

Testimony of Attorney Mary Bonauto, GLBTQ Legal Advocates & Defenders

Joined by American Academy of Pediatrics – Maine Chapter, MaineTransNet, OUT Maine

Opposition Testimony to LD 678, “An Act An Act to Require Parental Approval for Public School Employees to Use a Name or Pronoun Other than a Child's Given Name or Pronoun Corresponding to the Gender on the Child's Birth Certificate” - ONTP

Joint Standing Committee on the Judiciary

May 15, 2023

Good afternoon I am Mary Bonauto, a Maine-based attorney who works for GLBTQ Legal Advocates & Defenders GLAD is a legal organization advocating for the full range of civil rights for LGBTQ people and people living with HIV/AIDS in New England and nationally Together with the American Academy of Pediatrics – Maine Chapter, MaineTransNet, and OUT Maine, we oppose LD 678, “*An Act An Act to Require Parental Approval for Public School Employees to Use a Name or Pronoun Other than a Child's Given Name or Pronoun Corresponding to the Gender on the Child's Birth Certificate*”

**First and foremost, this rule will not help young people.** If a student asks to use a different name or pronoun at school, it is because they are exploring or testing out their identity, or because they are deeply uncomfortable with the name and gender they have been assigned **If they are exploring, or if they need support to figure out how to talk to their parents or guardian about their questions or discomfort, then this bill tells them to suppress who they are. Suffice it to say that this doesn't support their education at school. It doesn't work for young people; in fact, it is horribly dangerous.**

**What is also forgotten in the current debate is that school staff and teachers are often the first ones to encourage a student to share their concerns with a parent.** It is widely accepted, and for good reason, that a strong parent-child relationship helps a young person throughout their lives **Young people care about their families, too, and are often very invested in finding a way, with some time and support, to open up about important parts of themselves with their parents even though the discussion could be challenging. This bill cuts off support and puts up roadblocks to the path forward.**

**Second, from a school's perspective, the school must be student-centered, oriented to keeping students safe and engaging their learning and development so they can ultimately take their place as adults in our society.** Schools share this commitment with parents, although each plays different roles Because educators are committed to students learning and growing, they strive to ensure that a student's personal characteristics, including transgender status and gender *do not* affect the student's access to a learning environment in which they can engage fully **This commitment also derives from legal obligations imposed on schools to ensure that schools provide equal opportunities to all students and avoid discrimination based on sex, transgender status, and gender identity.**

Those nondiscrimination rules are enforced against schools.<sup>1</sup> This legal principle means that all children must be able to attend schools safely and get the education they deserve, including transgender young people. In 2014, the Maine Law Court was the first state supreme court to rule that state nondiscrimination law protected a transgender student's right to use the restroom consistent with her gender identity because it was important for the student's well-being and success at school). *Doe v. Regional School Unit 26*, 86 A.3d 600, 607 (Maine 2014) ("Where, as here, it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes [gender identity] discrimination in violation of the [state law against discrimination].").<sup>2</sup>

**Third, this bill does not protect parents' rights.**

Although this hardly does justice to the potential role of parents in a child's life, parents have enormous access to and influence over their children, including the ability to develop a strong, positive and loving relationship with them. Parents often share their views and values with their children, guide and show them how to be a good friend, sibling, son or daughter, and more. In other words, what is most protective of parents' rights is the relationship that parents develop with their children. This Committee saw that on display

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<sup>1</sup> In 2005, the Maine legislature enacted a statute to ensure that "[n]o person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools" based on their membership in a protected class, including based on sexual orientation and gender identity. This law was upheld in a people's veto campaign that unsuccessfully attempted to repeal that law.

In accord with legislative and judicial determinations (see below), the Maine Human Rights Commission controlling interpretation of the Maine Human Rights Act is that "A student's official record shall bear their legal name, which may be changed only upon proof that the student's legal name has been changed pursuant to a court order. At the written request of a student, however, and consistent with the student's gender identity, the educational institution shall use the student's preferred name and pronouns consistent with their gender identity on all other documents." Barbara Archer-Hirsch, Letter to Amy Sneirson, re Interpretation of Maine Human Rights Act (Jan. 13, 2016) at 3, available at [https://www.maine.gov/mhrc/sites/maine.gov/mhrc/files/pdfs/CCmemo\\_education\\_so.pdf](https://www.maine.gov/mhrc/sites/maine.gov/mhrc/files/pdfs/CCmemo_education_so.pdf). In addition, many school administrative units have adopted versions of policies about supporting students who are transgender or gender nonconforming.

<sup>2</sup> Other federal appeals court cases about school bathrooms and facilities include *Grimm v. Gloucester County School Board*, 972 F.3d 586, 614 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) ("[S]howing respect for each student's gender identity supports the dignity and worth of all students by affording them equal opportunities to participate and learn"), *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Board of Education*, 858 F.3d 1034, 1049-50 (7th Cir. 2017) (affirming grant of preliminary injunction, Title IX ensures that transgender boys and girls can access school facilities based on their insistent and persistent sense of their gender), *Dodds v. United States Department of Education*, 845 F.3d 217, 220 (6th Cir. 2016) (*per curiam*) (denying stay of preliminary injunction) (Title IX requires respect for student's gender identity). *But see contra Adams v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (*en banc*).

Notably, efforts by non-transgender students and their parents to assert a right to be separated from transgender students have failed repeatedly in courts. *See, e.g., Parents for Privacy v. Barr*, 949 F.3d 1210, 1239-40 (9th Cir. 2020) (no right under Title IX to use restroom and locker rooms apart from transgender students), *Doe v. Boyertown Area School District*, 897 F.3d 518, 537-38 (3d Cir. 2018) (same).

in Friday's hearing on LD 535 with parents nearly bursting with love and pride for their children testifying about the need for access to gender affirming care for certain minors.

**This bill puts young people in the position of suppressing their distress, fears and concerns, even if they need some safety valve outside of the home, including school, to acknowledge their concerns.** It isn't surprising that students need time to share these concerns at home, and even more so when they are uncertain about their feelings about their gender, or may need time to collect information from external sources about how to talk with their parents

While parents have a broad and powerful influence on their children, **the partnership of schools and parents for the safety and learning of students is an asset for students, families and schools. We don't need a law to state the obvious: that parents can check in with teachers about their own student's well-being and progress, that they can follow their child's assignments, readings, and progress through "Power School" and "Blackboard."** Schools also typically engage in "parental engagement" efforts to maintain communication with parents in the school community.<sup>3</sup> Parents can attend school board meetings and register their thoughts as the school board decides on policy and curriculum.

In addition, parents have longstanding legal rights nationwide to obtain school-maintained records about their student under the Family Educational Rights and Privacy Act (FERPA)<sup>4</sup> and other materials through the Pupil Privacy Protection Act (PPRA).<sup>5</sup> Among many other things, the PPRA also provides for parental consent to surveys with particular topics, including inspection of the survey on request, as well as notice and an opportunity to opt out of various surveys, and health examinations (with exceptions), and the "inspection" of "instructional" used by a "local educational agency" as part of the educational curriculum.

All of this said, there is no legal obligation to export what parents would counsel at home into a requirement on schools, even under the rubric of the parents' rights to direct the "care, custody and control" of their child. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opn.).

What is crystal clear is that parents have the recognized fundamental right to decide whether their child should attend public or private school or be home schooled. *Crowley v McKinney*, 400 F 3d 965, 971 (7<sup>th</sup> Cir 2005) (the parental right is "the right to choose the school" but not "a right to participate in the school's management—a right inconsistent with preserving the autonomy of educational institutions, which is itself ... an interest of constitutional dignity." *Id*

However, the constitution does not require parental preferences to be imposed on how public schools operate their day-to-day activities. Parents "do not have a due process right to

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<sup>3</sup> 42 U S C §6318 (schools to have written policy distributed to parents), 20-A MRS §254 (parent engagement policy)

<sup>4</sup> 20 U S C §1232g, available at <https://www.law.cornell.edu/uscode/text/20/1232g>

<sup>5</sup> 20 U S C §1232h, available at <https://www.law.cornell.edu/uscode/text/20/1232h> The state analogue to PPRA is at 20-A MRS § 952 et seq (Maine Student Information Privacy Act)

interfere with the curriculum, discipline, hours of instruction, or the nature of any other curricular or extracurricular activities,” and parental rights are “substantially diminished” once they elect to send their children to public school.<sup>6</sup> **Parents who disagree with school policies “have the right to remove their children from” public schools, but that right does not extend to requiring particular policies.”<sup>7</sup>**

**Notably, in the infrequent parental rights cases in the education context, many courts find that the parent’s asserted right is not a legal right, but a preference for a particular course of action. As a result, courts often find that a school has not violated parents’ rights.<sup>8</sup>**

Stated another way by the First Circuit Court of Appeal, s a parent’s right to bring up their children does not extend to “direct *how* a public school teaches their child.”<sup>9</sup> **Schools, too, have constitutional obligations to fulfill, and in doing so, must have discretion, during the school day to decide how to address student situations based on individual circumstances.**

Recent cases addressing a claimed parental right to information about a student’s use of a different name or pronoun at school have largely foundered to date. In a very recent Illinois case<sup>10</sup>, such a claim was dismissed for insufficient allegations to show a direct and substantial interference with a fundamental parental right. In addition, the Court agreed that the school policy served its “legitimate interest in maintaining a non-discriminatory environment for

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<sup>6</sup> *Hodge v Jones*, 31 F 3d 157, 163-64 (4th Cir 1994)

<sup>7</sup> *Parents for Privacy v Barr*, 949 F 3d 1210, 1230 n 16 (9th Cir 2020)

<sup>8</sup> *Barr*, at 1231-33 (no fundamental right to object to school policy allowing transgender students to use single-sex facilities consistent with their gender identity), *Thomas v Evansville-Vanderburgh Sch Corp*, 258 F App’x 50, 54 (7th Cir 2007) (private conversation between school counselor and student regarding school performance did not violate parent’s right to direct child’s upbringing), *Leebaert v Harrington*, 332 F 3d 134, 141 (2d Cir 2003) (upholding school’s mandatory health classes against father’s claim of violation of fundamental rights), *Parents United for Better Sch, Inc v Sch Dist of Phila Bd of Educ*, 148 F 3d 260, 277 (3d Cir 1998) (upholding school’s consensual condom distribution program), *Brown v Hot, Sexy & Safer Prods, Inc*, 68 F 3d 525, 533-34 (1st Cir 1995) (upholding compulsory high school sex education assembly program), *abrogated on other grounds by Martinez v Cui*, 608 F 3d 54 (1st Cir 2010), *Fleischfresser v Dirs of Sch Dist 200*, 15 F 3d 680, 690 (7th Cir 1994) (parents lacked constitutional right to exempt child from reading program)

<sup>9</sup> *Parker v Hurley*, 514 F 3d 87, 102 (1st Cir 2008), quoting *Blau v Fort Thomas Public School District*, 401 F 3d 381, 395 (6th Cir 2005) (emphasis in original). See also *Leebaert v Harrington*, 332 F 3d 134, 140-42 (2d Cir 2003) (same in denying exemption from mandatory health curriculum), *Fields v Palmdale School Dist*, 427 F 3d 1197 (9th Cir 2005) (same regarding distribution of a survey, there was “no constitutional reason to distinguish that concern [about a survey] from any of the countless moral, religious, or philosophical objections that parents might have to other decisions of the School District”), *Brown v Hot Sexy & Safer*, 68 F 3d 525, 534 (1st Cir 1995) (“If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school’s choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems.”)

<sup>10</sup> *Vesley v Illinois School Dist 45* (April 7, 2023), available at <https://law.justia.com/cases/federal/district-courts/illinois/ilndce/1-2022cv02035/414313/38/>

students as well as protecting students' privacy, mental well-being, and physical safety" (citations omitted)<sup>11</sup>

**As to the limitations on staff discussions proposed in this bill, those should fail for the same reasons discussed in the above cases. That is to say, in the ordinary course, *staff* can likewise be required to use names as stated by the student at school. This is because doing so supports the student's well-being and learning at school.<sup>12</sup> These objectives are the very reason school administrative units employ teachers and staff.**

**For all of the above reasons, we urge you to vote ought not to pass on LD 678.  
Thank you for your consideration.**

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<sup>11</sup> See, e.g. *Foote v Town of Ludlow*, Civ No 22-30041-MGM, 2022 U S Dist LEXIS 236102, at \*9 (D Mass Dec 14, 2022), *John & Jane Parents I v Montgomery County Board of Education*, Civ No 8 20-3552-PWG, available at <https://law.justia.com/cases/federal/district-courts/maryland/mddce/8/2020cv03552/487743/60/> These cases are on appeal in the 4<sup>th</sup> and 1<sup>st</sup> Circuits

<sup>12</sup> The 7<sup>th</sup> Circuit Court of Appeals recently held that such usage could be required and that doing so did not unlawfully discriminate against an objecting employee *Kluge v Brownsburg Cmty Sch Corp*, available at <https://law.justia.com/cases/federal/appellate-courts/ca7/21-2475/21-2475-2023-04-07.html> (April 7, 2023)