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## LEGAL ANALYSIS OF ADOPTED REGULATION R099-17

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For the past several months, the Nevada Department of Education has been pushing a proposed regulation that infringes upon the constitutional rights of students across the state. The latest round of revisions, as set forth in the “Adopted Regulation R099-17,” does not address the serious concerns raised by parents, students, and others at public meetings to discuss the proposal. This final version remains a constitutionally problematic regulation. It exposes school districts who follow its mandates to legal action and students subjected to its demands to a severe trampling of their rights.

### **I. The Regulation Infringes Students’ Free Speech Rights.**

The final Regulation requires schools to adopt policies that compel students to use biologically inaccurate pronouns or any other pronouns demanded by their peers. This includes the plethora of newly invented pronouns, such as ze, sie, hir, and ey. Any student who fails use a preferred pronoun can be punished if a school official determines that such actions create “an intimidating or hostile educational environment”—a vague and completely subjective determination—or if it violates any other policy of the school district.

School officials cannot “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 Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Indeed, just a few months ago, the U.S. Supreme Court reiterated that the Constitution forbids the government from compelling individuals “to mouth support for views they find objectionable.” *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2463 (2018). When the government “prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines” the right to free speech. *Id.*

Nevada has no authority to demand that its students communicate a message—that a boy is a girl or a girl is a boy—if they disagree with it. By doing so, the final Regulation violates the First Amendment rights of students.

### **II. The Individualized Gender Identity Plans Allow the Subjective Feelings of a Student to Determine District-Wide Policy.**

The final Regulation maintains the mandate that school districts create

“individualized” plans for teach transgender student in the district. These plans, which impact the rights of every student, are not subject to an open, democratic process that allows for engagement by other students, parents, and concerned community members. They are crafted in secrecy, but carry with them the full force of the district’s disciplinary authority. Under these plans, school officials could mandate that:

- all students use a classmate’s preferred pronoun;
- a male student to be allowed to play on a female intramural team;
- a teacher alter her lesson plans to provide instruction that is more “relevant and meaningful” to a transgender student; and
- a male be allowed to use female locker rooms when changing for P.E. class.

Particularly concerning is a new addition to the Regulation that requires the individualized plan to ensure that a student “is able to dress and act in an appropriate manner in accordance with his or her gender expression or identity.” With the list of identities rapidly increasing, it is only a matter of time before a gender-fluid students demands the freedom to use both the male and female restrooms or an agendered student asserting that, because the student is neither male nor female, the school must create a new restroom, locker room, and even intramural team to accommodate the student’s agendered identity.

Decisions that impact student privacy, free speech, instructional materials, and competitive fairness in sports should not be made in private by a small, unaccountable group. Nor should they be subject to the demands of an unbounded ideology that allows a child’s subjective feelings to dictate the policy for hundreds of their school peers. They should be made publically so that every voice is heard. The final Regulation takes away the right of parents and students to know about these decisions, hiding them under the cover of an “individualized” plan.

### **III. The Regulation Allows for Privacy Violations in School Facilities.**

Single occupant “bathrooms . . . obviously . . . [were] not intended to be used by both sexes at the same time.” *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1375 (3d Cir. 1992). This privacy interest is rooted in anatomical differences. *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993) (“special sense of privacy in their genitals”) (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)). The Sixth Circuit rightly grounded this understanding in “an abundance of common experience” that “there must be a fundamental constitutional right to be free from forced exposure of one’s person to strangers of the opposite sex. . . .” *Brannum v. Overton County Sch. Bd.*, 516 F.3d 489, 495 (6th Cir. 2008) (internal citations omitted). This is also true in the context of “underwear clad teen and pre-teen boys and girls.” *Id.*

Yet under the final Regulation, a school can force such exposure by opening up showers, locker rooms, and restrooms to students of the opposite sex pursuant to

an individualized plan.<sup>1</sup> In our nation, the Constitution is the supreme law of the land, and cannot be subjugated to any state regulation or individualized plan. Every school has a constitutional duty to preserve and protect the privacy and dignity of its students. Opening up private facilities for use by members of the opposite sex violates that duty, jeopardizing not just privacy, but student safety as well.

#### **IV. The Regulation Deprives Students of Competitive Fairness and Equal Athletic Opportunities in Sports.**

The final Regulation continues to defer to the policies of the Nevada Interscholastic Activities Association, which allows students to participate in athletics based on the student's gender identification. Yet the NIAA's policies ignore the undeniable biological differences between males and females that necessitate creating separate teams for each sex—a separation that promotes fairness and equal opportunities for everyone. This has a serious impact on educational opportunities and financial educational resources for girls, ones that could even determine their ability to afford the cost of college.

#### **Conclusion**

The concerns identified in ADF's analyses of the previous iterations of Regulation R099-17 remain unaddressed. Nevada school kids deserve regulations that affirm and protect their constitutional rights to free speech, privacy, and exercise their religion. The final Regulation evidences a disdain for the rights of students subjected to it and is only going to invite additional controversy and liability for the schools governed by it.

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<sup>1</sup> The final Regulation states that such individual plans cannot conflict with "any policies of the school district concerning public use of district facilities." If this means that a school district can adopt policies that limit use of locker rooms and restrooms to members of the designated biological sex, then the Department of Education needs to clearly say so. In an area fraught with confusion, school districts (and the families they serve) deserve unambiguous direction.