



P.O. Box 485, Laurel, MT 59044

February 9, 2015

## **Open Letter to Montana School Boards**

**RE: MTSBA's proposed revision to amend Equal Education, Nondiscrimination and Sex Equity policy**

Dear Board Members,

I am writing to provide our commentary for your review and consideration regarding the Montana School Board Association's (MTSBA) proposed changes to the Equal Education, Nondiscrimination, and Sex Equity policy, which have been submitted to local school boards so that they can consider whether or not to adopt them. We welcome the opportunity to discuss this policy further with MTSBA.

First, the Montana Family Foundation supports the right of all students to a quality education and access to programs, regardless of gender identity, sexual orientation, or conformance to stereotypical notions of masculinity or femininity. Participation in programs, activities, services, benefits, educational programs and extra-curricular programs is widely known to be a healthy, character-building pursuit for youth. The pursuit such participation for all students should be encouraged. However, in the case of activities that include any single-sex component, the ability of students whose gender identity does not conform to their biological sex to participate in such programs should not extend to their ability to select any single-sex component that does not correspond with their biological sex.

The Montana School Boards Association (MTSBA) has recently distributed a recommended policy change for Montana School Boards. MTSBA at first identified the proposed policy revision as "required" because "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. Using this guidance risks exposing school boards to lawsuits.

The proposed revision adds the language "gender identity, sexual orientation, or failure to conform to stereotypical notions of masculinity and femininity" as a protected class as a revision to extant discrimination policy.

The Montana Family Foundation has many concerns regarding the policy. These concerns arise from the fact that this language could create either or both of two similar situations: The first: that a student who is biologically male but identifies as a woman would expect to participate in activities and use facilities that are designated for women. The second, that a student who is biologically female but identifies as a man would have the corresponding expectation.

For the following reasons, we strongly urge local school boards **not** to adopt MTSBA's proposed policy revision.

**A. No Law Requires school boards to Adopt MTSBA's Proposed Policy Revision Regarding Issues of Gender Identity in Participation in School Activities**

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 suggested by MTSBA regarding activity participation by students whose gender identity does not conform to their biological sex. Nor has Congress added any such gender identity component to the Civil Rights Act beyond the historical distinctions between male and female.

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 in single-sex activities opposite those of their biological sex.

**B. The MTSBA Policy Could Subject Montana Schools to Civil Liability for Violating the Rights of Students and Parents and Creates an Environment Not Conducive to Healthy Activity Participation 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. MTSBA's proposed policy could create a situation where a student whose gender identity does not conform to his biological sex expects to use normally single-sex facilities that are designated for the biological sex opposite his. This risks disregarding 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. MTSBA’s proposed policy revision intensifies this self-consciousness and self-awareness, while creating an unhealthy environment for students who participate in high school activities.

**2. Parents’ right to control the extent of their children’s exposure to the differences between sexes**

Besides violating students' privacy rights, MTSBA's proposed policy revision also violates parents' right to control the extent of their children's exposure to the differences between the sexes.

Interaction between biological males and females in activities and locations that are normally single-sex will necessarily result in students' exposure to the unclothed bodies of people of the opposite sex. MTSBA's proposed policy creates the risk that students whose gender identity does not match their biological sex will be allowed to participate in single-sex activities for the opposite gender. It is quite likely that there will be demands to define "participate" to include access single-sex facilities and activities regardless of biological and anatomical 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 MTSBA's proposed policy revision undermines parental authority. The undermining of parental rights exposes MTSBA 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 activity context, Title IX was created to make sure that girls would have equal opportunity to participate in girls' sports programs. MTSBA's proposed 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 girl? 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 MTSBA wants to create for the female students in its member schools?

### **Conclusion**

MTSBA's proposed policy 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 school boards to **not** adopt MTSBA's proposed policy regarding gender identity and nonconformance to "stereotypical" notions of masculinity and femininity as it relates to participation in school activities.

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 MTSBA and offer any assistance we can provide.

Sincerely, \_\_\_\_\_



Jeff Laszloffy  
President/CEO