September 27, 2022

Dr. Jay Badams, Superintendent
Ms. Lisa Christie, School Board Chair
School Administrative Unit 70
41 Lebanon Street
Hanover, NH 03755

Sent via email

Dear Dr. Badams and Ms. Christie:

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 a report submitted to us through our reporting site, fairtransparency.org, regarding SAU 70's "Transgender and Gender Nonconforming Students" policy. That policy requires teachers and staff to conceal transgender students' gender identity from their parents, unless the student consents or the school is "legally required" to disclose the information:

> School personnel should not disclose information that may reveal a student's transgender status or gender nonconforming presentation to others, including parents and other school personnel, unless legally required to do so or unless the student has authorized such disclosure. Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information. When contacting the parent or guardian of a transgender or gender nonconforming student, school personnel should use the student's legal name and the pronoun corresponding to the student's gender assigned at birth unless the student, parent, or guardian has specified otherwise.

The policy also suggests that districts should store transgender students' chosen name in unofficial records, presumably to keep such information from their parents: "The District is required to maintain a mandatory permanent pupil record ('official record') that includes a student's legal name and legal gender. However, the District is not required to use a student's legal name and gender on other school records or documents."

Additionally, SAU 70's policy requires community members to use students' preferred pronouns and suggests that "intentional or persistent" failure to do so will be deemed punishable harassment or discrimination:

> The intentional or persistent refusal to respect a student's gender identity (for example, intentionally referring to the student by a name or pronoun that does not correspond to the student's gender identity) is a violation of this policy.
>
> …
>
> It is the responsibility of each school and the District to ensure that transgender and gender nonconforming students have a safe school environment. This includes ensuring that any incident of discrimination, harassment, or violence is given immediate attention, including investigating the incident, taking appropriate corrective action, and providing students and staff with appropriate resources. Complaints alleging discrimination or harassment based on a person's actual or perceived transgender status or gender nonconformity are to be handled in the same manner as other discrimination or harassment complaints.

We appreciate that SAU 70 may be seeking to protect its transgender students and create environments of respect. But its gender policy is inconsistent with constitutional and statutory law.

I. Gender Identity Non-Disclosure

The Family Educational Rights and Privacy Act (FERPA) requires public schools to disclose a student's name and sex to their parents, upon request at the very least. 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)—colloquially known as "official records." Few things are more directly related to a student than their name and sex/gender, which are routinely (and appropriately) stored in a student's official records and must, therefore, be available to parents under FERPA.

However, SAU 70's policy suggests that schools should maintain transgender students' information in separate, unofficial locations to keep it beyond the reach of parents and FERPA. In so doing, the policy contravenes FERPA. Simply moving information or labeling it "unofficial" does not change its character or disclosability. FERPA would be eviscerated if schools could escape compliance simply by moving information around or marking it "unofficial." Moreover, SAU 70's policy establishes different rules for transgender students and non-transgender students: the claimed sex and name of the former can be hidden from parents, while those of the latter may not be. That is the case even if a non-transgender student uses a name at school that differs from their legal name. Nothing in FERPA authorizes different disclosure rules depending on the student's gender identity.

Additionally, concealing gender transition from parents violates their constitutional rights. The Supreme Court has consistently held that 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. Because gender transition profoundly affects a child's mental, emotional, and physical development, involvement in that process is well within the scope of parents' fundamental rights.

SAU 70's gender non-disclosure policy deprives parents of those rights with no due process. It directs school personnel to actively conceal a student's gender transition from their parents upon the child's command, unless disclosure is required by law.[1] There is no process, no preliminary finding of parental unfitness, no appeal, and no notice. Thus, parents not only are denied input into the extremely consequential matter of their child's gender transition, but also are kept from even knowing whether their child is entering the transition process. Such double infringement upon parents' fundamental due process rights is unconstitutional.

"[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. SAU 70's non-disclosure policy turns that longstanding principle on its head by presuming (if not concluding) that parents must be unfit to address their child's gender transition 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.

The recent lower court decision in *Doe v. Manchester School District*, Case No. 216-2022-CV-00117 (N.H. Sup. Ct. Sept. 5, 2022), does not warrant a different conclusion. Certainly, it is correct that parents' fundamental rights regarding their children do not include the right to demand that a public school's educational program be tailored to their individual preferences. *See id.* at p. 6; *Arnold v. Board of Educ.*, 880 F.2d 305, 313 (11th Cir. 1989); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005). That line of authority, however, applies to the school *curriculum* and similar matters that historically and reasonably fall within the sphere of public education. *See, e.g., Parker v. Hurley*, 474 F. Supp. 2d (D. Mass. 2007) (parents' fundamental rights do not require schools to revise their curriculum); *Brown v. Hot, Sexy & Safer Prod., Inc.*, 68 F.3d 525, 533-4 (1st Cir. 1995) (parents could not "dictate the curriculum" at their children's public school), *abrogated on other grounds by Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010); *Leebaert v. Harrington,* 332 F.3d 134, 141 (2d Cir. 2003) (parents' fundamental rights do

[1] As discussed herein, disclosure is legally required under the Constitution and FERPA.

not include "tell[ing] a public school what his or her child will and will not be taught"); *Swanson v. Guthrie Indep. Sch. Dist.,* 135 F.3d 694, 700 (10th Cir. 1998) (school's refusal to allow student to attend classes part-time did not infringe upon parental rights); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.,* 89 F.3d 174, 176 (4th Cir. 1996) (school's public service requirement did not violate parents' right to control their child's education); *Littlefield v. Forney,* 268 F.3d 275, 291 (5th Cir. 2001) (parents' substantive due process rights did not apply to school uniform policies); *Blau,* 401 F.3d at 395-6 (parent did not have a right to exempt child from school dress code). Assisting a child in gender transition, which is what SAU 70's policy does, is not a curricular matter or within a public school's purview. Rather, it is a form of therapeutic and psychosocial treatment that significantly affects the child's entire well-being, including outside of school and long after he or she has graduated. Children considering or undergoing transition require ongoing psychological, medical, and other forms of care beyond school hours that only their parents or guardians can provide or authorize. Additionally, emerging research indicates that children who socially transition are extremely likely to seek medical and surgical interventions, many of which result in permanent effects and dependencies. *See* Annelou de Vries *et al.*, *Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment* (PEDIATRICS vol. 134 issue 4, Oct. 1, 2014); Annelou de Vries *et al.*, *Puberty Suppression in Adolescents with Gender Identity Disorder: A Prospective Follow-Up Study* (J. SEX. MED. vol. 8 issue 8, Aug. 2011). Public schools may not knowingly abridge parents' fundamental right to know of and be involved in a process that has such deep, broad, and lasting effects on their children's lives.

II. Compelled Pronoun Use

Additionally, SAU 70's policy of requiring students to use the preferred pronouns of others, under threat of harassment charges, violates those students' First Amendment rights. A public school may not restrict, chill, or punish student speech unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). That is particularly the case where the speech touches upon a matter of public concern, such as pronoun usage, which is a topic of ongoing public debate and controversy. *See Meriwether v. Hartop*, 992 F.3d 492, 508-9 (6th Cir. 2021) (preferred pronoun usage is a topic of public concern for First Amendment purposes). "[S]peech concerning matters of public concern occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citing *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 913 (1982)).

Civilly declining to use alternative pronouns would not materially disrupt classwork or create substantial disorder. Nor would it invade the rights of any student. We are aware of no applicable law giving students the legal right to force others to use their alternative pronouns. Title IX of the Civil Rights Act—the controlling authority on sex and gender discrimination in schools—does not recognize or grant any student the right to compel their classmates to use whatever pronouns they demand. *See* 20 U.S.C. §§ 1681 *et seq.*; 86 Fed. Reg. 32637-01 (eff. June 22, 2021). Nor could it, for the federal government lacks the power to compel speech on ideological matters. *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943); *Oliver v. Arnold*, 3 F.4th 152, 162 (5th Cir. 2021); *see* discussion below at p. 5. Avoiding

"the discomfort and unpleasantness that always accompany an unpopular viewpoint" is an insufficient basis for restricting student speech. *Tinker*, 393 U.S. at 509. As the Supreme Court elaborated:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Id. at 508-9 (internal citations omitted).

Moreover, threatening students with harassment charges for not using the alternative pronouns of others compels them to affirm beliefs they may not hold. The First Amendment forbids public schools from requiring students to recite ideological beliefs against their conscience. *Barnette,* 319 U.S. at 642; *Oliver*, 3 F.4th at 162. Alternative pronouns are not value-neutral terms such as name and age. They are politically loaded and premised on a specific set of ideological beliefs: that more than two genders exist, that one can be neither male nor female (or both), and that gender is a matter of personal choice rather than a biological condition. Requiring students to use others' preferred pronouns (and punishing them if they do not) necessarily compels them to affirm faith in a gender ideology they may not accept. It confines them to "the expression of those sentiments that are officially approved," which public schools may not do. *Tinker*, 393 U.S. at 511. As famously written by Justice Jackson, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can 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." *Barnette*, 319 U.S. at 642.

Compelling students to use the preferred pronouns of others may also violate their religious freedoms. The First Amendment protects against state intrusion into an individual's sincerely-held religious beliefs. *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."). Many world religions deny the existence of numerous genders and the ability of an individual to select their own gender. Mandating the affirmance of such ideas would violate the rights of students whose sincerely-held religious beliefs reject them. In fact, as you may know, a free speech and religious liberty lawsuit was filed last year against SAU 16 arising from a compelled pronoun use policy similar to SAU 70's. *See M.P. v. New Hampshire Sch. Admin. Unit 16*, Case No. 218-2021-CV-01123 (N.H. Sup. Ct., filed Nov. 4, 2021). That action is pending.

FAIR advocates for a healthy partnership between and among educators, students, and parents. That partnership is not honored when schools systematically deny parents their fundamental right to participate

in their minor child's decision of whether to transition. We also support 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. However well-intentioned, SAU 70's gender policy must conform with constitutional and statutory requirements. We urge the district to revise its policy to achieve a balance consistent with the rights of parents, guardians, and all students.

We would like to give SAU 70 an opportunity to respond. Please let us know within the next five days if you intend to do so.

Very truly yours,

Letitia Kim
Managing Director of the Legal Network
Foundation Against Intolerance & Racism

cc: Benjamin Keeney, Chair, Hanover School Board
Tom Candon, Chair, Norwich School Board
Rick Johnson, Chair, Dresden School Board