September 26, 2022

The Honorable Colt Gill
Director of the Oregon Department of Education
Deputy Superintendent of Public Instruction
255 Capitol Street NE
Salem, OR 97310-0203

Sent via email

Dear Mr. Gill:

The Foundation Against Intolerance & Racism (FAIR) is a nonpartisan, nonprofit organization dedicated to advancing civil rights and liberties and promoting a common culture based on fairness, understanding, and humanity. Our website, fairforall.org, can give you a fuller sense of our identity and activities.

We write in response to the Oregon Department of Education's gender policies for public schools. Those policies provide that disclosure of transgender students' gender identity to their own parents should be made on a "case-by-case basis":

> [T]ransgender students may not want their parents to know about their transgender identity. These situations should be addressed on a case-by-case basis and school districts should balance the goal of supporting the student with the requirement that parents be kept informed about their children. The paramount consideration in such situations should be the health and safety of the student, while also making sure that the student's gender identity is affirmed in a manner that maintains privacy and confidentiality. Students may openly discuss and express their gender identity and expression, and decide when, with whom, and how much information to share.

The Department also suggests that disclosing transgender students' gender identity to their own parents "may violate privacy laws, including but not limited to FERPA [the Family Educational Rights and Privacy Act]." To that end, the Department appears to direct school districts to prevent such information from being reflected in transgender students' official records:

> Additionally, transgender students often make the transition in stages and may not, yet, be ready to complete the legal name change process. In order to support students, ODE recommends that school districts enter the name the student is currently using (the name that corresponds to the student's self-identified gender) into the "Preferred name" field and retain the legal name in the school electronic record and generally in the student records. However, in some student information systems, the "preferred name" does not appear throughout the system and the legal name may appear in daily use documents like the gradebook, attendance records, etc. This can result in "outing" of the student as a

student who is transgender. In cases such as these, ODE will support the following options:

1. Replace the legal first name of the student in the electronic system with the student's preferred name and move the legal name to the middle name field. Monitor for SSID errors and resolve. Student should retain the same SSID and last name in the system.
2. Replace the legal first name of the student in the electronic system and make sure you monitor for SSID errors.
3. Have a cross-reference system in place to locate the student's electronic records by use of the student's legal name.
4. Retain the same SSID for the student in the electronic system.
5. Maintain the student's legal name generally within the student's record as required by Secretary of State administrative rules relating to the archiving of student records.

We have several concerns with the Department's policies. First, while we appreciate the Department's efforts to balance transgender students' interests with the rights of their parents, the policy is inconsistent with established Supreme Court precedent. Parents have a "fundamental right" under the Due Process Clause of the Fourteenth Amendment to direct the upbringing, care, and control of their children. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65-6 (2000). ("[T]he 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"). It is parents, and not the state or its schools, who have the primary role in the care and rearing of children. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (stating that it "is now established beyond debate" that parents have the "primary role" in rearing their children); *see Pierce v. Society of Sisters*, 268 U.S 510, 535 (1925) ("[A] child is not the mere creature of the State."). Parental authority over their minor children is broad. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). It includes involvement in their children's medical and personal decisions, as "most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment." *Id.* at 603. Social gender transition profoundly affects a child's mental and emotional development. Additionally, emerging research suggests that children who socially transition are extremely likely to medically transition in the future. Involvement in that process is well within the scope of parents' fundamental rights.

While a balancing test may sound reasonable, the "case-by-case" policy set forth above ultimately gives the Department and/or the minor child, full discretion over whether a student's transgender status is conveyed to the parents. The policy is written so that a student's desire to keep their transgender status private will trump the right of parents to be informed of such status. The policy includes an underlying presumption that transgender students will naturally be in danger if their transgender status is revealed to their parents. There is no process, no preliminary finding of parental unfitness, no appeal, and no notice. Instead, a student's word that they will feel endangered if their parents are aware of their transgender status trumps all.

"[T]here is a presumption that fit parents act in the best interests of their children." *Troxel*, 530 U.S. at 68. That presumption originates from the historical recognition that the natural bond between parent and child leads parents to act in the best interests of their children. *Parham*, 442 U.S. at 602. Without ample evidence that a parent is unfit to raise children, the state may not "inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-9. The Department's policy fails to recognize this longstanding principle and instead presumes that parents are not qualified to address their child's gender dysphoria simply if their child says so. The consequences are amplified in the case of adolescents, who frequently conceal information from their parents (often very effectively) not because of a lack of support, but as a byproduct of the normal teenage separation process. Certainly, schools should act to protect the interests of their students, as stated in the Department's gender policies. However, absent a determination of parental unfitness, schools cannot lawfully withhold such information from parents. Additionally, children experiencing gender dysphoria are often choosing to reject their parents rather than the other way around.

Second, the Department's policy is inconsistent with FERPA. That statute gives parents of minor children "the right to inspect and review the education records of their children." 20 U.S.C. § 1232g(a)(1)(A). The term "education records" means "information directly related to a student" that is "maintained by an educational agency or institution or by a person acting for such agency or institution." *Id.* § 1232g(a)(4)(A). Few things are more directly related to a student than their name and sex/gender, which are routinely reflected in official school records. By instructing schools to store that information separately in unofficial records to keep it beyond the reach of FERPA and parents, the Department is violating the spirit and purpose (if not the letter) of FERPA. Simply moving information to a different location does not change its character or disclosure requirements under FERPA. Otherwise, schools could move *any* official student record to a separately-located "preferred name" record location, eviscerating FERPA. It is also worth noting that schools cannot lawfully change a minor child's name in their FERPA record purely on the basis of the minor student's request. The FERPA record is technically owned by the parents of children who are under 18 years old, and therefore, such a request can only be honored by the parent. We understand the intention of the policy is to avoid accidentally "outing" a transgender child by making their first name consistent across the various recrds a school may keep; however, amending a student's FERPA record can only be done in accordance with state and Federal laws.

Finally, we have concerns about the Department's policy of "making sure that a student's gender identity is affirmed." Requiring students to use the chosen pronouns of others, if that is the Department's or school districts' intention, would violate those students' First Amendment rights. Public schools may not require students to affirm any particular ideological belief, or punish them for refusing to do so. *See West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943) (public school students cannot be required to recite the Pledge of Allegiance); *Oliver v. Arnold*, 3 F.4th 152, 162 (5th Cir. 2021) (public school teachers may not give assignments for the purpose of compelling students to assert specific ideological beliefs). Alternative pronouns are not analogous to anodyne facts such as name and address. They are politically loaded and premised on the ideological beliefs that pronouns refer to gender and not sex, that gender is independent of sex, and that gender (or sex) is a matter of personal choice. Compelling students to affirm

ideas contrary to their sincerely-held religious beliefs, with no ability to opt out, would similarly violate their religious rights as guaranteed by the First Amendment. *See Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp.*, 515 U.S. 557, 573 (1995); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.").

FAIR supports efforts to encourage respect for others in the classroom. But such measures should not in turn result in intolerance of protected speech that differs from the prevailing orthodoxy. We also advocate for a healthy partnership between and among educators, students, and parents. That partnership, however, is not honored when schools foreclose parents from knowing about their child's gender transition, in violation of their fundamental due process rights. However well-intentioned, the Department's gender policy prescriptions must conform with Constitutional and legal requirements. We urge the Department to revise its policies to achieve a balance that is consistent with the rights of parents, guardians, and all students.

We would like to give the Department an opportunity to respond. Please let us know within the next weeks if you intend to do so.

Very truly yours,

Leigh Ann O'Neill
Staff Attorney
Foundation Against Intolerance & Racism