Testimony of Attorney Mary Bonauto, GLBTQ Legal Advocates & Defenders
& Attorney Meagan Sway, ACLU of Maine
Joined by Equality Maine, Maine Chapter American Academy of Pediatricians, MaineTrans.Net, Maine Women's Lobby, OUT Maine, Portland Outright

(Corrected) Opposition Testimony to LD 1953, a "*RESOLUTION, Proposing an Amendment to the Constitution of Maine to Establish a Parental Bill of Rights*" – ONTP

Joint Standing Committee on the Judiciary

May 24, 2023
Corrected May 30, 2023

Good Morning. I am Mary Bonauto, a Maine-based attorney who works for GLBTQ Legal Advocates & Defenders. GLAD, together with Meagan Sway of the ACLU of Maine, have prepared some high-level points to explain our concerns about the constitutional amendment proposed in this Resolve.[1] We are joined by Equality Maine, Maine Chapter American Academy of Pediatricians, MaineTrans.Net, OUT Maine, and Portland Outright in opposing LD 1953, *RESOLUTION, Proposing an Amendment to the Constitution of Maine to Establish a Parental Bill of Rights.*" We also incorporate by reference GLAD's and the ACLU's opposition to LD 678 rather than repeat those arguments here. [2]

At the outset, we want to be clear that some of us are parents, and we appreciate that parents are of profound importance to their children and vice versa. We know that parents have enormous influence over their children. That is what gives us hope that we will eventually move past this time of distrust. What is most protective of parents' rights is the relationship the parents develop with their children. We also want to be clear that we are often advocating *for* parents' rights.

Our opposition to this Resolve includes but is not limited to the following concerns.

1. LD 1953 unnecessarily inserts into our Constitution, both with respect to schools and as to "any other governmental entity," a duty to not to "infringe" on "the fundamental rights of a parent" to raise their child. The language in LD 1953 is also very broad, applying

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1 GLAD is a nonprofit legal organization advocating for the civil and legal rights for the full range of LGBTQ people and people living with HIV/AIDS, both in New England and nationally. The ACLU of Maine is a nonprofit legal organization active in the courts, the legislature and the public sphere to defend the Constitution and the Bill of Rights, and to extend their promises to all Mainers.

2 Testimony of Mary L. Bonauto in opposition to LD 678, "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, May 15, 2023, available at http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=178964.

Testimony of Meagan Sway in opposition to LD 678, "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, May 15, 2023, available at http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=178963.

not only to the State of Maine, its political subdivisions and school boards and administrative units, but also "any government entity" from infringing upon a parent's right to raise their child. Sec. 26(2), (3), (3)(B), (6). As stated, this could have broad and unintended consequences, such as judicial application of the best interests of the child standard in parental rights and responsibilities proceedings under Title 19-A, and undoubtedly other areas of law as well.

By way of background as to Title 19-A, existing law provides that parents are "jointly entitled to the care, custody, control, services, and earnings of their children" and together can meet the safety needs and best interests of their children. But when parents separate or when they can no longer cooperate under the terms of an existing court order, courts look to a wide-ranging list of factors geared to the welfare of children in allocating parental rights and responsibilities between the parents. Under Tit. 19-A MRS §1653,[3] after a thorough examination of these factors, the court may invest the parents with shared or sole responsibilities as warranted by the evidence.[4]

To be sure, parents have a fundamental right "to make decisions concerning the care, custody, and control of their children,"[5] but that liberty interest "does not reside there exclusively," nor is it beyond regulation "in the public interest."[6] We should not introduce doubt into whether courts would retain the authority to allocate sole parental rights when warranted for safety reasons, because they have abused children, or because of the public interest in the welfare of children, or undermine the state's paramount interest in protecting the welfare of children.[7]

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[3] Available at: https://legislature.maine.gov/statutes/19-A/title19-Asec1653.html

[4] See 19-A Me. Rev. Stat. §1653, available at: https://legislature.maine.gov/statutes/19-A/title19-Asec1653.html

This proposed amendment also raises questions about expansion of a parent's rights to educational records of their children even when, based on all of the relevant circumstances, it is not in the interests of the child to do so. Current law provides for the Judge to provide a statement that "each parent must have access to records and information pertaining to a minor child" including "medical, dental and school records and other information on school activities, whether or not the child resides with the parent." However, current law differs from the proposal because the court is authorized to deny access, in whole or in part, if "that access is found not to be in the best interest of the child or that access is found to be sought for the purpose of causing detriment to the other parent. If that access is not ordered, the court shall state in the order its reasons for denying that access." 19-A MRS §1653 (2)(D)(4). The current rule is based on a holistic view of the parenting of the child and the parent-child relationships.

[5] *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion).

[6] *Parents for Privacy v. Barr*, 949 F.3d 1210, 1231 (9th Cir. 2020). *See also Hodge v. Jones*, 31 F.3d 157, 163-64 (4th Cir. 1994) ("The maxim of familial privacy is neither absolute nor unqualified, and may be outweighed by a legitimate governmental interest.").

[7] Among the many factors a court must review in allocating parental rights are those that implicate the welfare of the child, and which the proposed bill would effectively disregard. These include:

P. If the child is under one year of age, whether the child is being breast-fed;

Q. The existence of a parent's conviction for a sex offense or a sexually violent offense as those terms are defined in Title 34-A, section 11203;

R. If there is a person residing with a parent, whether that person:

(1) Has been convicted of a crime under Title 17-A, chapter 11 or 12 or a comparable crime in another jurisdiction;

(2) Has been adjudicated of a juvenile offense that, if the person had been an adult at the time of the offense, would have been a violation of Title 17-A, chapter 11 or 12; or

2. Although LD 1953 identifies some parental rights that are indeed of a constitutional dimension, e.g. the right to direct the child's education by choosing public, private or home schooling, (see §3(A)(3)) most of the proposed amendment reads as a statute directing schools to establish plans and procedures about school management or information about their specific child which are already protected by state, federal or local law and policy, or which are vague. Specific applications of LD 1953 raise serious issues involving the US Constitution's Supremacy Clause.

   It is odd, to say the least, to constitutionalize matters that could be obtained from school websites, students' school accounts, and from conversations between parents and their child's teachers and school administrators or their own children. This has been ably addressed by the MSMA, MSBA, MPA, Attorney General, Department of Education and advocates in multiple bills this session in both the Education and Cultural Affairs Committee and this one. The amendment would also require schools to notify parents of "counseling services," something already debated this session. The amendment would also conflict with and stymie the the student support some schools provide to young people at school as well as with student privacy protections under existing law. See sec. 26 (A)(6)(g) (also erroneously referring to such services as "medical treatment").

3. We are concerned that LD 1953 is really a statute posing as a constitutional amendment. It takes a blunderbuss approach to constitutionalizing "parental rights" with directives for "plan[s]", "procedure[s]", and "notif[ications]" from school staff that could and ordinarily would be addressed by statute and without the inflexibility that comes with the amendment language.[8] Statutes can be amended; it is very difficult to amend a constitutional provision. Importantly here, the Education Committee has already heard testimony on numerous bills addressing many of the issues addressed in this proposed amendment.[9]

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(3) Has been adjudicated in a proceeding, in which the person was a party, under Title 22, chapter 1071 as having committed a sexual offense; and

S. Whether allocation of some or all parental rights and responsibilities would best support the child's safety and well-being.

[8] Examples include: a policy that schools must adopt "to promote parental involvement in the public system" with detailed descriptions of what must be included in that policy, sec. 26(A)(4); an list of circumstances when school boards, school districts, school administrative units, school administrators or school employees must disclose information to parents, sec. 26(A)(6); and the number of days after which a superintended must respond to a parent's request for information, sec. 26(B).

[9] These bills include: LD 1129, An Act to Enact the Curriculum Transparency Act, LD 1196, An Act to Require Public Schools to Allow Parents and Guardians to Opt Out Their Children with Respects to Portions of the Curriculum, LD 1199, An Act to Provide Transparency in Public School Curricula, LD 1518, An Act Regarding the Rights of Parents to Withdraw Their Children from Public School Classes or Activities That Include Certain Controversial Viewpoints, LD 1643, An Act Regarding Instructional Materials, Surveys, Analyses, Evaluations and Events at Public Schools, and LD 1800, An Act Regarding Parental Rights in Education.

While we disagree with constitutionalizing rules and procedures for schools as proposed in this amendment, we also need to highlight that the question proposed for voter ratification is not adequate to address this sprawling amendment touching on many areas of law. The Resolution proposes an up or down vote from the public even though it sprawls across multiple areas of law. Quite reasonably, voters could be conflicted in their feelings about its many substantive provisions, liking some and opposing others. This would be a classic "logrolling" situation, in which people are put in a no-win situation by having to accept provisions they oppose in order to advance those they favor, or vice versa. For example, a voter may agree that all parental rights are reserved to the parent of a minor child without interference from the state, Sec. 26(3), but not agree with the portions of the bill that micromanage school board policies, sec. 26(4). Under LD 1953, the voter would need to make an up or down vote on the entire package, despite favoring one subsection and disfavoring the other.

As a result, state drafting standards for initiated legislation suggest that, in fairness, there would need to be multiple questions presented in order for this measure to avoid a situation where a sweeping measure is passed but a voter supports only a small part of it. *See* Title 21-A MRS section 906 (6).[10] Other structural rules for amendments to the Maine Constitution are not adequately addressed by LD 1953.[11]

4. As to matters within the school context, the amendment utterly ignores the rights and responsibilities of others involved and the careful balancing of all affected interests that normally applies in disputes arising in the school context. This includes the parental rights asserted here around upbringing and education, *and also the rights of other parents and community members* who engaged with their local school boards and schools and do

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[10] Tit. 21-A sec. 906 (6) provides in relevant part: Wording of ballots for people's veto and direct initiative referenda. Ballots for a statewide vote on a people's veto referendum or a direct initiative must set out the question or questions to be voted on as set forth in this subsection.

A. The Secretary of State shall advise petitioners that the proper suggested format for an initiative question is a separate question for each issue. In determining whether there is more than one issue, each requiring a separate question, the most relevant considerations include whether:

(1) A voter would reasonably have different opinions on the different issues;

(2) Having more than one question would help voters to better understand the subject matter; and

(3) The questions are severable and can be enacted or rejected separately without negating the intent of the petitioners.

B. The Secretary of State shall write the question in a clear, concise and direct manner that describes the subject matter of the people's veto or direct initiative as simply as is possible.

C. The question for a direct initiative must be phrased so that an affirmative vote is in favor of the direct initiative. Available at: https://legislature.maine.gov/statutes/21-A/title21-Asec906.html

[11] Among other things, the main body of the constitutional resolution typically "recites the specific provision of the Constitution to be affected" and moves through the Constitution sequentially with the proposed provisions "to amend, repeal or enact." Office of the Revisor of Statutes, Maine Legislative Drafting Manual (6th ed. 2016), at 48. By contrast, LD 1953 simply lumps all its provisions together into a new proposed article 26 without regard to how the Resolution would address "liberty . . . and obtaining safety and happiness," freedom of speech, or depriving or denying people of "equal protection of the laws," or "enjoyment of that person's civil rights" and right not to "be discriminated against in the exercise thereof." Maine Constitution, Art. I, sec. 1, 4, 6-A.

not desire some or all of the detailed rules proposed here. It also includes the rights of *students* who have rights to a safe and supportive learning environment in order to benefit from the equal educational opportunity state and federal nondiscrimination laws promise to students. (see GLAD Testimony in Opposition to LD 678, fn. 2 above). It could also deprive students of their right to manage their own familial relationships without the schools inserting themselves in the middle of those relationships.

The roles and responsibilities of public schools – state created institutions – also matter here. 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. As courts acknowledge, "Schools cannot be expected to accommodate the personal, moral, or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but it would also be impossible to satisfy." *Fields. v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005), *op. reaffirmed and amended, on denial of reh'g sub nom*, 447 F.3d 1187 (9th Cir. 2006).

Glaringly, the amendment ignores the balancing that characterizes disputes about "parental rights" and many other such rights, including for example, the responsibilities of our schools to provide that equal educational environment and to comply with existing state and federal laws. At present, legal obligations imposed on schools seek to ensure that schools provide equal opportunities to all students and avoid discrimination based on sex, transgender status, and gender identity, among other personal characteristics such as race, national origin, color, ethnicity, physical or mental disability, and religion.

Those nondiscrimination rules are enforced against schools.[12] 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

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[12] 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. In addition, many school administrative units have adopted versions of policies about supporting students who are transgender or gender nonconforming.

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].").[13]

5. The proposed amendment would require a notification system about matters that are undefined and vague, thereby setting up schools to disappoint parents, such as requiring notification of "discipline imposed," "state or federal medical services" provided, enrollment in "federal services for students from low-income families" §4(A)(6)(b, d, e).

   While schools are the first to say that parents should be brought into sensitive matters involving children, such as those identified in Sec. 26 (4)(A)(7), schools must also be attentive to existing state and federal confidentiality laws and the possibilities of harm to the student. Even when the school or young person shares this information with the parent, a parent may object that they did not receive "prompt notification."

   The amendment would require a parent be notified "promptly" when any school or agent of the school "investigates or finds the need for any action by school authorities" related to a bevy of items from dress code violations to gender expression or identity to a special meal preparation, to "counseling services" sec. 26(A)(4). This will not support young people. Are schools supposed to report home if a student takes off her hijab? Will a teacher or coach run afoul of these prescriptions if they ask a student, "Hey, where's our smile today?" which then leads to a conversation about the student's concerns?

   Gender identity and expression are also singled out, raising important questions of equal protection and discrimination when other students are not reported on for questioning or exploring how they are. If a student asks to use a different name or pronoun at school, it is because they are exploring or testing out their identity, which is developmentally appropriate in the school-aged years, 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.

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[13] 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).

Not only are school staff and teachers often the first ones to encourage a student to share their concerns with a parent, but 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.

6. It creates a process designed to invite litigation that will burden, distract and antagonize both parents and schools from their common interest in ensuring that students are safe and learn what they need to succeed as adults. It creates an inflexible process for providing information to parents and school board review (Sec. 26 (7)(B) as well as a private right of action both the State and school boards, districts and school administrative units for monetary damages, declaratory and injunctive relief, and attorney's fees for claimed violations of the amendment. Sec. 26 (8).

   Take the provision requiring schools to respond within 10 days after a parent's request for particular information, followed by school board review in the constitutionally-rquired policy promoting parental involvement in schools. It may be that the information is simply not available on that timeline, or at all because of existing state and federal laws on confidentiality. There could be litigation about any of these terms, such as what constitutes "care," "discipline," "medical treatment" for a student, among others. See Sec. 26 (3)(A)(1), 4 (A)(6)(b, d, e, g). Schools could be drawn into litigation because they cannot comply with existing laws, including federal laws like the Family Education Privacy Rights Act (FERPA) governing student records and this amendment. This also illustrates the downside of proceeding by constitutional amendment: such amendments cannot be amended as statutes can be, and if the items listed in this constitutional amendment turn out to be unworkable, it will be very difficult to change them.

   For all of the above reasons, we respectfully urge an ought not to pass recommendation on LD 1953.

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