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December 17, 2019

VIA UPS NEXT DAY DELIVERY
Sherry Terrell-Webb
Interim General Legal Counsel
545 West Dayton Street
Madison, WI 53703

Re: Demand letter regarding certain District policies pertaining to transgender students

Dear Ms. Terrell-Webb,

The Wisconsin Institute for Law & Liberty ("WILL") is a public policy legal center that seeks to protect constitutional rights and advance the rule of law. WILL represents a group of parents (currently fifteen) with children in the Madison School District (the "District").

The District's recently adopted document entitled "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" (the "Policy") contains certain policies that violate our clients' constitutional rights as parents. Specifically, the Policy allows children of any age to change gender identity at school without parental notice or consent, prohibits teachers and other staff from notifying parents about this (without the child's consent), and, in some circumstances, even requires teachers and other staff to actively deceive parents.

We are hopeful that the District will remove these problematic policies and commit to retraining its teachers and staff accordingly. To the extent such a resolution is not possible, however, we are prepared to file a complaint in court. Please let us know **within 45 days, by January 31, 2019,** whether the District is willing to remove these policies.

Background Law

A long line of cases from both the United States Supreme Court and the Wisconsin Supreme Court establishes that parents have a constitutional right under the due process clauses of the state and federal constitutions "to direct the upbringing and education of [their] children." *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶ 15, 387 Wis. 2d 1, 927 N.W.2d 486 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925)). This is "perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.). Over the years, the Supreme Court has described this right as "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "commanding," *Santosky v. Kramer*, 455 U.S. 745, 759 (1982), a "basic civil right[ ] of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), "far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953), and "established beyond debate as an enduring American tradition," *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Likewise, the

Wisconsin Supreme Court has "long [ ] recognized" the rights of parents "to rear their children according to their own system of beliefs," *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 43, 426 N.W.2d 329 (1988), describing parents' rights as "substantial," *In Interest of D.L.S.*, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983), and "of constitutional magnitude." *K.F.*, 145 Wis. 2d at 43; *see also Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602(1998). Parents' rights are also protected by the free exercise clauses of the state and federal constitutions to the extent that child-rearing decisions implicate religious beliefs. *See*, *e.g.*, *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 42–43, 426 N.W.2d 329 (1988); *State v. Yoder*, 49 Wis. 2d 430, 438, 182 N.W.2d 539 (1971); *State v. Kasuboski*, 87 Wis. 2d 407, 416, 275 N.W.2d 101 (Ct. App. 1978); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14, 230–34 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944); *Pierce*, 268 U.S. 510. The Wisconsin Supreme Court unanimously reaffirmed parents' rights over the summer, holding that any government action that "directly and substantially implicates a fit parent's fundamental liberty interest in the care and upbringing of his or her child" is "subject to strict scrutiny review." *A. A. L.*, 2019 WI 57, ¶ 22.

This line of cases establishes four important principles with respect to parents' rights.

First, parents are the primary decision-makers with respect to their children—not their school, or even the children themselves. *Parham v. J. R.*, 442 U.S. 584, 587 (1979) ("Our jurisprudence historically has reflected … broad parental authority over minor children."); *Yoder*, 406 U.S. at 232 ("This *primary* role of the parents … is now established beyond debate."); *Jackson*, 218 Wis. 2d at 879 ("Wisconsin has traditionally accorded parents the *primary* role in decisions regarding the education and upbringing of their children."). Parental decision-making authority rests on two core presumptions: "that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions" and that the "natural bonds of affection lead parents to act in the best interests of their children." *Parham*, 442 U.S. at 602; *Yoder*, 406 U.S. at 232 ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.").

Second, parental rights reach their peak, and thus receive the greatest constitutional protection, on "matters of the greatest importance." *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005) (calling this "the heart of parental decision-making authority"); *Yoder*, 406 U.S. at 233–34. One such area traditionally reserved for parents is medical care, as the Supreme Court recognized long ago: "Most children, even in adolescence, simply are not able to make sound judgments concerning … their need for medical care or treatment. Parents can and must make those judgments." *Parham*, 442 U.S. at 603. Indeed, the "general rule" in Wisconsin "requir[es] parents to give consent to medical treatment for their children." *See In re Sheila W.*, 2013 WI 63, ¶ 16, 348 Wis. 2d 674, 835 N.W.2d 148 (Prosser, J., concurring) (noting that Wisconsin has not adopted a "mature minor doctrine," which allows older minors to make independent medical decisions in some circumstances). Another category of decisions at "the heart of parental decision-making authority" are those "rais[ing] profound moral and religious concerns." *Bellotti v. Baird*, 443 U.S. 622, 640 (1979); *Arnold v. Bd. of Educ. of Escambia Cty. Ala.*, 880 F.2d 305, 314 (11th Cir. 1989); *C.N.*, 430 F.3d at 184.

Third, a child's disagreement with a parent's decision "does not diminish the parents' authority to decide what is best for the child." *Parham*, 442 U.S. at 603–04. *Parham* illustrates how far this principle goes. That case involved a Georgia statute that allowed parents to voluntarily commit

their minor children to a mental hospital (subject to review by medical professionals). *Id*. at 591–92. A committed minor argued that the statute violated his due process rights by failing to provide him with an adversarial hearing, instead giving his parents substantial authority over the commitment decision. *Id*. at 587. The Court rejected the minor's argument, confirming that parents "retain a substantial, if not the dominant, role in the [commitment] decision" because "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id*. at 603–04. Thus, "[t]he fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority." *Id*.

Fourth, the fact that "the decision of a parent is not agreeable to a child or … involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham,* 442 U.S. at 603. Likewise, the unfortunate reality that some parents "act[ ] against the interests of their children" does not justify "discard[ing] wholesale those pages of human experience that teach that parents generally do act in the child's best interests." *Id*. at 602–03. The "notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children" is "statist" and "repugnant to American tradition." *Id*. at 603 (emphasis in original). Thus, as long as a parent is fit, "there will normally be no reason for the State to 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 68–69.

In accordance with these principles, lower courts have recognized that a school violates parents' constitutional rights if it attempts to usurp their role in significant decisions. To give just one example, in *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), a high school swim coach suspected that a team member was pregnant, and, rather than notifying her parents, discussed the matter with other coaches, guidance counselors, and teammates, and eventually pressured her into taking a pregnancy test. *Id*. at 295–97, 306. The mother sued for a violation of parental rights, explaining that, had she been notified, she would have "quietly withdrawn [her daughter] from school" and sent her to live with her sister until the baby was born. *Id*. at 306. "[M]anagement of this teenage pregnancy was a family crisis," she argued, and the coach's "failure to notify her" "obstructed the parental right to choose the proper method of resolution." *Id*. at 306. The court found that the mother had "sufficiently alleged a constitutional violation" against the coach and condemned his "arrogation of the parental role": "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." *Id.* at 307. The court also suggested that the guidance counselors may have violated the mother's parental rights, even though she had not sued them: "We need not consider the potential liability of school counselors here, although we have considerable doubt about their right to withhold information of this nature from the parents." *Id*. at 307.

This constitutional commitment to parental authority is also reflected in many state and federal laws. For example, state and federal law require schools to provide parents with access to all records about their children. Wis. Stat. § 118.125(2)(a), (b); 20 U.S.C. § 1232g(a)(1)(A). Under the federal Family Education Rights and Privacy Act (FERPA), only parents can request to amend education records. 34 CFR §§ 99.3; 99.4; 99.20(a). State law prohibits children under the age of 14 from legally changing their names without the consent of both parents. Wis. Stat. § 786.36.

And, as already noted, parental consent is required for most medical procedures in Wisconsin. *See*, *e.g.*, *In re Sheila W.*, 2013 WI 63, ¶ 16 (Prosser, J., concurring).

The District's Unconstitutional Policies

The District's Policy violates parents' rights in two ways. First, the Policy requires District staff to facilitate a child's social transition to a different gender identity at school, without parental notice or consent. Policy at 18 (allowing students to select a new "affirmed name and pronouns" to be used at school "regardless of parent/guardian permission to change their name and gender in [the District's] systems."). Second, the Policy prohibits staff from communicating with parents about a subject directly relevant to their children's welfare and, in some cases, even requires teachers to actively deceive parents. Policy at 9 ("School staff shall not disclose any information that may reveal a student's gender identity to others, including *parents or guardians* … unless legally required to do so or unless the student has authorized such disclosure."); Policy at 11 (instructing staff "not to 'out' students while communicating with *family*[ ]"); Policy at 16 (directing staff to "us[e] the student's affirmed name and pronouns in the school setting, and their legal name and pronouns with family").

Enabling children to socially transition at school without parental notice or consent violates parents' constitutional right to make important decisions about their children's well-being. When a child experiences gender dysphoria, the decision whether he or she should socially transition is a significant and controversial medical decision that falls squarely within "the heart of parental decision-making authority," *C.N.*, 430 F.3d at 184; *Parham*, 442 U.S. at 603. Furthermore, children with gender dysphoria often require professional assistance (whether or not they transition), and only parents can select and pay for such assistance and provide informed consent on behalf of their children. Parents must be involved not only to decide which treatment approach to pursue, but also to select the best mental health professional for their child.

There is an ongoing debate within the medical community over how to respond when a child experiences gender dysphoria, as has been well documented in the media.[1] Social transition, in particular, is an important psychotherapeutic intervention or treatment that can dramatically alter outcomes for children who suffer from gender dysphoria. Multiple studies have found that—if they do not socially transition—the vast majority of children who experience gender dysphoria (roughly 80–90%) ultimately resolve to comfort with their biological sex and cease experiencing gender dysphoria.[2] Accordingly, many medical and psychiatric professionals believe that children with gender dysphoria should *not* immediately transition, but instead recommend treatment designed to give them time and perhaps assistance to embrace their biological sex. One prominent

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[1] *See*, *e.g.*, Alix Spiegel, *Q&A: Therapists on Gender Identity Issues in Kids*, NPR (May 7, 2008), https://www.npr.org/templates/story/story.php?storyId=90229789; Beth Schwartzapfel, *Born This Way?*, The American Prospect (March 14, 2013), https://prospect.org/power/born-way/; Jesse Singal, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired*, The Cut, (Feb. 7, 2016), https://www.thecut.com/2016/02/fight-over-trans-kids-got-a-researcher-fired.html

[2] *See* World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* at 11 (version 7, 2012), available at https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf.

example of this approach is Dr. Kenneth Zucker, who for over three decades operated "one of the most well-known clinics in the world for children and adolescents with gender dysphoria" and successfully treated many children using this approach. *Singal*, supra n.1. Dr. Zucker has argued that "affirming" an alternate gender identity too early may cause gender dysphoria to "become self-reinforcing," since "messages from family, peers, and society do a huge amount of the work of helping form" a child's gender identity, which is, at least initially, quite malleable. *Singal*, supra n.1. In other words, when a child begins to wrestle with gender dysphoria, there is a critical fork in the road: Should the child immediately transition to a different gender identity? Or could the child learn to embrace his or her biological sex?

Even the World Professional Association for Transgender Health ("WPATH")—an advocacy organization that generally supports an "affirming" approach—acknowledges that "[s]ocial transitions in early childhood" are "controversial," that "health professionals" have "divergent views," that "[f]amilies vary in the extent to which they allow their young children to make a social transition to another gender role," and that there is insufficient evidence at this point "to predict the long-term outcomes of completing a gender role transition during early childhood." *See supra* n.2 at 17. WPATH therefore encourages health professionals to defer to *parents* as "as they work through the options and implications," even "[i]f parents do not allow their young child to make a gender-role transition." *Id*.

The District's Policy completely discounts the view of these medical professionals and instead takes this potentially life-altering medical decision out of parents' hands and places it with educators and young children, children who lack the "maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham*, 442 U.S. at 587. By enabling children to transition without parental involvement, the District is effectively making the medical decision to affirm an alternate gender identity without the legal authority to do so and without informed consent from the parents. Given the significance of changing gender identity, especially at a young age, parents "can and must" make this decision. *Parham*, 442 U.S. at 603. The District's Policy therefore "directly and substantially" interferes with parents' right to make this critical decision. *A.A.L.*, 2019 WI 57, ¶ 22.

Worse yet, putting aside the issue of consent, the District's Policy does not even require parents to be *notified* that their child has or wants to transition to a different gender identity at school. Instead, the Policy actually *prohibits* staff from notifying parents (without a child's consent), since that would "reveal a student's gender identity to … parents." Policy at 9; *see also* Policy at 11. And the Policy even directs staff to actively deceive parents in some circumstances. Policy at 16. These policies violate parents' rights by circumventing parental involvement altogether on this sensitive issue. Parents cannot guide their children through the difficult decisions in life without knowing what their children are facing. That is why state and federal law give parents complete access to all of their children's education records. Wis. Stat. § 118.125(2)(a), (b); 20 U.S.C. § 1232g(a)(1)(A). By prohibiting staff from communicating with parents about this one issue, the District's Policy cuts off an important channel of information (teachers) and effectively substitutes school district staff for parents as the primary source of input for children navigating these difficult waters.

The lack of notice is particularly troubling because it may prevent parents from providing professional assistance their children urgently need. Gender dysphoria can be a serious

psychological issue that requires support from mental-health professionals. The American Psychiatric Association recognizes an official diagnosis for gender dysphoria,[3] and WPATH notes that mental health professionals can "alleviat[e] distress related to [ ] gender dysphoria, and ameliorat[e] any other psychosocial difficulties," *supra* n.2, at 14. We are not aware of any medical expert who takes the position that children with gender dysphoria do not need any professional assistance whatsoever. The School District is not offering to obtain and pay for such help, and parents cannot provide it if they do not know their child is dealing with this issue. For this reason, the District's Policy prohibiting teachers from "revealing a child's gender identity … to parents," Policy at 9, violates parents' rights whether or not a child transitions, or even wants to transition. If a teacher learns that a child may be dealing with gender dysphoria, the teacher must be able to notify parents so that they can assess whether their child needs professional help.

The District's Policy also conflicts with the "general rule [in Wisconsin] requiring parents to give consent to medical treatment for their children." *See*, *In re Sheila W.*, 2013 WI 63, ¶ 16 (Prosser, J., concurring). As already noted, gender dysphoria is a clinical diagnosis of a mental health condition that calls for treatment from mental health professionals, and the District has no authority to provide consent for such treatment on parents' behalf. Furthermore, while there are different views on its wisdom and efficacy, there is widespread agreement among mental-health professionals that social transition is a significant psychotherapeutic intervention or treatment. WPATH, for example, produces a list of "treatment options" for gender dysphoria, and the first item on the list is "[c]hanges in gender expression and role." *See supra* n.2 at 9.

Finally, the District's policies also violate parents' free exercise rights to raise their children in accordance with their religious beliefs. For some parents, including some of the parents we represent, gender identity issues "raises profound moral and religious concerns." *Bellotti*, 443 U.S. at 640; *Arnold*, 880 F.2d at 314. Questions about sex and gender go to the heart of what it means to be human and are therefore deeply intertwined with religious beliefs. For these parents, the choice over which treatment path to pursue would be motivated, in part, by their religious beliefs, and, as already explained, the Policy directly interferes with parents' right to make that decision. Additionally, the policies designed to keep information secret from parents, by cutting them out of the conversation, "deprive[ ] the parents of the opportunity to counter influences on the child the parents find inimical to their religious beliefs or the values they wish instilled in their children." *See Arnold*, 880 F.2d at 313.

Accordingly, we respectfully ask the District to do the following:

1. Remove the policy allowing students to change gender identity without parental notice or consent, Policy at 18, and replace it with a new policy requiring parental notice and consent before a student may change gender identity at school.
2. Remove the policies prohibiting staff from "disclos[ing] any information that may reveal a student's gender identity to … *parents or guardians*," Policy at 9, and directing staff "not to 'out' students while communicating with *family*[ ]," Policy at 11, and any similar prohibitions.
3. Remove the policy directing staff in some circumstances to deceive parents by using different names and pronouns around parents than at school. Policy at 16.

[3] *See What Is Gender Dysphoria?*, American Psychiatric Association, https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.

4. Retrain all teachers and staff in accordance with these changes.

We would be happy to work with the Madison School District to update the Policy to restore parents' constitutionally protected role. Please let us know **within 45 days, by January 31, 2019,** whether the District is willing to make these changes to its Policy and to retrain its staff accordingly.

Sincerely,

WISCONSIN INSTITUTE FOR LAW & LIBERTY

Luke N. Berg
Deputy Counsel