FREEDOM FROM RELIGION *foundation*

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August 15, 2024

SENT VIA EMAIL & U.S. MAIL: adam.bertrand@fhsdschools.org

Adam Bertrand
President
Francis Howell School Board
801 Corporate Centre Drive
O'Fallon, MO 63368

Re: Unconstitutional and Illegal Anti-Trans School Policies

Dear Mr. Bertrand:

We are writing on behalf of the Freedom From Religion Foundation regarding the risks presented by today's vote on policies impacting transgender students in the District. FFRF is a national educational nonprofit with more than 40,000 members across the country, including hundreds of members in Missouri. FFRF protects the constitutional separation between state and church and educates about nontheism.

Later today on August 15, 2024, the Francis Howell School District is set to vote on two anti-trans policies. The first is Policy 2116, which would require that students use the bathroom conforming to the sex markers on their birth certificates.[1] The second is Regulation 6116, which would prohibit District employees or contracted personnel from discussing human sexuality with *any* students except when part of a "group discussion of current events…."[2]

Both provisions run into state and federal constitutional and statutory provisions. They are both unlawful as written and should not be adopted to avoid litigation risk. We ask that the Board vote against both of these policies.

Policy 2116 Is Illegal Under Multiple Laws

Requiring that students conform to the sex-markers on their birth certificates and then segregating those students into different bathrooms based on their assigned sex at birth is a sex-based classification. Title IX of the Education Amendments Act prohibits recipients of federal funding from discriminating on the basis of sex. *See* 20 U.S.C. § 1681 *et seq*. The Seventh Circuit Court of Appeals recently held that the ***exact scheme*** present in Policy 2116 violated Title IX. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *see also Doe v. Elkhorn Area Sch. Dist*, No. 24-CV-354-JPS (E.D. Wis. Aug. 1, 2024).

[1] https://go.boarddocs.com/mo/fhsdmo/Board.nsf/files/D83NDJ5F6E78/$file/P2116%20-%20Privacy%20in%20Locker%20Rooms%20and%20Restrooms_Clean.pdf.
[2] https://go.boarddocs.com/mo/fhsdmo/Board.nsf/files/D83HX34A9095/$file/Reg%206116%20-%20Human%20Sexuality%20(new%20reg)%20-%20updated%20Aug.pdf.

The Supreme Court of Missouri ruled that the Missouri Human Rights Act (RSMo. § 213.010 *et seq*.) prohibits sex-based classifications by public school districts. *See R.M.A. ex rel. Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W. 3d 420 (Mo. banc 2019). There, a transgender student sued their school district over denying the student equal access to a public accommodation on account of their transgender status. *Id.* The Court reversed dismissal of the plaintiff's complaint stating that Blue Springs School District's policy constituted unlawful sex discrimination in a public accommodation. *Id.* Blue Springs eventually paid $4,175,000, to R.M.A. which Missouri's Court of Appeals for the Western District upheld.[3] *See R.M.A. ex rel. Appleberry v. Blue Springs R-IV Sch. Dist.*, WD85778 (Mo. App. W.D. 2024) ("*R.M.A.* II"). The District should avoid similar liability—by voting against Policy 2116.

Policy 2116 also violates the federal Fourteenth Amendment's Equal Protection Clause, which prohibits sex-based classifications without an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 533 (1996); U.S. Const. Amend XIV. In *A.C. v. Metro Sch. Dist. of Martinsville*, the Seventh Circuit Court of Appeals held that the anti-trans bathroom policies of the defendant-district likely violated the Equal Protection Clause. 75 F.4th 760 (2023). That court upheld a preliminary injunction enjoining that district's bathroom policies. *Id.* The Supreme Court of the United States denied certiorari, leaving the preliminary injunction in place. *See Metro Sch. Dist. of Martinsville v. A.C.*, 144 S.Ct. 683 (2024) (denying certiorari). FHSD can avoid this too. *See also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (finding district bathroom policies which do not affirm gender of student to violate Title IX and the Equal Protection Clause).

Policy 2116 violates the Equal Protection Clause, Title IX of the Education Amendments Act, and the Missouri Human Rights Act; that is an unholy trifecta of laws being violated. To avoid litigation risk, as well as the associated financial burden to taxpayers, the District should decline adopting this policy.

Regulation 6116 Is Fatally Overbroad

Section 1 of Regulation 6116 reads, "District employees or contracted personnel shall not make values judgements [sic] on human sexuality and shall recommend students direct those questions to their parents or legal guardians." Section 2 of Regulation 6116 reads that "No district employee or contracted personnel shall encourage a student under the age of eighteen years old to adopt a gender identity or sexual orientation." Section 3 reads "No district employee or contracted personnel shall encourage a student to pursue gender reassignment therapy or any medical or surgical service that seeks to surgically alter or remove healthy physical or anatomical characteristics or features that are typical for the individual's biological sex."

When read plainly, Section 1, seems to prohibit the making of value judgments about human sexuality *altogether*. This seems to tell employees that they may not silently and privately make judgments about human sexuality. That interferes with their rights of conscience secured under the federal First Amendment and Missouri Constitution. *See* U.S. Const. Amend. I. *and* Mo. Const. Art. I. § 5.

[3] https://missouriindependent.com/2024/06/04/missouri-appeals-court-sides-with-transgender-student-in-4-million-discrimination-case/.

The second half of section 1, instructing employees to redirect students to their parents or legal guardians also presents major safety concerns. As written, this policy does not leave discretion for employees to consider whether the student might be put at risk for physical and/or psychological harm as a result of presenting their caregivers with these questions. While it is admirable that the District wishes to encourage open and honest communication within families, the unfortunate reality is that some children will be faced with hostility for even asking questions about human sexuality. School personnel, especially teachers, coaches, and counselors, play vital roles in the lives of young people, and are often aware of the individual family dynamics in question. While student safety does not demand that District employees answer questions about human sexuality, it does demand that they be able to refuse to answer the question while still using their best judgment regarding whether it is safe to encourage an individual student to discuss these issues with their parent or guardian.

Section 2's vagueness also presents major issues. All people have a gender identity and sexual orientation, including cisgender and heterosexual students. The policy is woefully unclear about what "encourag[ing] a student…to adopt a gender identity or sexual orientation" actually entails. It would seem that very basic conversations and social interactions would suddenly become incredibly complex and fraught. Using any pronoun to refer to any student is technically encouraging a student to adopt a gender identity. Having students line up to use the restroom, or the common practice of splitting class activities into "boys vs. girls" is encouraging students to adopt a gender identity. Permitting students to take dates to school dances could easily be interpreted as encouraging students to adopt a sexual orientation. Allowing "promposals" on school property, Valentine candygram fundraisers, and any other number of common and widely accepted school activities and traditions all would be barred under this policy. There is no functional way for this section to be enforced without radically changing the school environment to something completely unrecognizable to all involved. Should this section be challenged in a court of law, it would almost certainly be struck down for being overly vague.

None of these sections are restrained to District employees *in the course of their official duties*, which is when the District may restrain their speech. *See generally Garcetti v. Ceballos*, 547 U.S. 410 (2006); *City of San Diego v. Roe*, 543 U.S. 77 (2004). Instead these sections seem to hinder their employees' speech *all the time*—even in their private lives. That is an unlawful prior restraint of speech, not consistent with the First Amendment. *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

On top of all of this, the adoption of these policies present potential issues with the separation of church and state. The current anti-transgender moral panic is based first and foremost in a particular religious understanding of the proper expression of gender identity. In a 2023 report, the Southern Poverty Law Center found that there is a major network of primarily conservative Christian organizations such as the Alliance Defending Freedom, the Heritage Foundation, and Focus on the Family behind the large volume of misinformation and pseudoscience being disseminated about transgender people.[4] These policies not only restrict District employees from being able to engage in understandings of gender and gender identity outside of the one being advanced by these religious organizations, but also requires them to coerce students into

[4] *Group dynamics and division of labor within the anti-LGBTQ+ pseudoscience network*, Southern Poverty Law Center, Dec. 12, 2023, https://www.splcenter.org/captain/defining-pseudoscience-network.

complying with a single theological understanding of these topics. This goes far beyond what is permissible under both the First Amendment and the Missouri Constitution.

Missouri's constitutional provisions "'declaring that there shall be a separation of church and state are not only more explicit but *more restrictive*' than the First Amendment." *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. banc 1997) (quoting *Paster v. Tussey*, 512 S.W.2d 97, 101-02 (Mo. banc 1974) (emphasis added)). The Supreme Court of the United States's decision in *Trinity Lutheran Church of Columbia, Mo., Inc. v. Comer*, 137 S.Ct. 2012 (2017), did not change that. *See Doe v. Marianist Province of U.S.*, 620 S.W.3d 73, 78 (Mo. banc 2021) (quoting *Brewer* and *Paster*). So, irrespective of the First Amendment, Missouri's Constitution prohibits this type of preferential treatment and coercion.

The Constitution does not fall short of transgender students. On the whole, both provisions that FHSD's Board will consider today are unlawful, unenforceable, and greatly increase the litigation risk the District assumes. The District should vote against both policies, or risk litigation. Thank you for your time and attention.

Sincerely,

Kat D. Grant
Equal Justice Works Fellow (sponsored by the Wm. Collins Kohler Foundation)
Freedom From Religion Foundation

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