



## PUBLIC SCHOOL TRANSGENDER POLICIES

*The Detrimental Effect on Children and Parents*

School boards all over Michigan are considering policies regarding transgender students and whether to allow such students to use the bathroom and locker room facilities of the gender with which they self-identify. These proposed policies are similar to the one Rocklin Academy Gateway in California implemented when it presented lessons to its kindergarten class last June that some parents say left their five-year-old children traumatized. One girl came home crying, shaking and afraid she could turn into a boy. Angry parents flooded a school board meeting to protest that they were not forewarned that a boy was “transitioning” to a girl or that the kindergarten class would be taught about transgenderism.

The public school academy asserted it did not need to tell the parents anything. The teacher and school board refused to disclose to parents what happened during the lesson and told them to ask their child instead. The board stated that the boy has a “right” to self-identity as either sex, and anyone who intentionally does not use a student’s preferred pronoun could be guilty of “gender identity harassment.”

School boards should affirm and uphold constitutionally-protected rights and freedoms for all students. They should not pass policies granting special protections for some while coercing others to endorse and comply with a social experiment that denies science. The following analysis illustrates why the proposed transgender policies threaten students and parents’ constitutional rights and legal protections:

### **TRANSGENDER POLICIES VIOLATE CONSTITUTIONAL AND STATUTORY RIGHTS OF CHILDREN & PARENTS**

The proposed policies interfere with the fundamental right of a parent to raise and educate their child. MCL 380.10 states:

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*It is the natural, fundamental right of parents and legal guardians to determine and direct the care, teaching, and education of their children. The public schools of this state serve the needs of the pupils by cooperating with the pupil's parents and legal guardians to develop the pupil's intellectual capabilities and vocational skills in a safe and positive environment.*

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Public schools are required to cooperate with parents, not undermine parents, or refuse to notify and include a parent on personal issues involving their child.

The proposed policies potentially violate state sex education laws. MCL 380.1507a permits parents to provide a written notice to excuse their child from sex education classes under MCL 380.1507. The school is required to notify parents ahead of time of courses and information being

taught regarding human sexuality. No child is to be enrolled in such a class unless the parents give written approval. Moreover, the sex education advisory board should review any transgender curriculum prior to its use. MCL 380.1507(5). Material and instruction in the sex education curriculum under section 1507 must be age-appropriate and must not be medically inaccurate. MCL 380.1507b(2). A policy promoting education to children in kindergarten about transgenderism without parental consent clearly violates these statutes.

The proposed policies infringe on a student’s Constitutional right to privacy in a bathroom or locker room. As one court explained, “shielding one’s unclothed figure from the view of strangers, particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.” *York v. Story*, 324 F.2d 450 (9th Cir., 1963). See also *Obergefell v. Hodges*, 135 S. Ct. 2584, 576 U. S. \_\_\_\_ (2015).

Further, the proposed policies potentially create a hostile sexual environment in bathrooms and locker rooms in violation of the Elliott-Larsen Act. MCL 37.2202.

The proposed policies prohibit persons with traditional views of family and sexuality from exercising their constitutionally protected free speech and free exercise of religious conscience rights. Instead, they will face charges of



harassment, discrimination, or other punitive action if a child or parent dares to publicly disagree with the anti-science policy.

Religion is already a protected class under federal and state Constitutions and civil rights laws. If school boards adopt such policies, it will conflict with existing religious protections for parents and children.

### **TITLE IX DOES NOT MANDATE NEW POLICIES**

Title IX and its implementing regulations expressly permits schools and school districts to provide and designate separate locker rooms, restrooms, and other facilities on the basis of sex. 45 CFR 618.410. This separation is not discrimination; it is common sense.

The U.S. Department of Education’s Office for Civil Rights rescinded an unlawful Title IX policy interpretation it issued in 2016. Nonetheless, LGBTQ activists continue to misrepresent Title IX as authority for requiring schools to allow boys to use girl’s bathroom and girls to use boy’s bathrooms.

Title IX, as enacted by Congress, states:

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*No 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.*

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20 U.S.C. § 1681(a).

Notably, Title IX recognizes the biological and physiological differences between men and women:

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*Notwithstanding anything to the contrary contained in this chapter, nothing*

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<sup>1</sup> Many citizens reject the legitimacy of these recently coined terms as unfounded in science or reason and as the self-serving political rhetoric of a small group of activists. See, e.g., R. Reilly, *Making Gay Okay – How Rationalizing Homosexual Behavior Is Changing*

*contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.*

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20 U.S.C. § 1686. Likewise, Title IX’s implementing regulation, 34 C.F.R. § 106.33, expressly allows for schools to designate separate facilities based upon sex:

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*A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.*

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As these sections make clear, the word “sex” in Title IX, means male and female. Recognizing the biological and physiological differences between men and women, Title IX therefore expressly allows educational institutions to provide separate facilities based on sex. 20 U.S.C. § 1681(a); 20 U.S.C. § 1686. Its implementing regulation also clearly permits the designation of separate toilet, locker room, and shower facilities based on sex. 34 C.F.R. § 106.33.

LGBTQ activists are improperly attempting to change the word “sex” in Title IX to include terms like “gender identity” and “transgender.” These words do not appear in Title IX, its enacting regulations, or its legislative history.<sup>1</sup> Such a misrepresentation and faulty analysis cannot be reconciled with the plain meaning of the actual language used by Congress in Title IX. Further, it is preposterous to argue that Congress was contemplating “transgenderism” or “gender identity” when it passed Title IX in 1972.

*Everything*, pp. 11, 47-48, 64, 117-29 (Ignatius Press, 2014) (acceptance and promotion of homosexual behavior is based on politics rather than science).



The purpose of Title IX was to prevent discrimination based on biological sex. By necessity, this means Congress based the law on the premise that there are distinct, genetic differences between a man and a woman. Proponents of “transgenderism” or “gender fluidity,” however, contend no distinction between the sexes exist. It cannot be both ways. Either there is a distinction between the sexes or there is not. The entire purpose of Title IX to prevent discrimination based on sex is rendered useless if every person in the country can be both a man and a woman. This is nonsensical and clearly not the intent of Congress. Congress intended Title IX to protect everyone from discrimination against their biological sex, regardless of their self-perceived identity. Transgender policies actually defeat the purpose of Title IX.

Thus, Title IX, as passed and implemented by the politically accountable branches of the government: 1) requires that schools not discriminate on the basis of biological sex in order to receive federal funding; 2) clearly states that separate “toilet, locker room, and shower facilities” on the basis of biological sex are permissible; and 3) includes no provisions, legal or otherwise, pertaining to the special treatment of “gender identity” or “transgenderism.”

For over 40 years, Title IX permitted schools to provide separate bathrooms, changing rooms, and showering facilities based on sex. The clear and plain meaning of the legislation was never

questioned.<sup>2</sup> Therefore, this social engineering experiment through these types of policies is not authorized under Title IX.

### **UNLAWFUL TRANSGENDER POLICIES CREATE A HOSTILE AND DISCRIMINATORY ENVIRONMENT FOR RELIGIOUS FACULTY, STUDENTS, AND PARENTS**

The misrepresentation of Title IX will inevitably lead to authorities infringing on constitutional rights of students, faculty, and staff. The rights threatened include: 1) the constitutional right to bodily privacy; 2) the fundamental right of parents to control and direct the upbringing of their children; 3) the First Amendment rights of freedom of speech and religious conscience; and 4) the fundamental constitutional liberty and equal protection interests judicially recognized by the Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (i.e., the personal identity rights of students, faculty, and staff who find their personal identity not in their sexuality but in Jesus Christ or other faith orientation).

#### **1. The Right to Bodily Privacy.**

Every person has a fundamental right to bodily privacy. See *Griswold v. Connecticut*, 381 US 479 (1965), *De May v. Roberts*, 46 Mich 160 (1881); *Cf. Moore v. East Cleveland*, 431 U.S. 494 (1977); U.S. Const. amend 3, 4. This includes a right to privacy in one’s fully or partially unclothed body. It also includes the right to be

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<sup>2</sup> During the pendency of the appeal in *Gloucester v. GG*, a similar case recently before the Supreme Court, the Department of Education issued a letter to every Title IX recipient in the country. The letter, drafted during the Obama Administration, essentially directed that a school must allow a biological girl to use the boy’s restroom and shower if the girl says she’s a boy. Respondents in *Gloucester* then argued that the Department of Education letter provided the “controlling interpretation” of Title IX. It was undisputed that the agency’s letter failed to address Title IX’s implementing regulations, including 34 C.F.R. § 106.33, which allows for the separation of toilets, locker rooms, and showers based on sex. App. 121a, 123a, 126a-142a. It is also undisputed that the Department of Education never published the letters and never issued notice of rulemaking regarding its

radical new “interpretation” of Title IX. App. 103a, 126a-142a. The Great Lakes Justice Center and others called on the Departments of Education and Justice to rescind the letter at issue. The Departments of Education and Justice thereafter rescinded the letter on February 22, 2017. See: <https://www.justice.gov/opa/press-release/file/941546/download> (last visited September 21, 2017). The Supreme Court vacated the judgment of the Fourth Circuit and remanded the case for further consideration in light of the guidance issued by the Department of Education and Department of Justice on February 22, 2017. *Gloucester v. GG*, (16-273) (March 6, 2017) (Summary Disposition Order).

free from the risk of intimate exposure of oneself to the opposite biological sex, or being forced to endure such exposures by the opposite sex. See, e.g., *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from views of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.").

Throughout history, American law and society maintained a national commitment to protecting citizens, and especially children, from suffering the risk of exposing their bodies, or their intimate activities, to the opposite sex. The same is true of forcing them to be exposed to members of the opposite sex in public and in semi-public contexts, such as bathrooms, dressing rooms, and locker rooms.

Early in our history, the law allowed legal actions against "Peeping Toms."<sup>3</sup> As American law developed after the nation's founding, it disfavored the surreptitious viewing of its citizens to protect their reasonable expectation of privacy.<sup>4</sup> This protection is heightened for children. For example, Federal law makes it a crime to possess, distribute, or even view images of naked children. 18 USC 1466A(a)(1). Nearly every state criminalizes the transmission of a naked picture of a minor via email, text messaging, or other electronic means. See, e.g., MCL 750.145a, MCL 750.145c, and MCL 750.145d.

In the late 1800s, as women began entering the workforce, the law developed to protect privacy by mandating that workplace restrooms and changing rooms be separated by sex. Massachusetts adopted the first such law in 1887.<sup>5</sup> By 1920, 43 of the then 48 states had similar laws protecting privacy by mandating sex-separated facilities in the workplace.<sup>6</sup> Because of our national commitment to protect our children from the risk of being exposed to the anatomy of the opposite sex, as well as the risk of

being seen by the opposite sex while attending to private, intimate needs, sex-separated restrooms and locker rooms are ubiquitous. Using restrooms and locker rooms in a public school separated by sex are an American social and modesty norm. Historically, the purposeful exposure of one's self to the opposite biological sex has been considered wrongful, and possibly even criminal, behavior. See e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991).

A child's locker room or restroom has always been a private place to be used exclusively by boys or girls, and a place where members of the opposite biological sex are not allowed.

Freedom from the risk of compelled intimate exposure to the opposite sex, especially for minors, is deeply rooted in our Nation's history and traditions. The ability to be clothed in the presence of the opposite biological sex, along with the freedom to use the restroom and locker room away from the presence of the opposite biological sex, is fundamental to a reasonable person's sense of self-respect and personal dignity. If a public school holds the power to compel its students to disrobe or risk being unclothed in the presence of the opposite sex to use its public facilities, then little personal liberty and privacy involving our bodies remain. Minors, in particular, must be free from the compelled risk of exposure of their bodies, or their intimate activities, to the opposite sex in restrooms and locker rooms.

The proposed policy allows a biological boy the right of entry to, and use of, the girl's bathroom and locker rooms any time he wishes as long as he claims to identify as female. This puts children at risk because a person could take advantage of the policy to gain access to private places occupied by the opposite sex. Because of this, Children risk being intimately exposed to those of the opposite sex merely because a member of the opposite sex wants to see them and is willing to assert a different gender identity.

<sup>3</sup> See e.g., *Commw. v. Lovett*, 4 Pa. L.J. Rpts. (Clark) 226, 226 (Pa. 1831)

<sup>4</sup> See, Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy" 4 Harv. L. Rev. 193 (1890).

<sup>5</sup> Act of Mar. 24, 1887, ch. 103, § 2, 1887 Mass Acts, 668, 669.

<sup>6</sup> George Martin Kober, *History of Industrial Hygiene and its Effects on Public Health, in A HALF CENTURY OF PUBLIC HEALTH* 361, 377 (Mazyck P. Ravenal ed., 1921).

Common sense and common decency belie such a policy. There is no possible way to prevent such potential for abuse of these policies.

Objections to the proposed policy are simple, reasonable, and concomitant with the legal and cultural traditions of the United States. Consider the standard used in civilized society throughout our nation’s history - boys use boy’s bathrooms and girls use girl’s bathrooms. Using this age-old premise grounded in biological and anatomical truth, everyone can safely access restroom and locker room facilities. Any attempt to misrepresent Title IX will lead to authorities unconstitutionally infringing on the bodily privacy rights of students.

## **2. The Right of Parents to Direct and Control the Education and Upbringing of their Children.**

Misrepresenting Title IX substantially infringes upon the parents’ right to direct and control the education and upbringing of their children. It imposes morally relative social engineering and experimentation into schools by promoting conduct (selecting a “gender identity”) contrary to biological truth and the sincerely held religious conscience of a student and his or her parents. The proposed policy fails to even allow parents to be notified if their child requests to enter, or if their child will be forced to use, a bathroom, shower, or changing room with a child or adult of the opposite sex.

The United States Supreme Court recognizes parental rights to be fundamental rights. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Such liberty serves as a powerful limitation on exercises of government authority, including those exercises of authority that impact the parental role in educational matters.

Courts strictly scrutinize government actions that substantially interfere with a citizen’s fundamental rights:

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*The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance*

*legitimate claims to the free exercise of [a fundamental right].*

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*Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Church of the Lukumi Babalu Aye, Inc., v. Hialeah*, 508 U.S. 520 (1993).

The fundamental rights standard preserves fit parents’ fundamental liberty to control and direct the upbringing of their children. The historical underpinnings of the fundamental right of parents to direct and control the upbringing of their children, and the case law in support of it, compels the conclusion that these policies violate constitutionally protected fundamental liberty, especially when it infringes upon parental choices grounded in religious conscience. Certainly, no compelling governmental interest exists to violate parental rights and force students, parents, and faculty to deny biological truth and forsake their sincerely held religious beliefs. Chromosomes are not a social construct. Even if a compelling interest did exist (which we do not concede), the least restrictive means of accomplishing this interest surely must not be the promulgation of a facility policy that threatens both the privacy and safety of other students using these facilities.

As much as a school board may believe they know what’s best for all children, the Constitution protects the fundamental right of parents to control and direct the upbringing of their children, including in the sensitive and private matters relevant here.

## **3. The Right to Freedom of Speech and Religious Conscience.**

The misrepresentation of Title IX will lead to censorship and punishment for students, faculty, and administrators whose valid religious, moral, political, and cultural views necessarily conflict with the radical new “gender identity” political agenda. For these students, parents, and faculty, these policies will lead to unconstitutional interference with, and discrimination against, their sincerely held religious beliefs and identity, as well as their freedom of speech (e.g., by banning any dissent to the mandated acceptance

of gender fluid access to bathrooms, and locker rooms of the opposite sex).

Under the Constitution, no public school or state agency can dictate what is acceptable and not acceptable on matters of religion and politics. The government cannot silence and punish all objecting discourse to promote one political or religious viewpoint. Yet, this is exactly what these policies enable.

For over the last half-century the United States Supreme Court has repeatedly upheld the First Amendment rights of students. Indeed, it is axiomatic that students do not “shed their constitutional rights to freedom of speech or expression at the school house gate.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

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*Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive and often disputatious society. In order for the [government] to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly, where there is no finding and no showing that engaging in the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained.*

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*Id.* at 508-09.

Here, the effect of these policies and the expansion of Title IX will inhibit, if not ban, the expression of a particular viewpoint or religious belief without any evidence that the belief materially and substantially interferes with the operation of the school. Truly, any public criticism of the policy would be classified by the school as “harassment” and subsequently punished. The proposed policy creates “the ironic, and unfortunate, paradox of . . . celebrating ‘diversity’ by refusing to permit the presentation to students of an ‘unwelcomed’ viewpoint on the topic of homosexuality and religion, while actively promoting the competing view.” *Hansen v. Ann Arbor Pub. Schools*, 293 F. Supp. 2d 780, 782 (E.D. Mich. 2003). This re-writing of Title IX requires that everyone get on board with the politically correct “gender identity” or “transgender” agenda or be sanctioned. The anti-science, transgender dogma lives loudly within these proposed policies. This invites schools to limit the viewpoint of allowable student speech and compels school faculty to politically normalize LGBTQ behavior. Indeed, these proposed policies violate the freedom of speech rights of all students and parents, regardless of whether their speech is based upon a Christian, Catholic, Jewish, Muslim, or Atheistic viewpoint.

These proposed policies are reminiscent of the broad “anti-harassment” policy struck down as facially unconstitutional in *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001). The plaintiffs in *Saxe* sincerely identified as Christians and believed that homosexual behavior is sinful and that their religion required them to be courageous and speak out about homosexuality’s negative consequences. Plaintiffs feared punishment under the school’s policy for discussing and sharing their religious beliefs. The Court held that the policy violated the rights of students guaranteed by the First Amendment. *Id.* at 210. The Court found that the “anti-harassment” policy’s very existence inhibited free expression because it failed to follow the standard articulated in *Tinker*. *Id.* at 214-15.

Students, parents, and faculty, have a right to articulate their disapproval or concerns with “gender identity” or “transgenderism” on religious grounds. See, e.g., *Zamecnik v. Indian*

*Prairie School Dist. # 204*, 636 F.3d 874, 875 (7th Cir. 2011). Students have a constitutional right to advocate their religious, political, and moral beliefs about homosexuality “provided the statements are not inflammatory—that is, are not ‘fighting words,’ which means speech likely to provoke a violent response amounting to a breach of the peace.” *Id.*

Indeed, “a school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality . . . people in our society do not have a legal right to prevent criticism of their beliefs or even their way of life.” *Id.* at 876. An interpretation that punishes a dissenting opinion by promoting another is unconstitutional. *Id.*; see also *Hansen*, 293 F. Supp. 2d at 792-807 (holding a School District’s censorship of student speech due to its perceived negative message about homosexuality violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment); *Glowacki v. Howell Public School Dist.*, No.2:11-cv-15481, 2013 U.S. Dist. LEXIS 131760 (Sept. 16, 2013) (holding that a teacher’s snap suspension of a student for making a perceived anti-gay comment in class was an unconstitutional infringement on the student’s First Amendment freedoms).

Further, these policies fail to adequately respect the First Amendment freedoms of school faculty and staff. It will ultimately require school administrators, teachers, and support staff to adopt, implement, and enforce policies that promote the LGBTQ lifestyle. This mandated orthodoxy requires support, encouragement, and affirmation of LGBTQ behaviors and it unavoidably conflicts with school faculty members who believe this lifestyle to be contrary to their sincerely held religious conscience. They are forced to either violate their religious conscience and endorse a pro-LGBTQ message under the compulsion of governmental power or face punishment. Nowhere do the policies protect dissenting opinions or sincerely held religious conscience. It must be remembered that “[t]olerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination.” *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

As the Supreme Court has emphasized, government officials are not the thought police: “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.” *W. Virginia State Bd. Of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). These policies patently violate this critical principle.

The proposed policies claim to promote non-discrimination by discriminating against, silencing, and punishing those who cannot and do not support the LGBTQ lifestyle. This is still a free country, however, and such censorship is still unconstitutional. The public schools cannot and should not create an environment that will undoubtedly chill the First Amendment freedoms of those students and faculty who disagree with the LGBTQ social experimentation for valid religious, moral, political, and cultural reasons. Because these policies will lead to school officials infringing on the First Amendment rights of faculty, administrators, parents and students, such policies must not be enacted.

#### **4. The Right to Personal Religious Identity and Autonomy.**

These proposed transgender policies will lead to substantial infringements on the Constitutional liberty and equal protection interests recognized by the Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

The Court’s recent ruling in *Obergefell* created a new constitutional right of personal identity for all citizens. The Court held that one’s right of personal identity precluded any state from proscribing same-sex marriage. In *Obergefell*, the Justices in the majority held that “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.” *Id.* at 2593.

The Court defined this new fundamental liberty right as including “most of the rights enumerated in the Bill of Rights,” and “liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and

beliefs.” This new right of personal identity must also comprehend factual contexts well beyond same-sex marriage. Clearly, this newly created right of personal identity applies not just to those who find their identity in their sexuality and sexual preferences—but also to citizens who define their identity by their religious beliefs.

Many Christian people, for example, find their identity in Jesus Christ and the ageless, sacred tenets of His word in the Holy Bible. For followers of Jesus, adhering to His commands is the most personal choice central to their individual dignity and autonomy. A Christian whose identity inheres in their religious faith orientation is entitled to at least as much constitutional protection as those who find their identity in their sexual orientation. There can be no doubt that this newly created right of personal identity protects against government authorities who use public policy to persecute, oppress, and discriminate against Christian people. Indeed, the dignity of all, including Christians, must be protected.

A transgender policy will inevitably lead to authorities infringing on the personal identity, dignity, liberty, and equal protection rights the Supreme Court discovered in *Obergefell*. *Id.* at 2607 (noting, “The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.”).

According to *Obergefell*, then, beyond the First Amendment religious liberty protections expressly enshrined in the Bill of Rights, the new judicially-created substantive due process right to personal identity now provides Christian and other religious people additional constitutional protection. Henceforth, government action not only must avoid compelling a religious citizen to facilitate or participate in policies that are contrary to their freedoms of expression and religious conscience protected by the First Amendment, but it must also refrain from violating their personal identity rights secured by substantive due process and equal protection. Because these policies and the misrepresentation

of Title IX will lead to school authorities infringing on the personal religious identity and dignity rights that the Supreme Court created in *Obergefell*, such policies must not be adopted.

Those who came before us built a constitutional republic based upon the Rule of Law. It is now our watch. We must protect the privacy and constitutional rights of all Americans.

### **TRANSGENDER POLICIES ILLEGALLY COERCE CHILDREN & PARENTS**

It defies common sense and decency to force a girl or boy to shower, change clothes, and use bathrooms with a biological, anatomically correct member of the opposite sex.

Some proposed policies empower the school to arbitrarily suspend or expel a student for expressing a different ideology or belief than those authorized by the school board. The real potential for bullying and the loss of one’s right to a free public education exists against anyone who has the courage to contest the policy.

There is no need for policies regarding bullying of “transgender” students because our legislature has already enacted an extensive anti-bullying statute that applies to all students (MCL 380.1310b). There is no need to carve out special protections for any group. Everyone is protected under the current law. It is interesting to note that there was an attempt to add additional language to specifically protect LGBTQ individuals in the bullying statute and the Legislature declined to do so because all students were protected and there was no need for such language.

### **TRANSGENDER POLICIES IMPOSE BURDENSOME REGULATORY AND FINANCIAL COSTS ON PUBLIC SCHOOLS**

Beyond the added cost to schools for regulatory requirements, a great expense exists when school districts face legal challenges to such new policies. Federal lawsuits will inevitably be filed charging the school with §1983 Civil Rights violations and requesting injunctive and other relief. School Board members may not have immunity from such lawsuits because of their knowing deprivation of

the constitutional rights of students, parents, faculty, and staff as delineated herein.

The public school also faces a loss of revenue when parents with traditional and religious views remove their children from the school when it becomes clear their rights and dignity are of no importance to the local school board. When a school ignores, ridicules and punishes parental exercise of conscience, parents will protect their children by educating them elsewhere.

#### **FEDERAL CASE LAW DOES NOT REQUIRE NEW TRANSGENDER POLICIES**

Some school districts falsely claim that a federal 6<sup>th</sup> Circuit Court of Appeals case (*Dodds v U.S. Dept. of Ed.*, 845 F3d 217 (CA 6, 2016)) mandates and requires the imposition of “transgender” policies. That court, however, simply entered a preliminary order denying a stay and maintaining the status quo while the appeal is heard. It is not a final order and is not binding on anyone except the parties to that case. Moreover, federal court decisions interpreting employment discrimination cases under Title VII have no bearing on the proposed policy.

#### **THE MICHIGAN BOARD OF EDUCATION GUIDELINES ARE UNLAWFUL AND NOT MANDATORY**

The Michigan Board of Education (MBE) guidelines issued on September 14, 2016, are unlawful and not binding on any school district. The document itself states: “These guidelines are voluntary and should not be considered mandates or requirements.”

The MBE admits: “The legal basis for the following recommendations is grounded in the U.S. Department of Education (USED) Office for Civil Rights’ (OCR) interpretation of Title IX.” This non-binding interpretation letter issued under the Obama administration has been rescinded. Therefore, the so-called “legal basis” for the MBE’s guidelines no longer exists.

Moreover, voters overwhelmingly replaced the main proponents of the guidelines with new board members. As such, majority support for the Guidelines at the MBE no longer exists.

#### **PROPOSED TRANSGENDER POLICIES DIVIDE STUDENTS AND PARENTS**

The policies do not respect all opinions and viewpoints. Rather, it elevates one ideology as superior over all others.

Across the country, activists continually target people of faith, forcing them to either violate their religious conscience or be coerced into submission to the new orthodoxy. Thus, this new policy will be used as a sword, not a shield, and will be divisive.

These policies specifically refuse to notify and include parents in decisions made by their children, thus driving a wedge between the parent and child with the school assuming the role of “protector” of the child. This directly undermines the authority and role of the parent. Although a school district may believe it knows how to raise children better than parents, such action is a direct violation of the Public School Code (MCL 380.10) which requires that the public school not undermine parents.

#### **TRANSGENDER POLICIES CREATE AN UNSAFE AND NON-SUPPORTIVE LEARNING ENVIRONMENT FOR ALL STUDENTS**

The American College of Pediatricians recently issued a statement that engaging in a “gender identity” ideology is actually a form of child abuse. Teachers, school officials and counselors are mandatory reporters of child abuse under Michigan’s Child Protection Law. MCL 722.623.

The report further states: “Gender dysphoria (GD), formerly listed as Gender Identity Disorder (GID), is a recognized mental disorder in the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-V).” Many physical health risks (including, but not limited to, high blood pressure, blood clots, stroke and cancer) exist for individuals who choose to take medications and hormones to facilitate gender choices. The risks are just as serious for children. In a peer-reviewed article published in the *Journal of American Physicians and Surgeons* (Volume 21, Number 2, Summer 2016), pediatrician Michelle A. Cretella, M.D., states:

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*Normality has been defined as “that which functions according to its design.” One of the chief functions of the brain is to perceive physical reality. Thoughts that are in accordance with physical reality are normal. Thoughts that deviate from physical reality are abnormal – as well as potentially harmful to the individual or to others... A person’s belief that he is something or someone he is not is, at best, a sign of confused thinking; at worst, it is a delusion. Just because a person thinks or feels something does not make it so. Children with gender dysphoria do not have a disordered body – even though they feel as if they do. Similarly, a child’s distress over developing secondary sex characteristics does not mean that puberty should be treated as a disease to be halted, because puberty is not, in fact, a disease.*

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Dr. Cretella compares gender dysphoria to other similar conditions, i.e., anorexia nervosa where the person has the mistaken belief he or she is obese; body dysmorphic disorder where the person has the erroneous belief that he or she is ugly; body integrity identity disorder where a person believes he or she is a disabled person and feels trapped in a fully functional body. All of these conditions do not conform with reality and, if affirmed as normal, would lead to real harm to the afflicted person. Dr. Cretella further states that if transgender children receive proper treatment that affirms their gender identity as aligning with his or her biological sex that:

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*Experts on both sides of the pubertal suppression debate agree that within this context, 80 percent to 95 percent of children with gender dysphoria accepted their biological sex and achieved emotional well-being by late adolescence.*

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This above fact refutes the claims of the transgender advocates that discrimination, violence, psychopathology, and suicide are the direct result of withholding social affirmation of children with gender dysphoria. Dr. Cretella further points out the serious health risks children may face who are being treated with hormones and medications, such as increased risk of coronary heart disease and cardiovascular disease, weight gain, arrested bone growth, inhibiting fertility and causing sterility in some children, high blood pressure, decreased glucose tolerance, breast cancer, etc. Dr. Cretella continues:

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*Neuroscience clearly documents that the adolescent brain is cognitively immature and lacks an adult capacity for risk assessment prior to the early to mid-twenties. . . . The treatment of gender dysphoria in childhood with hormones effectively amounts to mass experimentation on, and sterilization of, youth who are cognitively incapable of providing informed consent. There is a serious ethical problem with allowing irreversible, life-changing procedures to be performed on minors who are too young to give valid consent themselves.*

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Dr. Cretella and the American College of Pediatricians conclude that the transgender-affirming movement, and the treatments it advocates, is abusing children by engaging in a massive, uncontrolled experiment on children causing untold psychological damage for a condition that would otherwise resolve after puberty in the vast majority of cases.

Dr. Kenneth Zucker, acknowledged as a foremost authority on gender identity issues in children and a life-long advocate for LGBTQ rights, agrees that children with gender dysphoria are best served by helping them align their gender identity with their anatomic sex.

Transgender policies do not promote public health, safety, or welfare and potentially expose the school district to liability for the resulting

harmful health consequences to children. Current science does not support the wholesale experimentation on children by the transgender movement that is being aided and abetted by public schools that adopt such policies. Again, chromosomes are not a social construct. Science and truth deniers should not be empowered to implement social engineering on our schools to the detriment of parents and children.

### **CONCLUSION**

All children are made in God’s image and are deserving of love, dignity and respect, and that includes transgender as well as non-transgender children. Transgender children need help and compassion, not enablement (see Appendix A).

For all the above reasons, Michigan School Boards should decline to issue policies violating the clearly established constitutional rights of children and parents. These policies defy truth, science, common sense, and common decency. Parents need to stand up and resist this social engineering and experimentation on their children. Students who object to using facilities with other students of the same biological sex, or who for any reason desire greater privacy, can make use of a variety of reasonable accommodations, such as single-user facilities. School Boards should weigh carefully the rights of all children and parents and consider other, less-intrusive alternatives to accommodate transgender children.

### **GREAT LAKES JUSTICE CENTER:**

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**APPENDIX A**  
**AMERICAN COLLEGE OF PEDIATRICIANS**  
**GENDER IDEOLOGY HARMS CHILDREN**

The American College of Pediatricians urges health professionals, educators and legislators to reject all policies that condition children to accept a life of chemical and surgical impersonation of the opposite sex as normal and healthful. Facts – not ideology – determine reality.

**1. GENDER DYSPHORIA (GD) OF CHILDHOOD DESCRIBES A PSYCHOLOGICAL CONDITION IN WHICH CHILDREN EXPERIENCE A MARKED INCONGRUENCE BETWEEN THEIR EXPERIENCED GENDER AND THE GENDER ASSOCIATED WITH THEIR BIOLOGICAL SEX.** They often state that they are the opposite sex. Prevalence rates among children are estimated to be less than 1%.

**2. IT IS FALSE THAT BRAIN DIFFERENCES OBSERVED IN SOME STUDIES BETWEEN TRANSGENDER ADULTS AND NON-TRANSGENDER ADULTS PROVE THAT GD IS INNATE.** If differences do exist in brain structures of transgender adults, these differences are more likely to be the result of transgender identification and behavior, not the cause of transgender identification and behavior. This is because thinking and behavior is known to shape brain microstructure through a process called neuroplasticity.

**3. WHEN GD OCCURS IN THE PRE-PUBERTAL CHILD, IT RESOLVES IN 80-95 PERCENT OF PATIENTS BY LATE ADOLESCENCE AFTER THEY NATURALLY PASS THROUGH PUBERTY.** This is consistent with studies of identical twins that prove no one is born hard-wired to develop GD.

**4. ALL COMPLEX BEHAVIORS ARE DUE TO A COMBINATION OF NATURE (BIOLOGY), NURTURE (ENVIRONMENTAL FACTORS) AND FREE WILL CHOICES. STUDIES OF IDENTICAL TWINS PROVE THAT GD IS PREDOMINATELY INFLUENCED BY NON-SHARED POST-NATAL EVENTS.** The largest study of twin transsexual adults found that only 20 percent of identical twins were both trans-identified. Since identical twins contain 100 percent of the same DNA from conception, and develop in exactly the same prenatal environment where they are exposed to the same prenatal hormones, if genes and/or prenatal hormones contributed significantly to transgenderism, the concordance rates would be close to 100 percent. Instead, 80 percent of identical twin pairs were discordant for transgenderism. This means that at least 80 percent of what contributes to transgenderism in

one adult co-twin consists of one or more non-shared post-natal experiences.

**5. THERE IS NO SINGLE FAMILY DYNAMIC, SOCIAL SITUATION, ADVERSE EVENT, OR COMBINATION THEREOF THAT HAS BEEN FOUND TO DESTINE ANY CHILD TO DEVELOP GD. THIS FACT, TOGETHER WITH TWIN STUDIES, SUGGESTS THAT THERE ARE MANY PATHS THAT MAY LEAD TO GD IN CERTAIN VULNERABLE CHILDREN.** Clinical case studies suggest that social reinforcement, parental psychopathology, family dynamics, and social contagion facilitated by mainstream and social media, all contribute to the development and/or persistence of GD in some vulnerable children. There may be other as yet unrecognized contributing factors as well.

**6. THERE IS A SUPPRESSED DEBATE AMONG PHYSICIANS, THERAPISTS, AND ACADEMICS REGARDING THE RECENT TREND TO QUICKLY AFFIRM GENDER DYSPHORIC YOUTH AS TRANSGENDER.** Many health professionals are deeply concerned because affirming youth as transgender sends them down the path of medical transition (a sex change) which requires the use of toxic hormones and unnecessary surgeries. Healthcare professionals opposed to affirming a child's gender dysphoria based upon the medical ethics principle of "First do no harm" are being silenced. This is true among left-leaning youth trans critical professionals as well as those who are traditionally more conservative.

**7. HUMAN SEXUALITY IS AN OBJECTIVE BIOLOGICAL BINARY TRAIT: "XY" AND "XX" ARE GENETIC MARKERS OF SEX, MALE AND FEMALE RESPECTIVELY – NOT GENETIC MARKERS OF A DISORDER.** The norm for human design is to be conceived either male or female.

Human sexuality is binary by design with the obvious purpose being the reproduction and flourishing of our species. This principle is self-evident. The exceedingly rare disorders of sex development (DSDs), including but not limited to androgen insensitivity syndrome and congenital adrenal hyperplasia, are all medically identifiable deviations from the sexual binary norm, and are rightly recognized as disorders of human design. Individuals with DSDs do not constitute a third sex.

**8. HUMAN BEINGS ARE BORN WITH A BIOLOGICAL SEX. GENDER (AN AWARENESS AND SENSE OF ONESELF AS MALE OR FEMALE) IS A PSYCHOLOGICAL CONCEPT; NOT AN OBJECTIVE BIOLOGICAL ENTITY.** No one is born with an awareness of being male or female; this awareness

develops over time and, like other aspects of one’s self-awareness, may be derailed by a child’s subjective perceptions, relationships, and adverse experiences from infancy forward. People who identify as “feeling like the opposite sex” or “somewhere in between” do not comprise a third sex. They remain biological men or biological women.

**9. A PERSON’S BELIEF THAT ONE IS SOMETHING ONE IS NOT IS, AT BEST, A SIGN OF CONFUSED THINKING; AT WORST IT IS A DELUSION.**

**10. CROSS-SEX HORMONES (ESTROGEN FOR BOYS AND TESTOSTERONE FOR GIRLS) ARE ASSOCIATED WITH DANGEROUS HEALTH RISKS.** Oral estrogen administration to boys may place them at risk for experiencing: thrombosis/thromboembolism; cardiovascular disease; weight gain; hypertriglyceridemia; elevated blood pressure; decreased glucose tolerance; gallbladder disease; prolactinoma; and breast cancer. Similarly, girls who receive testosterone may experience an elevated risk for: low HDL and elevated triglycerides (cardiovascular risk); increased homocysteine levels; hepatotoxicity; polycythemia; increased risk of sleep apnea; insulin resistance; and unknown effects on breast, endometrial and ovarian tissues.

**11. PUBERTY IS NOT A DISORDER AND THEREFORE SHOULD NOT BE ARRESTED AS THOUGH IT IS A DISEASE. PUBERTY-BLOCKING HORMONES INDUCE A STATE OF DISEASE – THE ABSENCE OF PUBERTY.** Puberty blocking hormones (gonadotropin releasing hormone agonists or GnRH agonists) arrest bone growth, decrease bone density, prevent the sex-steroid dependent organization and maturation of the adolescent brain, and inhibit fertility by preventing the development of gonadal tissue and mature gametes for the duration of treatment.

**12. PRE-PUBERTAL CHILDREN WHO RECEIVE PUBERTY-BLOCKING HORMONES (GNRH AGONISTS) FOLLOWED BY CROSS-SEX HORMONES ARE PERMANENTLY STERILIZED. PRE-PUBERTAL CHILDREN WHO BYPASS PUBERTAL SUPPRESSION AND ARE PLACED ON CROSS-SEX HORMONES DIRECTLY ARE ALSO PERMANENTLY STERILIZED.**

**13. AT LEAST ONE PROSPECTIVE STUDY DEMONSTRATES THAT ALL PRE-PUBERTAL CHILDREN PLACED ON PUBERTY BLOCKING DRUGS EVENTUALLY CHOOSE TO BEGIN SEX REASSIGNMENT WITH CROSS-SEX HORMONES.** This suggests that impersonation of the opposite sex and pubertal suppression, far from being fully reversible and

harmless as proponents claim, sets into motion a single inevitable outcome (transgender identification) that requires lifelong use of toxic cross-sex hormones, resulting in infertility and other serious health risks.

**14. ADOLESCENT GIRLS WITH GD WHO HAVE TAKEN TESTOSTERONE DAILY FOR ONE YEAR MAY OBTAIN A DOUBLE MASTECTOMY AS YOUNG AS AGE 16.** This is not a reversible procedure.

**15. A THIRTY YEAR FOLLOW UP STUDY FOUND RATES OF SUICIDE ARE NEARLY TWENTY TIMES GREATER AMONG ADULTS WHO UNDERGO SEX REASSIGNMENT IN SWEDEN WHICH IS AMONG THE MOST LGBTQ – AFFIRMING COUNTRIES.** This demonstrates that while sex-reassignment eases some of the gender dysphoria in adulthood, it does not result in levels of health on par with that of the general population. It also suggests that the mental health disparities are not primarily due to social prejudice, but to whatever pathology has precipitated the transgender feelings in the first place and/or the transgender lifestyle itself.

**16. CONDITIONING CHILDREN TO BELIEVE THE ABSURDITY THAT THEY OR ANYONE COULD BE “BORN INTO THE WRONG BODY,” AND THAT A LIFETIME OF CHEMICAL AND SURGICAL IMPERSONATION OF THE OPPOSITE SEX IS NORMAL AND HEALTHFUL IS CHILD ABUSE.** Affirming gender dysphoria via public education and legal policies will confuse children and parents, leading more children to present to “gender clinics” where they will be given puberty-blocking drugs. This, in turn, virtually ensures that they will “choose” a lifetime of sterility, toxic cross-sex hormones, and likely consider unnecessary surgical mutilation of their healthy body parts as young adults.

**17. THERE IS A SERIOUS ETHICAL PROBLEM WITH ALLOWING IRREVERSIBLE, LIFE-CHANGING PROCEDURES TO BE PERFORMED ON MINORS WHO ARE TOO YOUNG TO GIVE VALID CONSENT THEMSELVES. CHILDREN AND ADOLESCENTS DO NOT HAVE THE COGNITIVE MATURITY OR EXPERIENTIAL CAPACITY TO UNDERSTAND THE MAGNITUDE OF SUCH DECISIONS.** Ethics alone demands an end to the use of pubertal suppression, cross-sex hormones, and sex reassignment surgeries in children and adolescents.