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May 24, 2022

The Honorable Sherman Packard
Speaker, New Hampshire
House of Representatives

The Honorable Jason Osborne
Majority Leader, New Hampshire
House of Representatives

VIA EMAIL ONLY

Re: Constitutionality of HB 1431– NH Parental Bill of Rights

Dear Speaker Packard and Majority Leader Osborne:

The National Legal Foundation (NLF) supports parental rights, which the U.S. Supreme Court has declared as a fundamental right. NLF therefore supports HB 1431 as presently drafted. NLF is a public interest law firm dedicated to the defense of constitutional liberties. We write on behalf of ourselves and our donors and supporters, including those in New Hampshire. The NLF has had a significant federal and state court practice since 1985, including representing numerous parties and *amici* before the Supreme Court of the United States and the supreme courts of several states.

The Fundamental Right of Parents to Direct Their Children's Education

Beginning with *Meyer v. Nebraska*, 262 U.S. 390 (1923), a case involving a state education policy for minor children contrary to the desire of their parents, the Supreme Court has consistently recognized the fundamental right of parents to direct the welfare, education, and upbringing of their children without undue interference by the state. This liberty interest is protected by the Due Process Clause of the Fourteenth Amendment and was long established

previously in the common law.[1] The "Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Wash. v. Glucksberg*, 521 U.S. 702, 721 (1997), quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993) (emphasis in original); *see Jordan by Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994).

The plurality opinion in *Troxel v. Granville*, 530 U.S. 57 (2000), summarized prior decisions of the Court on the issue of fundamental rights:

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska,* 262 U.S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents "to establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that **"[t]he child is not the mere creature of the State**; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.,* at 535. We returned to the subject in *Prince v. Massachusetts,* 321 U.S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "**It is cardinal with us that the custody, care and nurture of the child reside first in the parents**, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.,* at 166.
>
> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. **In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right**

[1] *See generally* Wm. Blackstone, *Commentaries on the Law of England*, Book the First, ch. XVI, at *447, *450, https://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-1; *see also Middleton v Middleton*, 329 Md. 627, 620 A.2d 1363 (1993) (relying on Blackstone).

> **of parents to make decisions concerning the care, custody, and control of their children.**

Id. at 65-66 (emphasis added, some internal citations and quotations omitted); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (collecting cases); *May* v. *Anderson,* 345 U. S. 528, 533 (1953) (describing parental rights as "far more precious . . . than property rights").

Parents' fundamental right to direct the education of their child is not absolute. A parent, for instance, cannot dictate the school calendar for the children, nor the curriculum to follow in a specific grade, nor the dress code. A specific textbook is needed for the *whole* 4th grade English class, and a separate text is needed for the *whole* 7th grade math class. Any teacher, quite frankly, would be overwhelmed if parents dictated which history book would be used by their child in class, and testing would be next to impossible. Similarly, a child-specific calendar would be unworkable in the attendance office, and child-specific dress codes would be unenforceable.

Although calendars, curricular matters, and dress codes are within the province of the school, there are other areas that are clearly within the province of the parents. The Third Circuit Court of Appeals in a school case involving parental rights drew the line at school counseling and psychological testing and is apt here.

> School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution. Public schools must not forget that *"in loco parentis"* does not mean "displace parents."

It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights. State deference to parental control over children is underscored by the [Supreme] Court's admonitions that the child is not the mere creature of the State, and that it is the parents' responsibility to inculcate moral standards, religious beliefs, and elements of good citizenship.

Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000) (internal citations and quotations omitted). See also *Parham v. J.R.,* 442 U.S. 584, 602 (1979), in which the U.S. Supreme Court stated,

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries * 447; 2 J. Kent, Commentaries on American Law * 190.

Gender dysphoria, like other medical or psychological conditions that may need to be addressed while the child is in school, is not part of the primary educational mission for which parents have entrusted their children to the public schools. It is a core parental issue involved in the care, health, and welfare of their children. Just as a school must send scholastic progress reports (report cards) to parents (which, incidentally, "outs" the lazy or uncooperative students to their parents and may lead to abuse), so schools must share information with parents on those matters particularly within the province of parents.

<u>HB 1431 Correctly Designates Those Areas of School That Are the Province of Parents</u>

HB 1431 declares this "oldest of the fundamental liberty interests" to be also a fundamental right under New Hampshire law, and imposes upon the government the usual burden if the State seeks to limit this fundamental right – the State and its political subdivisions and/or schools must show that its limitation is "reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and cannot be achieved by less restrictive means." House Bill 1431 may flesh out parental rights in New Hampshire more precisely than the courts have done, but this Bill is precisely aligned with U.S. Supreme Court precedent.

We understand that in a communication with some of the conferees on HB 1431, the Department of Justice has raised some questions with respect to this Bill. In reading this communication, we are quite surprised that the Department did not consider or even mention

Meyer v. Nebraska, Pierce v. Society of Sisters, Prince v. Massachusetts or *Troxel v. Granville*, all of which establish without question the fundamental right of parents to control the upbringing and education of their children. The Department instead focuses on potential litigation and potential conflicts with New Hampshire's Law Against Discrimination that may arise if HB 1431 is enacted.

Regarding potential litigation, let us assure you that the Department and the public schools need not worry only about litigation filed by certain civil rights groups. We have filed against the Montgomery County (Md.) Public Schools alleging that the schools' policy of withholding information from parents concerning their children's gender dysphoria violates the fundamental right of the parents. A similar complaint has been filed against the public schools in Madison, Wisconsin and the public schools in Jacksonville, Florida (let me know if you want a copy of the complaints). We are preparing to file another similar lawsuit in the Midwest, and we look forward to representing New Hampshire parents who have suffered injury because a New Hampshire public school has violated their parental rights by purposely withholding information and, in some cases, deceiving the parents.

Regarding the Law Against Discrimination, the Department quotes the statute – "no person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools because of their . . . sex, gender identity, [and] sexual orientation." The Department then cites three portions of HB 1431 that trigger parental notification – first, if the school initiates, investigates, or takes action with respect to the policy governing gender expression or identity (169-I:5 (g)); second, if the school registers (or terminates the registration of) a student in a club ((169-I:5 (f)(1); or third, if the school provides counselling services to a student regarding their sexual orientation or gender identity. The

Department argues that the required parental notification will "out" the child to his/her parents, and fear of this "outing" will cause a child to decline educational services and thus suffer "discrimination."

A review of HB 1431 reveals, however, its lack of discrimination. Students with gender dysphoria are not singled out in the statute. Parental notification is triggered if the child bullies, hazes, sexually harasses, commits a dress code violation, skips school, has behavioral management issues, has substance abuse issues, considers suicide, needs a disability accommodation, or needs a special meal (169-I:5 (g)). Parents are also notified if the school initiates, terminates or changes a child's course of study, athletic teams, clubs, other extracurricular activities, imposes any discipline, recommends an individualized education plan, receives medical services, enrolls in a free lunch plan, goes on a field trip, and receives medication, psychological or counseling services (169-I:5 (f)). So, the school must give parents notice if the child registers for the Gay-Straight Alliance, or the Fellowship of Christian Athletes. The school must give parents notice if a child gets school counselling because of a breakup with a girlfriend, frustration with parents because they won't buy her a new car, or because of gender dysphoria. The school must give notice if a boy indicates to the school that he wants to be a girl, if a girl wants to become a boy, or if a boy who was once a girl wants to become again a boy. The whole purpose of HB 1431 is, of course, providing parents with information so they can fulfill their duty to raise and educate their children, and HB 1431 guarantees that schools are an ally, and not an enemy, of parents in the exercise of their fundamental right.

Regarding the case law in this area, the Department cites the U.S. Supreme Court decision of *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020) and the Fourth Circuit decision of *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020). *Bostock* was an

employment case that construed Title VII of the Civil Rights Act. Although this case may be pertinent to the State and schools and their employees, it has nothing to do with education and the relationship between a school, a student, and his/her parents. In fact, Justice Gorsuch, writing for the Court, specifically wrote that the Court was **not** deciding the meaning of "sex" with respect to Title IX that pertains to schools. See 140 S.Ct. at 1753. *Grimm* was a Virginia case involving a biological female who saw herself as a male and challenged the school's refusal to allow her to use the boys' bathroom at school. In spite of the fact that federal law specifically authorized the segregation of sexes for purposes of bathrooms under Title IX (see 34 C.F.R. § 106.33), the 2-1 majority concluded that denying a biological girl who thought herself a boy the right to use the boys' washroom at school was sex discrimination under Title IX.

No parents intervened in the *Grimm* case, and therefore the Fourth Circuit never considered the Virginia Parental Rights Act (Virginia Code § 1-240.1). Moreover, Gavin Grimm and his mother jointly asked the school to allow Gavin to use the boys' washroom, so the school did not "out" Gavin to his parents. The *Grimm* case, therefore, does not lend much support to the Department's argument.

A case far more pertinent to the Department's main argument that "outing" a gay or gender dysphoric student may threaten the safety of the child is the recent case of *Ricard v. USD 475 Geary County, KS School Board,* 2022 WL 1471372 (D. Kan. 2022). In *Ricard* the school adopted a policy requiring its teachers to use for students the pronoun the student specified (therefore a male may prefer the use of she/her and the teacher must comply). The teacher contended that the policy resulted in dishonesty and therefore for religious reasons she refused to comply, was disciplined, and thereafter brought an action for equitable relief. The federal court determined that the teacher's religious conviction was substantial and burdened by the school's

action, and therefore determined that the school must show a compelling reason for the policy. At the hearing on the motion for preliminary injunction, the "District's administrator took the position it was not the District's place to 'out' a student to their 'parents.' And the District's counsel argued that 'if the home life is such that the —the student doesn't want to be out to their parents, it's not our job to do it." *Id.* at 7.

In response to this argument, the *Ricard* court noted that under federal policy, as evidenced by the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g), parents have the right to access information held by the school about their minor children. *Id.* Moreover, the court noted that parents in the United States have a fundamental right to control the upbringing of their children, which rests on the "fundamental premise that a child is 'not the mere creature of the State . . .'" *Id.* at 8, quoting *Troxel v. Granville,* 530 U.S. 57, 65 (2000). The court concluded in this regard that,

> It is difficult to envision why a school would even claim—much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns. *Id.*

The Department's fear of a school "outing" a child to a parent, and placing that child in danger, is overblown. If a parent receives notice from a school that her child is meeting with a school counselor to discuss gender dysphoria, or has joined the Gay-Straight Alliance Club (or for that matter the school club sponsored by the local Baptist church), the parent's reaction can be acceptance (if not joy), indifference, or concern. For the joyous or indifferent parent, there certainly is no danger in the child being "outed." For the concerned parent, the Department assumes that the parent will abuse the child, which is itself a denial of due process since there has been no investigation, notice, or

hearing as to the unfitness of the parent with respect to the child. Moreover, HB 1431 specifically addresses this concern in Section 169-I:6, which states that the Parental Rights Act does not

> I. Authorize a parent of a minor child in this state to engage in conduct that is unlawful or to abuse or neglect his or her minor child in violation of general law, as defined in RSA 169-C.
> II. Restrict the authority of the department of health and human services, division for children, youth and families.
> III. Prohibit a court of competent jurisdiction, law enforcement officer, or employees of a government agency that is responsible for child welfare from acting in his or her official capacity.

In other words, established law enforcement authorities are not restricted from handling child abuse cases that may arise from an "outing," just like they have been handling these cases for decades.

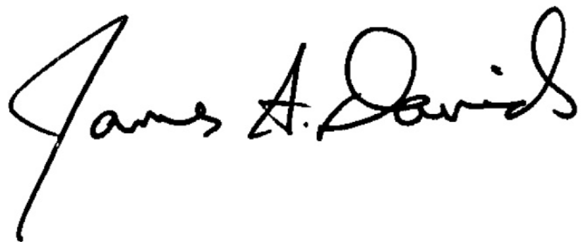
The Department's final paragraph discussing the potential liability of a school/ municipality that "outs" a child is disingenuous. The Department cites the case of *Sterling v. Borough of Minersville,* 232 F.3d 190, 196 (3rd Cir. 2000) in which municipal police threatened to "out" **an 18 year old adult** who thereafter committed suicide, and the city settled the claim for $100,000. Here the children subject to the NH Parental Rights Act are ***children***, who lack the capacity to file suit. Moreover, the children's parents are being informed, pursuant to their fundamental rights as parents, by schools pursuant to New Hampshire law. How can parents under such facts ever establish standing to sue?

In the last case cited by the Department in its communication on HB 1431 (*Wyatt v. Fletcher,* 718 F.3d 496 (5th Cir. 2013), the Department of Justice cites with good reason the *dissenting* opinion, since the majority held directly the opposite. In *Wyatt,* two public high school coaches confronted a female high school student about dating an older woman and, in a subsequent meeting with the student's mother, the coaches "outed" the student's sexual

orientation to the mother. The mother sued the coaches and school on behalf of her daughter, asserting violations of the Fourteenth Amendment and Texas privacy laws. In ruling on these claims, the Fifth Circuit Court of Appeals, after reviewing the case law on this issue, held that "there is no controlling Fifth Circuit authority . . . showing a clearly established Fourteenth Amendment privacy right that prohibits school officials from communicating to parents information regarding minor students' interest, even when private matters of sex are involved." *Id.* at 508.

Contrary to *Sterling* that considered the privacy rights of an adult, both *Wyatt* and *Ricard* deal with a school and "outing" a student's sexual orientation or gender identity to the student's parent. In both cases, the Fifth Circuit and the Kansas federal district court ruled that there was no liability on the school's part. Given these cases and the arguments raised above, we respectfully request that you ignore the Department's comments on HB 1431 and the conferees report out the bill and present it to the Governor.

Respectfully submitted,



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