



December 29, 2014

Mr. Mark Beckman, Executive Director
Montana High School Association
1 South Dakota Avenue
Helena, MT 59601

RE: MHSA's proposed transgender policy - Proposal No. 1 To Amend Eligibility By-Law In Consideration Of Gender Identity

Dear Mr. Beckman and MHSA Board Members,

I am writing to provide our commentary for your review and consideration regarding the Montana High School Association (MHSA) proposed transgender policy, which is scheduled for review by the Board in January 2015. We welcome the opportunity to discuss this policy further with MHSA.

First, the Montana Family Foundation supports the right of students who identify as transgender to participate in high school athletics. The participation in competitive athletics is widely known to be a healthy, character-building pursuit for youth, and the pursuit of athletic participation for all students should be encouraged. However, the ability of students who identify as transgender to participate in athletic programs should not extend to their ability to select a team, (or by extension, the corresponding restrooms and showers, changing facilities, overnight accommodations, and uniforms or practice attire) that does not correspond with their biological sex.

Montana Family Foundation has many concerns regarding the policy. For the following reasons, we strongly urge MHSA *not* to adopt MHSA's proposed transgender policy.

A. No Law Requires MHSA to Adopt MHSA's proposed transgender policy Regarding Participation of Transgender Students in Athletics

According to Title IX of the Education Amendments of 1972, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” (20 U.S.C. § 1681). Title IX was enacted with the purpose of eliminating discrimination on the basis of sex against women in the field of education. No court has ever interpreted Title IX to require schools to adopt the type of policy regarding transgender student athletic participation that MHSA is suggesting. And Congress has not added any transgender or other gender component to the Civil Rights Act beyond the historical distinctions between male and female.

The Montana School Boards Association (MTSBA) has recently distributed a “recommended” policy change for Montana School Boards similar to the transgender policy MHSB is proposing. MTSBA has attempted to persuade school trustees to add gender identity language by claiming that “binding guidance” has issued from the Federal Office of Civil Rights. This, however, is false and misleading. The “binding guidance” described by MTSBA is, in fact, an FAQ sheet issued by the Office of Civil Rights and has no binding component whatsoever, and is likely to open school boards that implement it up to threat of lawsuit.

Title VII employment cases further confirm this point. Courts interpreting Title VII have repeatedly interpreted Title VII to allow employers to require employees to use restrooms and changing areas that are consistent with their biological sex. For example, the Tenth Circuit held that “an employer’s requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes.”

There is a recognition in our laws that there are two distinct sexes, distinguished by physical and biological differences. No provision in federal or state law requires schools to allow students who have a gender identity or expression that differs from their biological sex to participate on athletic teams and access changing areas opposite those of their biological sex.

B. The MHSB Transgender Policy Fails to Address the Large Number of Religious Schools Within Its Membership

MHSB member schools include a large number of private, religious schools. Adherence to MHSB's proposed transgender policy would violate the sincerely held religious beliefs of these schools and their staff, students, and parents. Yet MHSB's proposed transgender policy is silent regarding these schools and raises a number of questions. Chiefly, will private religious schools that cannot comply because of the requirements of their faith be forbidden from being members of MHSB, thereby disqualifying their students from competing in state high school athletics? This would be a tragic outcome for hundreds of students in Montana. To this point, if MHSB pursues its proposed transgender policy without addressing its private religious schools, these schools may have a First Amendment claim against MHSB.

C. The MHSB Transgender Policy Could Subject Montana Schools to Civil Liability for Violating the Rights of Students and Parents and Creates an Environment Not Conducive to Healthy Competition and Learning

1. Students’ right to bodily privacy

Students (and their parents) have a right to expect their schools to protect their right to privacy. MHSB's proposed transgender policy disregards elementary notions of self-respect and personal dignity by forcing students into uncomfortable situations with opposite-sex students in places where they normally can be assured of privacy. Students’ privacy rights are violated when they risk exposure to the opposite sex in these locations. Even prisoners have privacy rights with respect to forced exposure to the opposite sex — shouldn’t our minor students have at least the same degree of protection when it comes to their privacy rights?

Adolescence is a difficult time for teens universally, especially with respect to their bodies and their interpersonal relationships with the opposite sex. MHSA's proposed transgender policy' intensifies this self-consciousness and self-awareness, while intentionally creating an unhealthy environment for high school athletics.

2. Parents' right to control the extent of their children's knowledge about and exposure to the differences between sexes

Besides violating students' privacy rights, MHSA's proposed transgender policy also violates parents' right to control the extent of their children's knowledge about and exposure to the differences between the sexes.

Interaction between males and females in locations such as the restroom, shower or changing facility, locker room, or overnight accommodation will necessarily result in students' exposure to the anatomical differences between the sexes. MHSA's proposed transgender policy makes clear that students who identify as transgender and are approved as such by the school will be allowed to "participate" on the sports team of the opposite gender. However, it is quite likely that there will be demands to define "participate" to include access to the team locker room, shower, and toilet facilities regardless of biological sex.

The bottom line is parents have a right to control the extent of their children's exposure to the anatomical differences of the opposite sex and that MHSA's proposed transgender policy undermines parental authority. The undermining of parental rights exposes MHSA member schools to tort liability.

3. The right of female students to be free from discrimination while at school

As noted above, Title IX prohibits sex discrimination at educational institutions. Specifically applied to the school athletic context, Title IX was created to make sure that girls would have equal opportunity to participate in girls' sports programs. MHSA's proposed transgender policy creates a situation that undercuts the entire purpose of Title IX. If biological boys are competing with biological girls for 12 spots on the girls basketball team, isn't it likely that in most situations, the biological boy will have a physical advantage over the girl? Is it fair to cut a biological girl to make room for the transgender boy? What if the biological girl is a freshman who loses her opportunity to improve over four years of high school and compete for a scholarship? Is this really the type of environment the MHSA wants to create for the female students in its member schools?

Conclusion

MHSA's proposed transgender policy contravenes the religious freedom rights of its member schools, violates the rights of parents and students, and leaves its member schools vulnerable to civil liability. It also creates an environment in which the purposes of Title IX are undermined and girls are disadvantaged. We strongly urge MHSA *not* to adopt MHSA's proposed transgender policy regarding participation of transgender students in high school athletics.

If you have any questions regarding this matter, please do not hesitate to contact me. I would be happy to speak with any member of MHSa and offer any assistance we can provide.

Sincerely,

Jeff Laszloffy, President/CEO

cc: Board of Directors