



Parental Rights Natick
Natick, MA

August 28, 2023

Re: Gender Identity Instruction in Natick Public Schools

Dear Members of Parental Rights Natick,

I write in response to your request for a legal opinion regarding instruction on gender identity in Natick Public Schools (NPS). Specifically, you asked me to review a document entitled “Frequently Asked Questions About Teaching About Gender Identity” (hereinafter “the NPS document”) that appears to have been produced by superintendent Anna Nolin of NPS. You asked whether certain claims that the NPS document makes about Massachusetts and federal laws regarding gender identity instruction are accurate. After reviewing the document, I have concluded that a number of its claims are inaccurate. In particular, its statement that gender identity issues are required to be taught to students “as part of MA general law” is incorrect. Below, please find an analysis of the document.

No Statute or Regulation Requires Gender Identity Issues to be Taught in Massachusetts Public Schools

Contrary to the NPS document’s statement that gender identity issues are required to be taught to students “as part of MA general law,” there is no law or regulation in Massachusetts that requires public schools to teach students about this subject.

The document refers to M.G.L. c. 76, § 5, which states in relevant part that “No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of [...] gender identity.” This statute prohibits public schools from discriminating against students on the basis of their gender identity; it plainly does not require instruction on gender identity issues.

As the document mentions, the Department of Elementary and Secondary Education (DESE) has issued implementing regulations for the nondiscrimination statute, found at 603 CMR 26.00. One of these regulations, 603 CMR 26.05, states in relevant part:

- (1) All public school systems shall, through their curricula, encourage respect for the human and civil rights of all individuals regardless of race, color, sex, gender identity, religion, national origin or sexual orientation.
- (2) Teachers shall review all instructional and educational materials for simplistic and demeaning generalizations, lacking intellectual merit, on the basis of race, color, sex, gender identity, religion, national origin or sexual orientation.

Again, however, the clear purpose of this regulation is to prevent discrimination, not to require schools to promote gender identity ideology through their curricula. The regulation requires schools to “encourage respect for the human and civil rights of all individuals” *regardless* of certain characteristics, including gender identity. A school may comply with this requirement without instructing students on gender identity, just as a school may comply with the requirement to encourage respect for the human and civil rights of religious individuals without teaching students about religion. It is worth noting that if NPS takes the position that to comply with these regulations they must teach students about various gender identities, there would be a strong argument that, by the same token, they would also be required to teach traditional religious perspectives on gender to encourage respect for religious students.

Finally, the NPS document also cites a DESE guidance document which expands on the gender identity nondiscrimination statutes and regulations. This document states, “In order to further a safe and supportive school environment for all students, schools should incorporate education and training about transgender and gender nonconforming students into their anti-bullying curriculum, student leadership trainings, and staff professional development.”¹ This guidance document does not have the force of law, and therefore Massachusetts public schools are not bound to follow it.² Moreover, it does not advise schools to incorporate gender identity into their general instructional materials, but only into their “anti-bullying curriculum.” Again, the focus here is on nondiscrimination, rather than instruction on gender identity theories.

The NPS document states that “Our mission is to run a district, school, or class where children are not discriminated against due to gender identity [...] To do so, we need to directly instruct our students so they, too, can create inclusive environments and act in accordance with the law.” However, it is unclear why directly instructing students about gender identity theories (which, unfortunately, often seem to be presented as fact) is necessary to prevent discrimination on the basis of gender identity. Again, to analogize to religion, I assume that NPS does not find it

¹ Massachusetts Department of Elementary and Secondary Education, “Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment,” <https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html>.

² *Foote v. Town of Ludlow*, 2022 U.S. Dist. LEXIS 236102, *11 (D. Mass. 2022) (describing DESE guidance as “non-binding”).

necessary to instruct students in the Catechism of the Catholic Church or the Five Pillars of Islam to prevent discrimination against Catholic or Muslim students.

In sum, the NPS document's claim that Massachusetts law mandates instruction on gender identity is not accurate. While NPS is required by DESE regulations to "encourage respect for the human and civil rights of all individuals," it is not required to teach students about gender identity.

Massachusetts School Committees Have Discretion to Allow Parents to Opt Their Children Out of Gender Identity Instruction

While public schools in Massachusetts are not required to instruct students about gender identity, many schools, including Natick, do so. You also asked whether a school may opt students out of such instruction at their parents' request. The answer is yes, a school may allow parents to opt their children out of instruction on gender identity.

The NPS document asserts that NPS is not required to opt students out of instruction on gender identity because such instruction does not qualify as "sexual education" under the Massachusetts sex ed opt-out statute, M.G.L. c. 71, § 32A. It also notes court precedents which held that parents do not have a right to opt their children out of instruction on "LGBTQ+ themes" under the Free Exercise Clause of the U.S. Constitution. However, the sex ed opt out statute also gives parents a right to opt children out of curriculum that covers "human sexuality issues." Based on my review of applicable caselaw, the precise scope of this language has never been determined by a Massachusetts court. Therefore, there is at least a plausible argument that schools *are* required to opt students out of instruction on gender identity, since this could qualify as a "human sexuality issue."

Regardless of whether such an opt-out is required by state law, it is clear that schools have discretion to provide such an opt-out if they choose to do so. As explained above, there is no legal requirement that public schools teach about gender identity. If teaching about gender identity is discretionary, then providing an opt-out from such instruction would certainly also be discretionary.

In addition, NPS's Policy Manual recognizes the right of parents to opt their children out of objectionable materials. Policy IHAM-R allows students or their parents to opt out of health instruction "on the grounds that the material taught is contrary to the religious beliefs and/or teachings of the student or the student's parent/guardian." This exemption is not required by state law. Policy IHAMA allows parents to exempt students from sex education, as required by state law. Finally, policy KEC states that

If a parent requests that his/her own child not read a given book, the teacher and/or school administrator should resolve the situation, perhaps by arranging for use of alternative material meeting essentially the same instructional purpose. This does not apply, however, to basic program texts and materials that the Committee has adopted.

These policies show that NPS has no issue exempting students from certain subjects based on their religious beliefs, including state-mandated subjects like health. Policy KEC also indicates that NPS gives substantial deference to parental rights by granting parents the option to exempt their children from certain instructional materials that conflict with their beliefs.

In sum, based on the lack of any legal requirement to teach gender identity in Massachusetts and on NPS's own policies regarding parental exemption rights, NPS has the ability (and potentially the obligation) to opt students out of gender identity instruction pursuant to parental requests.

Parents Have a Right to Opt Their Children Out of Questions About Their Gender Identity

Schools must also honor a parent's request to not force their child to disclose personal information about the child's gender identity. The Protection of Pupil Rights Amendment (PPRA), mentioned in the NPS document, allows parents to opt their children out of school-administered surveys that ask about sensitive personal information such as "sex behaviors and attitudes" and "mental or psychological problems."³ Because of the connections between gender identity, sexuality, and mental health problems like gender dysphoria, parents should be able to opt their child out of surveys asking about their gender identity. The PPRA is not, as the NPS document implies, restricted only to "experimental programs;" it applies to *any survey* administered by a school funded by the U.S. Department of Education that covers certain protected topics. While the PPRA does not define "survey," the ordinary meaning of the word, "an examination of opinions, behavior, etc., made by asking people questions," indicates that it would apply to gender identity questions asked to students in a classroom.⁴

Moreover, even if the PPRA did not apply to questions about gender identity, parents would still be able to assert the constitutional privacy rights of their children. Requiring children to disclose such sensitive information about their gender identity, sexual orientation, or beliefs about these topics would likely violate their right to privacy under the state and federal

³ 20 U.S.C. § 1232h.

⁴ Cambridge Dictionary, "Survey," <https://dictionary.cambridge.org/us/dictionary/english/survey>.

constitutions.⁵ Therefore, NPS should allow parents to opt their children out of any questions related to their gender identity, sexual orientation, or other sensitive personal information.

Public School Curricula are Public Records

Finally, the NPS document states that “[i]t is impossible to list all the books” and other resources at NPS that discuss gender identity, implying that NPS will not comply with parental requests to disclose which instructional materials they use to teach children about gender identity. While I would encourage parents interested in reviewing their child’s curriculum to be specific in their requests, the bottom line is that all public school instructional materials are public records under M.G.L. c. 66, § 10. Therefore, every parent has the right to ask to see what instructional materials a school is using to teach their child about gender identity. NPS should *want* to be transparent with parents about what materials they are using to teach their children; after all, it is the parents’ taxpayer dollars that were used to purchase those materials for the school. Parents should not take “no” for an answer when they ask to see the curriculum used to teach their children about controversial subjects.

Conclusion

Massachusetts Family Institute firmly believes that students flourish when schools respect parental rights, honor religious beliefs, and are transparent about what they teach. The NPS document you shared with me is concerning because it seems to cut against these principles and engages in flawed legal analysis. I hope this information is helpful as you continue to advocate for positive change in Natick.

Very truly yours,



Samuel J. Whiting, Esq.
Staff Attorney
Massachusetts Family Institute

⁵ See, e.g., *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000) (concluding that “sexual orientation [is] an intimate aspect of [one’s] personality entitled to privacy protection”).