

FREEDOM FROM RELIGION *foundation*

P.O. BOX 750 · MADISON, WI 53701 · (608) 256-8900 · WWW.FFRF.ORG

June 17, 2016

Mitchell J. Silver, FAICP
Commissioner
New York City Department of Parks and Recreation
830 Fifth Ave.
New York, NY 10065

Re: Sex Discrimination at Public Pool

Dear Commissioner Silver:

I am writing on behalf of the Freedom From Religion Foundation (FFRF) regarding a constitutional violation occurring at the Metropolitan Pool in Williamsburg, Brooklyn. Concerned citizens contacted us about this matter. FFRF is a national nonprofit organization with almost 24,000 members across the country, including nearly 1,300 members in New York. FFRF's purpose is to protect the constitutional principle of separation between state and church.

It is our understanding that a discriminatory policy is currently in place at the Metropolitan Pool, which is part of the Metropolitan Recreation Center, owned and operated by the New York City Department of Parks and Recreation. There are women-only swimming hours scheduled on Mondays, Wednesdays, Fridays, and Sundays.¹ After receiving an anonymous tip regarding the women-only hours at the pool, the New York Commission on Human Rights brought the matter to the Park Department's attention. The pool schedule was temporarily changed, eliminating the women-only hours. Then, Assemblyman Dov Hikind received complaints from several local women about this change. Finally, the Parks Department reinstated the women-only hours after Assemblyman Hikind and others pressured them to do so.²

Assemblyman Hikind claims that by allowing women-only swim sessions, the Parks Department is being appropriately "culturally sensitive."³ It is clear that the women-only hours are in place in order to serve a very small segment of the local community: Orthodox Jews, whose religious tenets require the separation of the sexes in activities such as swimming. In other words, the only justification for the sex discrimination taking place at this pool is a religious one. By being "culturally sensitive," the Parks Department is being "culturally insensitive" to everyone else, and in doing so depriving men equal access to a public pool. As one local resident put it, "[Orthodox Jews are] an extreme religious group that had a standard of modesty and decorum the rest of the culture doesn't share. I don't want to change my attire to accommodate them."⁴

¹ <https://www.nycgovparks.org/facilities/recreationcenters/B085/schedule#Pool>

² <http://patch.com/new-york/williamsburg/williamsburg-lap-pool-will-continue-gender-segregation-request-orthodox-jews-0>

³ <http://dovhikind.com/news/hikind-announces-major-victory-for-human-rights>

⁴ <http://www.fox5ny.com/news/154740101-story>

Therefore, the Metropolitan Pool's women-only swim sessions violate the Establishment Clause of the First Amendment. Potential violations of New York City's Human Rights Laws and the Equal Protection Clause also exist.

New York may not allow particular religious views to affect public property rules. "[R]eligious communities and institutions [are allowed] to pursue their own interests free from governmental interference," but any government policy that "singles out a particular religious sect for special treatment" is not permitted. *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 706–07 (1994) (holding a New York law benefitting a small Hasidic community unconstitutional despite no explicit mention of a religious purpose in the law). The intent of the women-only hours at the Metropolitan Pool is clearly only to benefit a small religious community. As in *Kiryas Joel*, this policy "crosses the line from permissible accommodation to impermissible establishment." *Id.* at 710.

Furthermore, the government cannot promote one religion over another or religion over non-religion. The First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers." *Everson v. Board of Ed.*, 303 U.S. 1, 18 (1947). *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27-28 (1997) (separate opinion concurring in judgment) (the "government may not favor religious belief over disbelief"); *Abington v. Schempp*, 374 U.S. 203, 305 (1963) ("The fullest realization of true religious liberty requires that government ... *effect no favoritism among sects or between religion and nonreligion.*") (Goldberg, J., concurring); *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) ("[T]he prohibition against governmental endorsement of religion 'preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred'" quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment) (additional emphasis added). By allowing Orthodox Jewish religious beliefs to preclude men from swimming in a public pool, New York is favoring a group's religious beliefs over the interests of the public.

This policy also shows unconstitutional entanglement by the Parks Department with religion, because it is imposing specific religious rules and tenets upon the pool patrons.

Despite whatever concentration of Orthodox Jews may exist in this area of Brooklyn, such preference for a religion is especially inappropriate when almost one in four Americans is not religious.⁵ The Metropolitan Pool is owned by New York City, and meant to serve anyone in the community who wants to enjoy it, not just the Orthodox Jewish community. Providing women-only swim sessions sends a message to all non-Orthodox Jews "that they are outsiders, not full members of the political community and an accompanying message to [Orthodox Jews] that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 668 (O'Connor, J., concurring). Orthodox Jews are free to privately segregate the sexes, but the government may not aid them in this task.

⁵ *America's Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), available at www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

We ask that you change the rules at the Metropolitan Pool so that the pool is open to everyone and that women-only hours are discontinued. As it stands, this indefensible policy leaves the department open to litigation and liability. Please inform us in writing of the steps you are taking to ensure that this constitutional violation does not continue. Thank you for your time and attention to this matter.

Sincerely,



Rebecca S. Markert
Staff Attorney

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