The Court stated, "Grooming standards that appropriately differentiate between the genders are not facially discriminatory." *Id.* at 1110.

Proponents of the MSHSL transgender policy reason that a prohibition of sex stereotyping, as was the case in *Price Waterhouse*, requires schools to permit a so-called "transgendered" student athlete to participate on an opposite-sex athletic team consistent with his or her "gender identity," irrespective of anatomical sex. However, case precedent does not support such a misguided and far-reaching interpretation of *Price Waterhouse*.

“First, post-*Price Waterhouse* courts have consistently held that Title VII does not prohibit discrimination based on sexual orientation or sexual preference.” *Schroer v. Billington*, 424 F. Supp. 2d 203, 208 (D.D.C. 2006) (citing *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir.2005); (*Schroeder v. Hamilton School Dist.*, 282 F.3d 946 (7th Cir.2002); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3rd Cir.2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir.1999); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751-52 & n. 3 (4th Cir.1996); *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir.1989)).

“Second, courts before and after *Price Waterhouse* have found no Title VII violation in gender-specific dress and grooming codes, so long as the codes do not disparately impact one sex or impose an unequal burden.” *Schroer*, 424 F. Supp. 2d at 208-09 (D.D.C. 2006) (citing *Jespersen v. Harrah's Operating Co., Inc.*, 392 F.3d 1076 (9th Cir.2004); *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir.2000); *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385 (11th Cir.1998); *Tavora v. New York Mercantile Exchange*, 101 F.3d 907 (2nd Cir.1996)).

Moreover, consistent with Congressional intent behind Title VII, numerous courts, including the Eighth Circuit, which has jurisdiction over Minnesota, have specifically *declined* to extend Title VII protections to transsexualism and gender identity. See e.g., *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir.1982); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir.1984); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir.1977).

In sum, provided that equal opportunities are presented to both males and females, Minnesota schools are and remain compliant with Title IX. The type of discrimination that the Supreme Court prohibited in *Price Waterhouse* only applies in cases of disparate treatment between the sexes of male and female. *Price Waterhouse* does not mandate or condone the novel and unfounded assertion that sex can be subjectively changed. Here, as long as Minnesota schools provide equal opportunities for both male and female students, as biologically distinct sexes, Title IX is irrelevant.

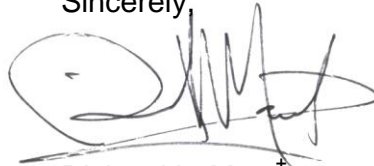
In addition to the absence of precedent to support the proposed MSHSL "transgender" policy, the Board should be cognizant of other serious concerns, that, taken as a whole, will serve to gut the protections of female athletic equality set forth in Title IX. As a matter of privacy, the policy is extremely troubling. As a result of sharing locker room space, the proposed policy would facilitate a gross intrusion of privacy, particularly for female student athletes. The use of shared facilities, where some degree of nudity is foreseeable, raises safety concerns that should be obvious. Safety concerns also arise in the context of travel and away games, where student athletes are expected to share a hotel room together. Height, weight, and body mass disparity of boys raises competitiveness and injury concerns for girls in girls' sports. All of these concerns create

barriers to equal female athletic participation, thus turning Title IX on its head, transforming it into a disincentive to girls' full athletic participation. Such is the foreseeable result of redefining terms without authority.

Finally, the proposed policy is a significant threat to religious freedom. While the proposed policy supposedly exempts private schools from mandatory compliance, it is silent on whether compliant member schools would be able to schedule activities or competitions with non-compliant private schools. As such, private religious schools will in all likelihood be subjected to discrimination, and excluded from interacting with compliant member schools. Such alienation, on the basis of sincerely held religious beliefs, is contrary to the First Amendment.

For these reasons, the Board should reject the proposed MSHSL transgender policy titled, "Gender Identity Participation in MSHSL Activities." Policy proponents' approach of "I think, therefore, I am" does not override biology, the intent of Congress, or the rights of others. If the Board votes to pass the MSHSL "transgender" policy, Liberty Counsel is prepared to defend the rights of parents, students and schools in Minnesota.

Sincerely,



Richard L. Mast[†]

RLM/jml
CC

Via Email

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Minnesota State High School League
Board of Directors
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Pg. 6

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