LGBTQ AGENDA ENSURING BOYS CAN INVADE THE GIRL'S LOCKER ROOM, ETC.

Response to the Michigan State Board of Education

INTRODUCTION

On February 23, 2016, the Michigan State Board of Education published a "Statement and Guidance on Safe and Supportive Learning Environments for LGBTQ Students." (Hereafter, the "Statement" or the "Policy").

After the Michigan State Board of Education (SBE) failed to adequately notify either the public or the legislature about its contentious LGBTQ proposal, considerable controversy erupted. No wonder. One SBE provision provides that "[s]tudents should be allowed to use the restroom in accordance with their gender identity." Likewise, another provision states that a "student should not be required to use a locker room that is incongruent with their gender identity." In other words, a biological, anatomically correct male, may assert that his gender identity is female, and then proceed into the girl's bathroom or shower. Apparently, neither scientific truth nor the law matters here, as the SBE expressly states:

> The responsibility of determining a student's gender identity rests with the student. Outside confirmation from medical or mental health professionals, or documentation or legal changes is not needed.

Most astoundingly, the SBE provisions provide that schools are to keep all this secret from the parents of the child who manufactures a new gender identity. Parents might also be interested in knowing that the SBE standards also call for inclusion of LGBTQ topics "across the curriculum". Finally, for a proposal that supposedly exists to provide "safe and supportive learning environments," another provision encourages schools "to review the computer-filtering protocol to ensure that students and other school community members can access information related to LBBTQ youth…"

After Michigan parents and grandparents expressed concern, the Great Lakes Justice Center responded to the SBE's Statement on their behalf, filing an official comment with the board. We noted that those we represent care deeply about the educational, emotional, intellectual, and spiritual needs of the children of our State. We further indicated that they are deeply troubled by the manner in which the SBE addresses those needs in its proposed Policy.

In its Statement, the SBE proposes to abandon long-standing policies established by numerous prior Boards, in favor of highly disruptive policies drafted by groups promoting an LGBTQ political agenda. We offer, therefore, our perspectives on these critical issues facing our children.

In connection with the proposed adoption of the SBE's Statement, we begin with an analysis of the numerous policy defects in the proposal. We then move to a constitutional and legal analysis of the broader good governance issues relevant to the proposed Policy.

POLICY DEFICIENCIES

We applaud the Board's commitment to "promoting a safe, supportive, and inclusive learning environment for all students and ensuring that every student has equal access to educational programs and activities." We certainly share that goal and offer our input in furtherance of it. But we believe the Board should be very careful to take a rational and well-reasoned approach to these issues, rather than an emotional and ideologically driven one.

The Board must remember though that it sits in loco parentis – that is, that it represents the parents (not the children, and not anyone else) in its role of overseeing the education of this State's youth. [1] We are therefore somewhat disturbed to find that the Board has chosen to take the advice of agenda-driven groups like Lambda Legal Foundation and the Southern Poverty Law Center – both of which are admittedly biased exclusively toward promoting a LGBTQ political agenda. We believe the better path is to seek input from more objective and broadly informed sources, not to mention common sense. That is how we try to raise and educate our children and, therefore, that is what we believe you should do when delegated to act in our stead. In this instance, we believe you have utterly failed to pursue, much less attain, that objective.

We note that the Policy first informs us of a new sexual identity glossary. We need no such enlightenment. We reject this new nomenclature that certain misguided individuals and "social scientists" have invented – some of whom are genuinely concerned for these troubled youths, and some of whom simply seek to rationalize aberrant sexual behaviors and give a patina of "scientism" to the new victimhood industry they promote. Understanding that some people use these terms is fine for the basis of dialog. Endowing them and those who assert newly minted "rights" based on them with preferential and privileged status, however, is unwise, unhealthy, and against the will of the people you are charged to represent. From the overall tenor of your Proposal, it is clear you have chosen the latter approach. It is improper for you to promote this fiction to our children and force our teachers and staff or us to accept it as factual. It is no more than opinion, but it is an unfounded and destructive opinion.

Indeed, the fundamental premise on which the proposed Policy is based – that students should be able to self-identify as either gender (or even nonsensical blends thereof) that they choose – is fatally flawed and immeasurably dangerous. No responsible adult should encourage a child who "identifies" as a member of the opposite sex to act like they are a member of the opposite sex any more than we should encourage a child who "identifies" as a superhero to don a cape and leap from a tall building. These are children. They are no more fit to choose their "gender identity" than they are to vote, marry, join the military, or stop going to school. We all know this. So why do you propose to make an exception for this even more monumental decision? To the extent it is even legitimate to consider this a decision to be made, as opposed to a condition to be treated, it is not the place of our schools to encourage such life-damaging, if not life-threateningly poor choices.

In this regard we find particularly offensive points number 3 and 4 of the Policy

[1] See, e.g., infra, the section of this Comment titled: The Proposed Policy Unconstitutionally Infringes on the Fundamental Right of Parents to Direct and Control the Upbringing of Their Children.

(page 3), which recommend that school officials should encourage groups that promote gender confusion to operate in our schools, and that schools should be dictating to parents the values and morality that parents should adopt on this issue.[2] It is not the State's job to tell parents how to parent. School officials should be listening to parents about how schools can help raise our children in our stead; they should not attempt to impose their own misguided values on our children, much less on us.

As part of this campaign to let boys use girls' bathrooms and locker rooms, and vice versa, the Board also cites some research that it mistakenly believes supports its novel theories. First, it points out on page 2 of the Policy that the Youth Risk Behavior Survey ("YRBS") found that 8.4% of high school students identify as LGB. This highlights the obvious fact that the vast majority of high school student are not LGB– a fact the Policy never expressly addresses, despite its claim to be addressing the needs of "all" students. But this statistic – and the Board's use of it -- fails to account for the fact that the vast majority of gender-confused high school students should eventually come to properly gender-identify after puberty – at least if official government policy does not discourage their clarification of this confusion.[3] Instead, the Policy advocates encouraging this gender confusion so that children are less likely to outgrow it. The Policy thus seeks to condemn these children to the significantly higher rates of sexual abuse, depression, disease, and suicide that LGB individuals suffer according to the YRBS, rather than helping them get a fair chance to clarify their confusion and embrace their true biological gender identities.

A further practical aspect of this statistic that the Board seems to have intentionally overlooked is that most (6% out of 8.4%) of the students identified as LGB in this survey identified as "bi-sexual". In terms of implementing the bathroom and locker-room aspects of the Policy, for example, this means that teenage boys who state that they are sexually interested in both boys and girls, should be able to undress, shower, etc. with girls if they so desire. Leaving aside whether this is fair and equal treatment for all the teenage boys who might like to have this "right", we think it is a very bad idea not only for the girls involved (obviously), but also for the allegedly "bi-sexual" boys on whom you would bestow this boon, because it is not the

[2] Additionally, to the extent that the ambiguously drafted point 3 suggests that students should be able to keep their confused gender choice designations "confidential" from their parents, we vigorously resist that suggestion.

[3] "Gender Ideology Harms Children," American College of Pediatricians (March 21, 2016) http://www.acpeds.org/the-college-speaks/position-statements/gender-ideology-harms-children [(last visited May 7, 2016) ("According to the DSM-V, as many as 98% of gender confused boys and 88% of gender confused girls eventually accept their biological sex after naturally passing through puberty.") (citing American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Arlington, VA, American Psychiatric Association, 2013 at 451-459, see especially page 455 re: rates of persistence of gender dysphoria.)

Even if one had some reason to question the reliability of this particular fact regarding students learning their proper gender identities over time (and we know of none), one need only compare the overall social incidence of those who identify as LGBT – roughly 2% -- to the YRBS numbers to conclude there is likely to be a drop-off over time. Thus, the YRBS appears to be merely a snapshot that is skewed quite a bit to the high side. Worse yet, the Policy seems to be designed to perpetuate the problems the YRBS identifies rather than solve them.

schools' job to place young men in situations of such powerful temptation. Indeed, we suspect the number of students who will self-identify as "bi-sexual" might well escalate if that means a free pass into the showers of the opposite sex. Call us old-fashioned if you will, but we are prepared to take a most determined stand against this type of insanity.

We see no reason whatsoever to change the current policy of requiring allegedly "bi-sexual" students to use the restrooms and locker rooms they have always used. Nor has the Board even offered one. Hence, the "8.4%" statistic on which the report relies is completely spurious, and none of this discussion should concern any more than the 2.4% of students who self-identified as "gay" or lesbian". This of course means that any consideration of policy changes to accommodate that 2.4% should entail a studied discussion of the impact on the other roughly 97% of the student body. Ultimately, however, we believe these matters are best handled at a local level by parents and teachers who are most aware of conditions in those specific environments and who can thus best determine how to accommodate this small minority.

On the same page of the Policy the Board notes that students identifying as LGB are 2.3 times as likely as non-LGB students to be threatened or injured and have the same rate of skipping school due to feeling unsafe. Similarly, it is reported that nationally, 26% of transgender students experienced physical violence as a result of their gender expression. Further, research supports the unremarkable conclusion that bullied and harassed students are more depressed, anxious, and underperforming.

Assuming the underlying research is methodologically sound, we, like the Board, are deeply concerned about these statistics and find them completely unacceptable. Yet we must seriously question the Board's proposed method of addressing this problem. The Board's proposal heightens the differentiation of – and hostility toward -- LGB students. According them special privileges -- especially privileges that many non-LGB students will find patently offensive – thus seems more likely to increase this statistic than decrease it. At the very least, the Board has offered absolutely no evidence or reasoning indicating that its Policy might somehow diminish this problem rather than exacerbate it.

We would instead encourage the Board and school officials to diligently enforce policies against assault and battery for all students. In addition, to the extent the curriculum schedule permits it, some training regarding non-aggressive interaction with those who do not share one's views, background, or gender identity perspective might be appropriate in schools where these problems seem pronounced. These steps are far more likely to solve the problem, and they would do so without the untoward consequences the Board's proposed Policy probably would incur.

The Board can also properly decry the highly elevated rates of sex abuse, depression, and suicide among LGB students reported in the YRBS.[4] Again, assuming the underlying research is methodologically sound, we certainly deplore this state of affairs; but we completely disagree with the Board's stance that seeking to cultivate gender confusion is the solution. Indeed, there is much evidence (not discussed at all in the Policy) that continuing down the path of gender confusion is the cause of these problems, not their cure.

[4] See page 2 of the Policy and pages 3 and 5 of the YRBS.

We could go on at length about the irrationality, lack of evidence of effectiveness, and other flaws in the rest of the Board's Policy. We do not think it necessary, however. Given that the radical proposals regarding staff training, new pronouns, and a host of other specific action items all hinge on the flawed premises and reasoning outlined above (as well as the deceptive statistics), the various recommendations regarding implementing the Policy necessarily fail as well. Moreover, calling this matter a civil rights issue (see policy page 4, part 5) is misleading at best -- and actually offending to those for whom real civil rights are a passion. Civil rights are based on a person's immutable characteristics. "Gender confusion" and "gender identity" are, by definition, quite mutable. To put it simply, confusion is not a civil right. In sum, you, as agents of the State, have no right to conduct dangerous social experiments on our children, and that is what your proposed Policy does. This fact is especially true when government uses its authority in contravention of the U.S. Constitution and State law. And so, in this vein, we also must examine the constitutional and other legal deficiencies of the Policy.

CONSTITUTIONAL AND LEGAL DEFICIENCIES

This portion of our Comment analyzes some of the broader good governance issues relevant to the proposed policy. These broader good governance issues include: 1) the Constitutional authority relating to exercises of government power concerning academic matters in Michigan, 2) the Constitutional limits on the exercise of such government power, and 3) the importance of subsidiarity and transparency to good governance under the rule of law.

ALLOCATION OF CONSTITUTIONAL AUTHORITY AND THE EXERCISE OF GOVERNMENT POWER

Article VIII, section 2 of the Michigan Constitution empowers "the legislature" to maintain and support a free public elementary and secondary public school system.

Art. VIII, section 3 vests the leadership and general supervision of such public education in the State Board of Education. This includes typical executive functions (i.e., serving as the general planning and coordinating body for all public education). Section three confirms that the role of appropriating public monies is left to the legislature by mandating that the State Board of Education merely advise the legislature as to the financial requirements connected to the Board's planning and coordinating functions.

Thus, provisions of the Michigan Constitution make clear that it is the legislature that holds the ultimate right to allocate public education authority. While such power has, in the area of public school curricula and standards, been previously delegated by the legislature to the State Board of Education and the State Department of Education, power exercised by a prior legislature (e.g., delegating authority) cannot limit a current legislature. Thus, a current legislature is constitutionally authorized to limit or even revoke power previously delegated.

In any case, all exercises of government power, (whether by the State Legislature, the Board of Education, or the Department of Education), must not unconstitutionally interfere with constitutionally protected liberty. Thus, while Constitutional authority exists for the government of the State of

Michigan to promulgate educational policy, any exercise of such power is subject to Constitutional liberty interests that limit the exercise of that authority. Because all relevant elected government officials take an oath to uphold both the American and State Constitutions, they must consider the applicability of such limits in assessing whether the Policy violates such vital liberty interests. It is to these limits on the exercise of government power that we now turn.

CONSTITUTIONAL LIMITS ON THE EXERCISE OF GOVERNMENT AUTHORITY

The SBE's proposed Policy fails to uphold its commitment to meet the needs of *all* students. Instead, the Policy advances a political agenda creating special considerations for school children who assert a sexual orientation of lesbian, gay, and bisexual or who seek to depart from his/her biological sex at birth and associate with different "gender identity."[5] In order to meet their stated goal of promoting an atmosphere without discrimination for LGBTQ schoolchildren, the SBE ignores: 1) the fundamental right of parents to control and direct the upbringing of their children; 2) the procedural due process requirements of the 14th Amendment; 3) the First Amendment Constitutional freedoms of students, faculty, and staff, (whose valid religious, moral, political, and cultural views necessarily conflict with the LGBTQ political agenda); and 4) the fundamental constitutional liberty and equal protection interests judicially recognized by the U.S. Supreme Court in the recent *Obergefell* decision (i.e., the personal identity rights of students, faculty, and staff, who find their personal identity not in their sexuality but in their faith orientation).

1. The Proposed Policy Unconstitutionally Infringes on the Fundamental Right of Parents to Direct and Control the Upbringing of Their Children.

Both Michigan law and the Supreme Court of the United States hold that parental rights are "fundamental" rights. Such liberty serves as a serious limitation on exercises of government power, including those exercises of power that impact the parental role in educational matters.

Under United States Supreme Court precedent, a Court applies "strict scrutiny" when reviewing government actions that substantially interfere with a citizen's fundamental rights. U.S. Supreme Court case law articulating this strict scrutiny standard indicates:

> The essence of all that has been said or 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]. – *Wisconsin v. Yoder*, 406 U.S. 205 (1972); See also *Adarand v. Pena*, (1995), *Widmar v. Vincent*, (1982), and *Church of the Lukumi Babalu Aye, Inc., v. Hialeah*, (1993).

The fundamental rights standard preserves a fit parent's fundamental liberty to control and direct the upbringing of their

[5] The Policy also includes a new classification, not recognized in state or federal law, of "questioning" that extends the policy to children who question which gender to which they might switch or question which gender with which they may wish to engage in sexual intercourse or extend romantic feelings.

children -- including educational choices – and is expressly recognized in Michigan.

People v. DeJonge, 501 N.W.2d 127, 442 Mich. 266 (Mich. 1993) involved two parents' choice, (grounded in a sincerely held religious conviction) to school their children without a certified teacher. In *DeJonge* the court applied strict scrutiny to an exercise of government power, as applied to families whose religious convictions prohibit them from using certified instructors:

> In sum we conclude that the historical underpinnings of the First Amendment of the United States Constitution and the case law in support of it compels the conclusion that the imposition of the certification requirement upon the DeJonges violates the Free Exercise Clause. We so conclude because we find that the certification requirement is not essential to nor is it the least restrictive means of achieving the state's claimed interest. Thus, we reaffirm "that sphere of inviolable conscience and belief which is the mark of a free people." Weisman, 505 U.S. at ----, 112 S.Ct. at 2658, 120 L.Ed.2d at 484. We hold that the teacher certification requirement is an unconstitutional violation of the Free Exercise Clause of the First Amendment as applied to families whose religious convictions prohibit the use of certified instructors. Such families, therefore, are exempt from the dictates of the teacher certification requirement. (442 Mich. At 298-99)

Moreover, in response a compulsory attendance case where the Michigan Supreme Court said parents do not have a fundamental right to control the upbringing of their children in contexts outside of exercising their Freedom of Religious conscience,[6] the Michigan legislature passed, and governor signed, MCL 380.10 (Rights of parents and legal guardians; duties of public schools). Sec. 10 of this act expressly provides that parents *do have a fundamental right* to direct and control the upbringing of their children, whether or not the exercise of that right is grounded in the free exercise of religious conscience:

> 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.

Thus, both the U.S. Constitution and Michigan law clearly protect the fundamental right of parents to control and direct the upbringing of their children, including in all of the matters relevant here. Because the proposed Policy infringes on this right of parents, it is, therefore, unconstitutional.

[6] *People v. Bennett*, 501 N.W.2d 106, 442 Mich. 316 (Mich. 1993)

2. The Proposed Policy Violates Procedural Due Process Requirements of the 14th Amendment by Unconscionably Failing to Provide Fair Notice of the Conduct it Proposes to Prohibit.

The SBE's proposed Policy calls for the adoption, implementation, and enforcement of "policies protecting students from harassment, violence, and discrimination based on their … *perceived sexual orientation, gender identity, and/or gender expression"* (e.g., enumerated nondiscrimination, anti-bullying, and anti-harassment policies) (emphasis added).

The Fourteenth Amendment to the U.S. Constitution provides that state governments must not "deprive any person of life, liberty, or property, without due process of law." The due process Clause of 14th Amendment to the U.S. Constitution requires, at a minimum, notice of what a government policy prohibits.[7] This Constitutional rule of law provides predictability for individuals in the conduct of their affairs. An unambiguously drafted policy affords prior notice to the citizenry of conduct proscribed. In this way, the rule of law provides predictability for individuals in their personal and professional behaviour. Although citizens may choose to roam between legal and illegal actions, Governments of free nations insist that laws give an ordinary citizen notice of what is prohibited, so that the citizen may act accordingly.

The ambiguous language of the SBE's proposed policy here fails to provide the public with adequate notice of the kind of conduct that is prohibited by the law. This failure creates an impossibly precarious proposition for students and faculty attempting to discern what constitutes prohibited conduct, so as to conform their personal and professional behaviour to the policy. Because accusers with political agendas can use ambiguity in the Policy to decide, after the fact, what the Policy prohibits, the possibility of facing oppressive government action is always unpredictable.

To illustrate, here the policy is violated subsequent to the actor's action, (i.e., after another subsequently "*perceives*" the conduct as prohibited). Another especially ambiguous phrase is particularly troublesome: "harassment". As used in the proposed Policy, this phrase is so vague and apparently subjective that it is impossible for any reasonable person to reliably discern permissible from prohibited expression.[8]

When, as here, ambiguous language prevents notice of what constitutes prohibited conduct, accusers (and sympathetic authorities) arbitrarily define the prohibited conduct *after* the commission of the act. Thus, the "conduct" prohibited by the harassment provision wholly depends (at best) on the whim of an accuser's personal

[7] U.S. Const. Amend. 14. This rule of law is axiomatic throughout the free world. The European Convention on Human Rights, for example, guarantees individuals the right to prior notice of what constitutes prosecutable criminal conduct. European Convention on Human Rights *opened for signature* Nov. 5, 1950, Arts. 6 and 7, Europe. T.S. No. 5, [hereinafter "ECHR"]. To access the ECHR on the web, click here: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.

[8] The vagueness of other phrases in the Policy also raises issues concerning lack of adequate notice. For example, the vagueness of the phrase "sexual orientation", even as defined by the SBE, fails to provide adequate notice of what the Policy prohibits. We find little comfort that the only thing the SBE's vague definition of sexual orientation seems to exclude is bestiality (where one's sexual orientation is toward animals).

feelings—rather than on a clearly expressed rule of law articulated in the language of the provision.

3. The Proposed Policy Unconstitutionally Infringes on Fundamental First Amendment Rights of Conscience and Expression, as well as the Constitutional Liberty and Equal Protection Interests Recognized by the Supreme Court in Obergefell.

The SBE Policy purports to "promot[e] a safe, supportive, and inclusive learning environment for all students … ensuring that every student has equal access to educational programs and activities." The express provisions of the proposed Policy will, however, ensure censorship and punishment for students whose valid religious, moral, political, and cultural views necessarily conflict with the LGBTQ political agenda. For these students, the Policy unconstitutionally interferes with and discriminates against their sincerely held religious beliefs and identity, as well as their freedom of speech (by disallowing any dissent to the State-mandated promotion and acceptance of homosexual and transgender behavior).

Under the Constitution, State government cannot dictate what is acceptable and not acceptable on matters of religion and politics. State government cannot silence and punish all objecting discourse to promote one political or religious viewpoint. Yet, this is exactly the design of the proposed policy. Simply put, the answer to the question of whether the Policy passes constitutional scrutiny on these matters is clear and simple: no. The question, therefore, is not if the State of Michigan would be sued upon enacting their proposed Policy, but when and how many times over.

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).

> 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.
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> In order for the State in the person of school officials 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.

Id. at 508-09.

Here, the SBE seeks to inhibit if not ban the expression of a particular viewpoint and religious belief without any evidence that the belief materially and substantially interferes with the operation of all the schools within the State of Michigan. Rather, the SBE seeks to silence and punish speech because it believes that some students who partake in or support the LGBTQ lifestyle will object to, and find no comfort in, a competing viewpoint. The proposed policy presents what Judge Rosen of the Eastern District of Michigan described as "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).

Again, the Policy suggests banning "any gesture or written, verbal, graphic or physical act that is reasonably *perceived as* being dehumanizing, intimidating, hostile, humiliating, threatening, *or otherwise likely to evoke fear of physical harm or emotional distress* and may be motivated either by bias or prejudice based upon any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression; or a mental, physical, or sensory disability or impairment; or by any other distinguishing characteristic, or is based upon association with another person who has or is perceived to have any distinguishing characteristic." (emphasis added).[9]

The SBE's Revised Model Code of Student Conduct, while bearing some inconsistencies with the Policy, expressly bans any speech "that has the effect of insulting or demeaning any student or group of students in such a way as to disrupt or interfere with the school's educational mission or the education of any student."[10]

The Policy limits the viewpoint of allowable student speech and compels school faculty to further politically normalize LGBTQ behavior, or as the SBE disingenuously asserts, "promote a positive shift in peer norms." The Policy punishes verbal acts likely to cause emotional distress. While the proposed policy fails to define emotional distress, the SBE inappropriately relies upon one national survey that provides an example of the type of speech that will be banned as "bullying" or "harassment." Greytak, E., A., Ksciw, J. G., & Diaz, E. M. (2009). Harsh realities: The experiences of transgender youth in our nation's schools. New York: GLSEN, *available at* http://files.eric.ed.gov/fulltext/ED505687.pdf. The study reports that 85% of transgendered students feel *distressed* upon hearing the often used expression "that's so gay" to describe something as boring. *Id*. at 10. The faulty study cited by the SBE also groups together feelings of discomfort,

[9] SBE's Model Anti-Bullying Policy, *available at* http://www.michigan.gov/documents/mde/SBE_Model_AntiBullying_Policy_Revised_9.8_172355_7.pdf at 1-2
[10] SBE's Revised Model Code of Student Conduct, *available at* https://www.michigan.gov/documents/mde/Revised_Code_of_Student_Conduct_SBE_Approved_465406_7.pdf at 19-20.

reasonably expected to occur in school and allowed under the *Tinker* standard, with feelings of safety concern in its analysis. *Id*. at 14.

The Policy mirrors 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. *Id*. at 203. The plaintiffs, therefore, believed that homosexual behavior is sinful and that their religion required them to speak about homosexuality's negative and sinful consequences. *Id*. Plaintiffs feared punishment under the school's policy for discussing and sharing their religious beliefs. *Id*. 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. As in *Saxe*, the SBE's Policy does not just punish speech that actually causes a substantial disruption in the classroom, but also punishes student speech protected under the First Amendment. *Id*. at 216-17.

Attempting to silence free speech under the guise of "anti-bullying" or "harassment" is not a new concept. And federal courts nationwide have ruled that such infringement on student's First Amendment freedoms is unconstitutional. Students have a right to articulate their "disapprov[al] of homosexuality on religious grounds. *Zamecnik v. Indian Prairie School Dist. # 204*, 636 F.3d 874, 875 (7th Cir. Ill. 2011). Students have "a constitutional right" to advocate their religious, political, and moral beliefs about the sins of 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. A state cannot legally enact a policy that silences free speech based on likely "hurt feelings" that such free speech may cause. *Id*. at 877-78. That, however, is the clear result of the SBE's Policy—it stifles the free speech of students who hold dissenting viewpoints on the LGBTQ political agenda because some might perceive the speech as disagreeable or even distressing. Such a state policy 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, the Policy fails to adequately respect the First Amendment freedoms of school faculty. It requires school administrators, teachers, and support staff to adopt, implement, and enforce policies that support the LGBTQ lifestyle; to undergo professional development with the viewpoint of promotion and acceptance of LGBTQ

lifestyle; to support the formation of student clubs that promote the LGBTQ political agenda; to affirm the LGBTQ political agenda through counseling and support services; and to encourage respect for those who associate as LGBTQ in school curriculum.

The State mandated support, encouragement, and affirmation of LGBTQ behaviors, necessarily coerces school faculty members, who believe this lifestyle to be sinful, to either violate their religious conscience and express a pro-LGBTQ message under the compulsion of governmental power or face punishment. Nowhere in the proposed policy does the SBE 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, state officials are not 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).

The SBE's Policy claims 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. Government cannot and should not create an environment that will undoubtedly chill the First Amendment freedoms of those students and faculty who oppose the LGBTQ political agenda for valid religious, moral, political, and cultural reasons.

Moreover, the U.S. Supreme Court's recent ruling in *Obergefell v. Hodges*,[11] created a new constitutional right of personal identity for all citizens. The Court, under the facts before it, held that one's right of personal identity precluded any State from proscribing same-sex marriage. It is clear from the Court's ruling though, that this newly created right of personal identity applies to all citizens, and not just those who find their identity in their sexuality and sexual preferences. In *Obergefell*, the justices in the majority expressly 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. 572 U.S. at ___.

The Supreme Court expressly defined this judicially-created fundamental liberty right to "include most of the rights enumerated in the Bill of Rights," and that "these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." (emphasis added). Thus, the Court's

[11] 57 U.S. __, 22 (2015).

judicially-created constitutional right of self-identity clearly comprehends factual contexts well beyond the same-sex marriage issue.

To be sure, in the factual context of the case, the *Obergefell* decision stated that for some individuals "personal identity" might come from a person's intimate sexual orientation. The Court's ruling anticipates though, that this judicially-created liberty extends beyond the LGBTQ community, as the Court clearly held that an individual's "personal identity" may come from non-sexual personal choices. 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 is inherently in their intimate religious faith orientation, is entitled to at least as much constitutional protection as someone who finds their identity in their secular sexual preferences. Indeed, it is clear from the Court's ruling that this newly created right of personal identity serves as protection against government authorities who use public policy to persecute, oppress, and discriminate against Christian people.

Thus, if enforced by government action against Christian people, a powerful argument exits that the SBE's proposed policy unconstitutionally infringes upon the personal identity liberty and equal protection recognized by the United States Supreme Court in *Obergefell.* Undeniably, the Supreme Court determined that its judicially-created fundamental constitutional liberty right of personal identity is found in, and protected by, the Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution. Significantly, the *Obergefell* majority opinion further explained that

> 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.

Beyond any First Amendment religious liberty protections that exist, a Christian person now has, therefore, an additional, judicially-created fundamental right to his or her religious self-identity, grounded in the 14th Amendment liberty and equal protection clauses. The Court's judicially-created 14th Amendment right to self-identity in *Obergefell*, therefore, now provides Christian people greater constitutional protection than previously existed prior to the Court's ruling. State action must not require or compel a citizen to facilitate or participate in policies which are contrary to: 1) a person's self-identity rights secured by the 14th Amendment, or 2) their freedoms of expression and religious conscience protected by the 1st Amendment.

Thus, if government applies the SBE's Policy against Christians or other religious people in ways that violate their religious conscience or identity, government violates not just the First Amendment, but also the judicially-created constitutional rights recognized by the U.S. Supreme Court in *Obergefell*.

EDUCATION POLICY AND GOOD GOVERNANCE UNDER THE RULE OF LAW

Finally, when government promulgates policy, an essential element to good governance under the rule of law is the principle of subsidiarity. Dictionaries define the principle of subsidiarity as:

> the principle that decisions should always be taken at the lowest possible level or closest to where they will have their effect, for example in a local area rather than for a whole country.[12]

Education policy ought, therefore, to be addressed at the least centralized level of government, closest to where the policy will have its effect – simply because such organizational governance is more likely to result in better and more effective educational policy. Moreover, such an approach increases the likelihood of transparency in policy-making because the citizen affected is so close in proximity to the government policy-maker. It is much easier for government to exercise power without transparency when it can sneak it into law without facing an informed citizenry. When policy is promulgated into law without transparency, the government (especially in democratic republics) quickly loses the trust of the citizenry because such tactics give citizens a reason to believe that the government is hiding something and not acting consistent with their best interest. For example, after the SBE failed to adequately notify either the public or the legislature about the proposed Policy, considerable controversy erupted. In our view, therefore, the Michigan legislature ought to carefully evaluate the process by which: 1) the State promulgates special rights for the LGBTQ political community under the guise of education policy; and 2) the legitimacy of a process vesting authority with higher levels of governance (i.e., the SBE), far away from where the policies will have their effect.

CONCLUSION

Although we strongly disagree with the underlying premises of the Policy and the rationales for its implementation, and although we believe the policy as written is unconstitutional and violates Michigan law, we do not advise that the SBE "return to the drawing board." Under the circumstances, no reason exists to believe any future revision of this Policy will occur in a rational, responsible, and unbiased manner. We therefore suggest that doing nothing would be far more positive than seeking to go forward. Should the SBE decide to proceed nonetheless, the Great Lakes Justice Center will oppose them with all of the considerable force of the law and public opinion that we can muster.

[12] *See, e.g.*, Cambridge Advanced Learner's Dictionary & Thesaurus © Cambridge University Press