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### **LEGAL MEMORANDUM**

#### **FERPA Allows Teachers to Inform Parents About Student Gender Confusion And “Transgender” Bathroom/Locker Access Directives**

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a federal law that protects the privacy of student educational records. Like Title IX and other laws, FERPA has also been the subject of a disinformation campaign claiming FERPA protects a minor student’s claimed lesbian, gay, bisexual or “transgender” identity from disclosure as an “educational record.”

This memo provides guidance on FERPA rules to teachers who desire to inform parents that their child is confused about or questioning his or her sexuality or identity, when other school staff are imposing or fostering an LGBT or “transgender” identity on the child without the knowledge of the child’s parents. Teachers objecting to school directives to permit access by “transgender” students into places where other children have an expectation of privacy based on objective biological sex have been unlawfully threatened or silenced by school administrators. Liberty Counsel has helped numerous teachers on these and other issues.

This memo also provides guidance to parents on enforcement of their FERPA rights, including a parent’s right of full access to their child’s educational records, as well as a parent’s right to require school administrators to use accurate gender pronouns; accurate sex markers; and their child’s legal name at school, including in the child’s records.

Frequently, school activists hide from parents their child’s sexual confusion or purported transition, until “transition” is thoroughly ingrained, or a student “comes out.” Schools also refuse to inform the parents of other children that a child claiming “transgender” identity is being granted access to opposite sex private facilities, until other children’s privacy or bodily integrity is violated. Without knowledge, parents are unable to take steps to protect their children from harmful social influences, medical or surgical treatments, or privacy invasions. Without notice, students are caught “[with their pants down](#),” as happened to boys in a Florida locker room; a boy is allowed to change [in a girls’ locker room in Minnesota](#), next to unwilling girls, and subject them to comments about their breasts and bra sizes; or worse, girls are sexually assaulted by males, like the five-year-old girl [in a girls’ bathroom at an elementary school in Georgia](#).

LGBT groups and administrators claim that FERPA justifies these invasions, because it supposedly prohibits disclosure of a child's "transgender status" to 1) the confused or questioning child's *own parents* (such as when the child makes "transgender" claims, requests false gender pronoun usage or false names, or otherwise expresses gender confusion to school staff). The same "FERPA" nondisclosure claim is often made regarding disclosure to 2) the parents of other children, or 3) the other children themselves, thus preventing them from taking steps to protect their own privacy, if a "transgender" child seeks access to their opposite-sex restrooms, lockers, or showers; sports teams; or overnight accommodations.

In fact, FERPA does not require non-disclosure of such critical information. On the contrary, failure by schools and teachers to appropriately disclose this information to other parents and students can be a violation of parents' rights and of other students' own rights to bodily privacy.

Bodily privacy from the opposite sex is a fundamental right. "[T]here is a right to privacy in one's unclothed or partially unclothed body;" *Poe v. Leonard*, 282 F.3d 123, 138-39 (2d Cir. 2002); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body."). Violations of the right to bodily privacy are most acute when one's body is exposed to a member of the opposite sex. *See Doe*, 660 F.3d 169, 177 (3rd Cir. 2011).

Schools have no authority to impose radical gender ideology on students, or foster students in a personal delusion. The U.S. Supreme Court has recognized that the "**primary role of the parents in the upbringing of their children,**" is "**now established beyond debate as an enduring American tradition.**" *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). (Emphasis added). The law is clear that **parents**, not agents of the state, **have the right to direct the upbringing and associations of the parents' own children**. The law presumes that **parents** possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions, not school employees or activist agencies. "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. . . **The child is not the mere creature of the State;**" *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). (Emphasis added). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. **This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.**" *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). (Emphasis added).

In light of these constitutional principles, schools have an affirmative obligation to inform parents of children claiming "transgender" identity that their child is questioning his or her identity. A parent has the right to disagree with and disallow a child's "gender expression," including dress, assumed names, and the use of false gender pronouns. Parents have the right to obtain counseling for their child that affirms their child in their natal sex, and helps them navigate their distress or confusion. Teachers may be assured that **FERPA does not prohibit them in any fashion from promptly notifying a minor student's own parents**, and asking whether they are aware that their child is "identifying" as the opposite sex, or requesting a teacher to use a false name or false gender pronouns.

Teachers also need not fear false assertions that FERPA protects "transgender status" claims and access demands from disclosure to other parents or students. School administrators' claims that FERPA prohibits disclosure are wrong for at least four reasons:

**1. FERPA generally prohibits the improper disclosure of personally identifiable information derived from education records.** The U.S. Department of Education dispenses with claims that mere *information* obtained by a teacher with first-hand knowledge is protected from disclosure:

**Thus, information that an official obtained through personal knowledge or observation, or has heard orally from others, is not protected under FERPA. This remains applicable even if education records exist which contain that information, unless the official had an official role in making a determination that generated a protected education record.**<sup>1</sup> (Emphasis added).

The Department's position, on its face, includes "transgender status" claims. A teacher or other school employee's knowledge that a student "identifies" as the opposite sex or as "transgender," and intends to improperly access opposite-sex facilities, when obtained through personal knowledge, observation, or being told orally by others, is not protected under FERPA. This knowledge, in and of itself, is not a "record," and may be disclosed to the "transgender" child's parents; other students' parents; and other students themselves, where necessary to help them protect their privacy and safety.

**2. Parents have all of the FERPA access rights for their minor child's educational records in the K-12 setting, not the students (and certainly not school administrators).** "An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights."<sup>2</sup> See 20 U.S.C. 1232g. A claim that FERPA shields a K-12 minor child's records or activities from the child's own parents is ridiculous on its face. (This is true until the child reaches the age of majority, or is in the university setting, and then access rights are reversed under FERPA in favor of the adult child). In K-12, the parent, as the child's legal guardian, has the primary right of access to the child's records, and the right to be informed by administrators of significant developments in the child's life which occur at school. In addition, "parents...have the right to request that a school correct records which they believe to be inaccurate or misleading."<sup>3</sup> This would include a parent's right to require school records to identify the child with accurate gender pronouns, accurate sex markers, and with the child's legal name. Administrators are responsible to the parents, as parents have legal authority and responsibility for their own children.

**3. FERPA permits the release of student directory information.** Education records that have been appropriately designated as "directory information" by the educational agency or institution may be disclosed without prior consent. See 34 CFR §§ 99.31(a)(11) and 99.37. FERPA defines directory information as information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. 34 CFR § 99.3. A student's biological sex is an objective characteristic, disclosure of which reasonable persons do not consider harmful or an invasion of privacy.

'Directory information' means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. (a) **Directory information includes, but is not limited to,** the student's name; address; telephone listing; electronic mail address; photograph; date and place

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<sup>1</sup> <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/students.html>; <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/for-eligible-students.pdf>

<sup>2</sup> [https://studentprivacy.ed.gov/ferpa-regulations#0.1\\_se34.1.99\\_14](https://studentprivacy.ed.gov/ferpa-regulations#0.1_se34.1.99_14)

<sup>3</sup> <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>

of birth; major field of study; grade level; enrollment status (e.g., undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors and awards received; and the most recent educational agency or institution attended.<sup>4</sup> (Emphasis added).

FERPA provides that a school may disclose directory information if it has given public notice of the types of information which it has designated as “directory information,” the parent or eligible student’s right to restrict the disclosure of such information, and the period of time within which a parent or eligible student has to notify the school in writing that he or she does not want any or all of those types of information designated as “directory information.” 34 CFR § 99.37(a). A school is not required to inform former students or the parents of former students regarding directory information or to honor their request that directory information not be disclosed without consent. 34 CFR § 99.37(b).

“Sex” is not specifically included within FERPA’s definition of “directory information,” and many schools already include it. A student’s “sex” may be disclosed without consent of the gender-confused student or his or her parents, if the school district considers “sex” within “directory information,” because it is not prohibited.

**4. Finally, as a last resort, FERPA permits the release of student personally identifiable information “to protect the health or safety of the student or other persons” “in connection with an emergency.”** Under 20 U.S.C.A. § 1232g(b)(1)(I), information about a student may be released “in connection with an emergency,” by **“appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons.”**

In some situations, school administrators may determine that it is necessary to disclose personally identifiable information (PII) from a student’s education records to appropriate parties in order to address a health or safety emergency. FERPA’s health or safety emergency provision permits such disclosures when the disclosure is necessary to protect the health or safety of the student or other individuals. See 34 CFR §§ 99.31(a)(10) and 99.36. This exception to FERPA’s general consent requirement is limited to the period of the emergency and generally does not allow for a blanket release of PII from a student’s education records. Rather, these disclosures must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease.<sup>5</sup>

The U.S. Department of Education’s list of “actual, impending, or imminent” emergencies is not exhaustive or exclusive, but indicative of what the Department considers an “emergency.” If a school administrator decides to use the “emergency exception” as the basis for disclosing to other parents or students that a student will be permitted to enter the restrooms, lockers or showers of the opposite biological sex, the administrator “must record in the student’s education records the articulable and significant threat that formed the basis for the disclosure, and the parties to whom the information was disclosed.”<sup>6</sup> See 34 CFR § 99.32(a)(5).

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<sup>4</sup> <http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferparegs.pdf>

<sup>5</sup> <https://studentprivacy.ed.gov/faq/when-it-permissible-utilize-ferpa%E2%80%99s-health-or-safety-emergency-exception-disclosures>

<sup>6</sup> <https://studentprivacy.ed.gov/faq/does-school-have-record-disclosures-made-under-ferpa%E2%80%99s-health-or-safety-emergency-exception>

In making a decision in connection with an emergency that knowledge of the information is necessary to protect the health or safety of the student or other individuals, an “educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals.” The totality of the circumstances could include a teacher’s knowledge of a particular child’s mental health, or a particular child’s intent to violate the rules or the rights of others, and the effect such violation would have on the mental health of other children.

If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, **it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department [of Education] will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.** (Emphasis added). *See* 34 CFR 99.36.

### Conclusion and Enforcement

The First Amendment protects the right of parents to direct their child’s upbringing, and prohibits the imposition of a radical gender “orthodoxy” by school officials. The First Amendment also protects a child’s right of bodily privacy based on sex. Sex-based privacy is part of the longstanding traditions of our country and protected by the statutory interpretation of “sex” for Title IX purposes. FERPA does not bar concerned teachers from informing parents regarding gender-confused student “transgender” status or access claims. Personal knowledge of “transgender status” or a claim of access to opposite-sex restrooms is not a “record,” and is not subject to FERPA. Parents have all of the FERPA access rights for educational *records* in the K-12 setting, not the students. Biological “sex” may be considered “directory information” by school districts and released pursuant to directory information rules without additional consent. FERPA permits the release of student personally identifiable information “to protect the health or safety of the student or other persons” “in connection with an emergency.”

Parents may enforce their FERPA rights by filing a timely complaint with the U.S. Department of Education, Family Policy Compliance Office. In order to be timely, the complaint must be filed within 180 days of the incident. Click here (<https://studentprivacy.ed.gov/file-a-complaint>) to file a complaint. Once your complaint is filed, the following enforcement provisions apply:

- The Family Policy Compliance Office (FPCO) investigates complaints and violations under FERPA. .
- If a State Educational Agency (SEA) or another entity that receives Department funds violates FERPA, FPCO may bring an enforcement action against that entity.
- Enforcement actions include the 5-year rule, as well as withholding payment, cease and desist orders, and compliance agreements.<sup>7</sup>

For confidential assistance to teachers who desire to inform parents about the plans of school activists; to parents in filing a FERPA complaint; or with these and other situations involving public schools, please contact Liberty Counsel at 407-875-1776, or via email at [Liberty@lc.org](mailto:Liberty@lc.org).

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<sup>7</sup> <https://www2.ed.gov/policy/gen/guid/ptac/pdf/slides.pdf>