



August 10, 2022

The Honorable Tony Thurmond
Superintendent of Public Instruction
California Department of Education
1430 N Street, Suite 5602
Sacramento, CA 95814

Sent via email

Dear Mr. Thurmond:

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. We have more than eighty chapters and tens of thousands of members nationwide, including throughout California. Our website, fairforall.org, can give you a fuller sense of our identity and activities.

We write in response to the California Department of Education's gender policies for public schools. Specifically, the Department prohibits schools from disclosing transgender students' gender identity to their parents, unless the student consents or the school believes there is a "specific and compelling need to know," which the Department considers "very rare":

Pursuant to the above protections, schools must consult with a transgender student to determine who can or will be informed of the student's transgender status, if anyone, including the student's family. With rare exceptions, schools are required to respect the limitations that a student places on the disclosure of their transgender status, including not sharing that information with the student's parents. In those very rare circumstances where a school believes there is a specific and compelling "need to know," the school should inform the student that the school intends to disclose the student's transgender status, giving the student the opportunity to make that disclosure her or himself.

The Department also instructs schools to store transgender students' chosen name and gender in separately-located "unofficial" records:

To prevent accidental disclosure of a student's transgender status, it is strongly recommended that schools keep records that reflect a transgender student's birth name and assigned sex (e.g., copy of the birth certificate) apart from the student's school records. Schools should consider placing physical documents in a locked file cabinet in the principal's or nurse's office.

If the school district has not received documentation supporting a legal name or gender change, the school should nonetheless update all unofficial school records (e.g. attendance sheets, school IDs, report cards) to reflect the student's name and gender marker that is consistent with the student's gender identity. This is critical in order to avoid unintentionally revealing the student's transgender status to others in violation of the student's privacy rights, as discussed above....

Additionally, the Department requires all members of the public school community, including students, to use the preferred pronouns of others, on penalty of harassment charges:

[A]ll members of the school community must use a transgender student's chosen name and pronouns.... If a member of the school community intentionally uses a student's incorrect name and pronoun, or persistently refuses to respect a student's chosen name and pronouns, that conduct should be treated as harassment.

We appreciate that the Department may be seeking to protect its transgender students and create environments of respect. But its expansive policies go too far.

I. Gender Identity Non-Disclosure Policy

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.

The Department's non-disclosure policy deprives parents of those rights with no due process. It directs schools to withhold gender transition information from parents at the child's command in all but “very rare” cases where there is a “specific and compelling need to know”—terms that are undefined yet unduly restrictive. Even then, the determination of whether a parent “needs to know” about their child's gender transition is left entirely within the boundless discretion of the school. There is no process, no preliminary findings 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. The Department’s policy turns that longstanding principle on its head by presuming (if not concluding) that parents must be unfit 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.

We understand the Department bases its non-disclosure policy on AB 1266. That statute, among other things, permits students to participate in school sports and activities consistent with their gender identity. Nothing in AB 1266 permits public schools to withhold from parents information regarding their minor child’s gender identity. Indeed, as explained above, the Fourteenth Amendment prohibits states and their agencies from doing so without due process.

The Department also relies on the California Constitution to justify its policy. It is correct that minors have a right to both autonomy privacy and informational privacy under the state Constitution. *See* Cal. Const. Art. 1, § 1. Neither of those privacy rights, however, requires a blanket policy of concealment from parents. The right of autonomy privacy prohibits intrusions that are “so serious in nature, scope, and actual or potential impact as to constitute an egregious breach of the social norms.” *Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 436 (N.D. Cal. 2017). Parental involvement in their child’s life is not a breach of social norms; it *is* a social norm, and a long-established one at that. The right of informational privacy, which is coextensive with the Fourth Amendment, applies to unlawful searches and seizures, surveillance, and similar acts of intrusion where the information recipient or user is the *state*. *See People v. Roberts*, 68 Cal. App. 5th 64, 108 (2021). It does not apply to communicating important information to *parents* about their own minor children.

Additionally, the Department’s policy is inconsistent with the Family Educational Rights and Privacy Act (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. One of the central purposes of that statute is to give parents and guardians the right to access basic official information about their minor children. Simply moving information to a different location does not change the character of the information or its disclosability under FERPA. Otherwise, schools would be able to move *any* student record to an “unofficial” location, eviscerating FERPA.

II. Compelled Pronoun Use Policy

While we understand the importance of creating environments of tolerance, requiring students to use the preferred pronouns of others, under threat of harassment charges, violates their 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. “[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)).

Civily 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. The current Department of Education interpretive rules on Title IX do not recognize or grant any student the right to compel their classmates to use whatever pronouns they demand. *See* 86 Fed. Reg. 32637-01 (eff. June 22, 2021). 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 disciplinary action 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. *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). 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.

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 systematically 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 five days if you intend to do so.

Very truly yours,

A handwritten signature in black ink, appearing to read 'L. Kim', with a stylized flourish at the end.

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

cc: Ms. Virginia Jo Dunlap, Chief Counsel, California Department of Education