Student Privacy v. Parent Rights – Must We Keep Secrets from the Parents? May We Keep Secrets from the Parents?

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Student Privacy v. Parental Rights: *Must* We Keep Secrets from the Parents? *May* We Keep Secrets from the Parents?

I. Parental Rights[1]

A. **Parents have a right to direct their children's upbringing and education, based on the Due Process Clause of the Fourteenth Amendment.**

In 1922, the voters of Oregon passed an initiative requiring all children in the state subject to compulsory school attendance to attend public schools. The new law, which was designed to promote American values and combat the influence of immigration, was immediately challenged by the state's parochial and private schools. The U.S. Supreme Court struck down the law in a unanimous decision.[2] In his opinion, Justice McReynolds wrote memorably that children were not "mere creature[s] of the state."[3] Only a parent had the right to decide whether to send the parent's child to a public or private school. To deprive a parent of this right violated the traditional American understanding of the Fourteenth Amendment's protection of liberty interests. *Pierce v. Society of Sisters* set in motion a line of Supreme Court jurisprudence regarding constitutionally protected individual liberty interests, which would eventually expand to include the right to marry, have children, obtain an abortion, and more.

Notably, the private schools in *Pierce* argued that the Oregon law also violated the First Amendment's guarantee of religious freedom, however that constitutional principle had not yet been extended to the states.[4] (Seven days after deciding *Pierce,* the Supreme Court would hold for the first time in *Gitlow v. New York* that the Fourteenth Amendment had applied certain First Amendment restrictions to the states.)

In *Meyer v. Nebraska,* another case related to wartime fear of foreign influence, the Supreme Court struck down a Nebraska statute that restricted the teaching of foreign languages in public or private school.[5] Writing for the majority, Justice McReynolds stated that the Fourteenth Amendment protected the plaintiff's right to teach German and the right of parents to employ him to teach German to their children. Legal scholars have referred to *Pierce* and *Meyer* as seminal to the Court's understanding of substantive due process in the context of individual liberties protected by the Fourteenth Amendment.

Since the 1920s, the Supreme Court has had opportunities to define parental rights further. In *Wisconsin v. Yoder,* the Court established the right of Amish parents to remove their children from formal education after the eighth grade based on their fundamental right to freedom of

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[1] Throughout this paper, when we say "parent" we also mean a legal guardian.
[2] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
[3] *Id.* at 534.
[4] *See Troxel v. Granville*, 530 U.S. 57, 95 (2000): "Pierce and Meyer, had they been decided in recent times, may well have been grounded upon First Amendment principles protecting freedom of speech, belief, and religion" (Kennedy, J., dissenting).
[5] *Meyer v. Nebraska,* 262 U.S. 390 (1923).

religion.[6] Dissenting in part, Justice William O. Douglas disagreed with the majority that parents alone should decide what type of education their children receive:

> It is the future of the students, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.[7]

Even in the "new and amazing world of diversity" of which Justice Douglas wrote in 1972, it would have been difficult to foresee the specific types of rights that students would one day claim in seeking to master their own destinies. Justice Douglas's words presaged the coming conflict between a parent's right to raise a boy or a girl in a certain school, with a certain religion and certain expectations about adulthood, marriage and family, and the child's right to rebel against all of these values—even the notion that the child is a boy or girl.

B. **Federal and state laws ensure that parents have the right to access their children's education records and to know what is going on at school.**

FERPA

The Family Educational Rights and Privacy Act (FERPA) establishes specific parental rights regarding their children's educational records and grants parents both the right of access to and the right of consent prior to public disclosure of student record information.[8] Access to the education records of a student who is or has been in attendance at a school shall be granted to the parent of a student who is a minor or who remains a dependent for tax purposes.[9] The term *education records* means those records, files, documents, and other materials that contain information directly related to a student and are maintained by the district or by a person acting for the district.[10] A parent or eligible student must provide written consent prior to the district's release of student education record information or personally identifiable information contained therein other than directory information.[11] Even an oral disclosure by a school official of information contained in a student's education record could be considered an

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[6] *Wisconsin v. Yoder,* 406 U.S. 205 (1972).
[7] *Id.* at 245.
[8] 20 U.S.C. § 1232g.
[9] 34 C.F.R. §§ 99.10, .3, .31(a)(8).
[10] 34 C.F.R. § 99.3.
[11] 34 C.F.R. § 99.30.

unlawful disclosure under FERPA if the disclosure was not authorized by law or parental consent.

The definition of an education record subject to FERPA is broad, but there is a limit. The federal law does not grant parents a right to access information about students that is not contained in any record maintained by the school (e.g., rumors, hunches, or informal discussions).

The Hatch Amendment (PPRA)

In 1978, the Protection of Pupil Rights Act (or the "Hatch Amendment") required that all instructional materials, including teachers' manuals, films, tapes, or other supplementary material, intended to be used in connection with any survey, analysis, or evaluation as part of any federally-funded program be made available for inspection by parents.[12] The law also gave parents the right to consent to any survey, analysis, or evaluation required as part of any federally funded program that would reveal certain sensitive information, including information regarding: political affiliations; mental and psychological problems; sex behavior and attitudes; illegal behavior; and income.[13]

State Laws

The states have enacted statutes that enhance or clarify a parent's right to access school information. For example, in Texas, parents have the right to "full information" regarding their children's school activities, with the exception of activities related to child abuse investigations of the parent.[14] An attempt by a school district employee to encourage or coerce a child to withhold information from the child's parent is grounds for discipline.[15]

A parent's statutory right to full information may be construed broadly in certain circumstances. In June 2016, the Texas attorney general opined that guidelines developed by the Fort Worth Independent School District to assist administrators with requests by transgender students to accommodate the students' gender identities violated parental rights under state law to the extent that the guidelines could have limited parental access to full information about their children's school activities.[16]

Online Student Data

In the last five years, California, Texas, and other states have enacted legislation designed to protect student information online and provide parents with the right to know about, and consent to, how their children's data is shared electronically.[17] California's Student Online

[12] 20 U.S.C. § 1232h(a).
[13] 20 U.S.C. § 1232h(b).
[14] Tex. Educ. Code §§ 26.008(a); 38.004.
[15] Tex. Educ. Code § 26.008(b).
[16] Op. Tex. Att'y Gen. No. KP-0100 (June 28, 2016).
[17] http://www.ncsl.org/research/education/student-data-privacy.aspx

Privacy and Protection Act (SOPIPA) and other state laws have greatly increased parental rights and student safety in the digital age of education.[18] Again, however, these laws do not typically impact parental rights over sensitive student information that is shared non-electronically at school; this topic is governed by a growing body of case law interpreting the constitutional privacy rights of parents and students under the Fourth and Fourteenth Amendments.

C. **Parents do not have a general right to direct the curriculum offered to their children.**

Although the Fourteenth Amendment protects parents' right to direct the education and upbringing of their children, this right is not absolute. Courts typically recognize that a parent's constitutional right does not override the ability of school officials to make policy decisions within the school district's lawful authority related to issues such as school discipline, curriculum, and access to campus facilities.

To illustrate the inherent tensions in this arrangement, picture school law as a map. Do you see a hazy, mine-studded war zone around the border between a state's duty to educate its youngest citizens and a parent's right to direct the upbringing of her child? That no man's land is called: Sex Ed. In 1992, one Massachusetts high school stepped boldly onto the minefield with an unorthodox presentation on safe sex and AIDS awareness. According to the lawsuit filed by two 15-year-old students and their parents, during the 90-minute, mandatory school assembly, a speaker from Hot, Sexy & Safer Productions, Inc., engaged in sexually explicit speech and simulations with students, including: lewd and lascivious language; endorsements of oral sex, masturbation, homosexual sex, and premarital sex; 18 references to orgasms; six references to male genitals; and eight references to female genitals. The plaintiffs alleged that the school's decision to require attendance at this assembly, without parental notice or the opportunity to opt out, violated their substantive due process rights under the Fourteenth Amendment, their religious rights under the First Amendment and Religious Freedom Restoration Act, and their right to be free from sexual harassment under Title IX.[19]

In *Brown v. Hot, Sexy, and Safer Productions, Inc.,* the First Circuit Court of Appeals examined the parents' claims that the school had deprived them of their right to direct their children's education in light of the Supreme Court's foundational decisions in *Meyer v. Nebraska* and *Pierce v. Society of Sisters.* The court acknowledged that these cases restrict a state's right "to 'standardize its children' or 'foster a homogenous people' by completely foreclosing the opportunity of individuals and groups to choose a different path of education."[20] The court continued, however:

> We think it is fundamentally different for the state to say to a parent, "You can't teach your child German or send him to a parochial school," than for the parent to say to the state, "You can't teach my child subjects that are morally offensive to me." The first

[18] Cal. Educ. Code § 49073.1.
[19] *Brown v. Hot, Sexy and Safer Productions, Inc.,* 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996).
[20] *Id.* at 533, citing *Meyer,* 262 U.S. at 402.

> instance involves the state proscribing parents from educating their children, while the second involves parents prescribing what the state shall teach their children. If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by Meyer and Pierce do not encompass a broad-based right to restrict the flow of information in the public schools.[21]

The court also distinguished *Wisconsin v. Yoder*. Whereas the Amish parents in that case had convincingly argued that enforcement of Wisconsin's compulsory attendance statute threatened the survival of their traditional way of life, the parents in *Brown* made no such sweeping allegation regarding the 90-minute assembly.[22] Further, the speaker's sexual innuendo and explicit content were not objectively offensive or severe enough to support the plaintiffs' Title IX sexual harassment claim, especially in light of the stated purpose of the assembly to educate students about safe sex.[23]

The Massachusetts plaintiffs' claims regarding the assembly failed, but it is unlikely that a high school principal aware of this case would dare to put on a similar production without first notifying parents. Many state laws require school officials to notify parents of the content of sex education curriculum.[24] For example, Texas school districts must notify parents whether the schools will offer instruction in human sexuality, and, if instruction will be provided, provide parents with a summary of the content and notice of their right to review curriculum materials and remove their children from any portion of the instruction, without disciplinary or academic penalty.[25]

II. Student Privacy

Courts have established constitutional protections for student privacy in certain contexts, such as searches of their personal belongings, pregnancy, and drug testing.[26] A hotly disputed issue in recent years is whether these protections may be extended to expressions of a student's sexuality or gender at school.

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[21] *Id.* at 533.
[22] *Id.* at 539.
[23] *Id.* at 540-541.
[24] According to the National Conference of State Legislatures, in 2016, 38 states and the District of Columbia required parental involvement in sex education programs; 35 states and the District of Columbia allowed parents to opt their students out of sex education; and four states required parental consent for sex education. http://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx
[25] Tex. Educ. Code § 28.004(i).
[26] *See New Jersey v. T.L.O.,* 469 U.S. 325 (1985) (holding that the Fourth Amendment prohibition on unreasonable searches and seizures applies to searches of students by public school officials).

A. **Students have a right to privacy in the context of mandatory drug testing.**

The parameters of student privacy are the focus of a 1995 Oregon case, in which an aspiring football player challenged his school district's mandatory drug testing policy for student athletes. The U.S. Supreme Court upheld the district's policy in the case of *Vernonia School District v. Acton*.[27] Justice Scalia's majority opinion in *Vernonia* provided a three-part test for reviewing suspicionless school searches under the Fourth Amendment.

The first factor that the Court considered was the nature of the privacy interest impacted by the search. The Court held that the Fourth Amendment rights of minor students at school are different than elsewhere, because students are sent to school to be educated *in loco parentis* by school employees. For example, students in public school are regularly required to submit to physical screenings and vaccinations. Thus, students have a lesser expectation of privacy than a general member of the population.[28] In addition, Scalia wryly observed that student athletes have even less of an expectation of privacy: "School sports are not for the bashful. They require 'suiting up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford."[29]

The second factor was the nature of the intrusion. In *Vernonia*, the drug testing took place in boys' and girls' bathroom. Boys provided urine samples at a urinal, where they were observed from behind by a male staff member. Girls provided urine samples in a locked stall, with a female staff member listening outside. The Court found that that the intrusion on the students' privacy rights under these conditions, which resemble using any public restroom, was merely negligible. In reaching this conclusion, the Court found significant that the purpose of the testing was only to uncover prohibited drug use rather than, for example, to determine whether the student was "epileptic, pregnant, or diabetic."[30]

Finally, the Court considered the "nature and immediacy" of the governmental concern and the efficacy of the drug testing policy for addressing the concern. The school district's concern regarding the effects of drug use on students was undoubtedly compelling, and the Court did not question the school officials' conclusions as to its immediacy. Further, while the plaintiffs argued that a less intrusive means (suspicion-based testing) would be just as effective at addressing the issue, the Court stated that the Fourth Amendment did not require the least intrusive method of searching, as long as the search was reasonable. Therefore, the Court concluded, "Vernonia's Policy is reasonable and hence constitutional."[31]

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[27] *Vernonia Sch. Dist. v. Acton,* 515 U.S. 646 (1995).
[28] *Id.* at 657, citing *New Jersey v. T.L.O,* 469 U.S. 325 (1985).
[29] *Id.*
[30] *Id.* at 658.
[31] *Id.* at 665.

Vernonia has been cited in more recent litigation for the concept that students at school have a reduced expectation of privacy in general, and that student athletes have an even lower expectation of privacy than their non-athlete peers.

B. **Students have a right to privacy in the context of pregnancy, but parents probably have a right to know.**

Pregnancy Tests

The case of *Gruenke v. Seip* serves as a cautionary tale for school employees who come into contact with sensitive student information such as a potential pregnancy. A male coach in a Pennsylvania school district suspected that a member of the varsity swim team was pregnant. When confronted, the student repeatedly denied that she was pregnant. The mother of another student suggested to the coach that he require the student to take a pregnancy test and provided a test for that purpose. After much pressure from the coach, who had no medical training, the student took the test and the results were positive. The student's mother then sued the coach in federal court, alleging violation of her daughter's Fourth Amendment privacy interests as well as her parental right to manage the upbringing of her child. The Third Circuit Court of Appeals held that the coach was not entitled to qualified immunity with regard to the Fourth Amendment claim, because his actions were unreasonable in light of the student's clearly established constitutional right to be free from unreasonable searches and disclosure of protected medical information.[32]

Interestingly, the court saw the mother's assertion of parental rights differently. Since children are required to go to school, the court reasoned, it is foreseeable that school policies may occasionally conflict with parental rights. "[W]hen such collisions occur, the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest. . . . Public schools must not forget that '*in loco parentis*' does not mean 'displace parents.'"[33] Nonetheless, the court concluded that the mother's constitutional rights in this situation were not clearly established enough to deprive the coach of qualified immunity. The court was evidently struck by the fact that, in addition to the coach and the other parent on the swim team, numerous school authorities also became aware of the potential pregnancy and said nothing to the parent.[34]

In another case, a school nurse in San Marcos, Texas, who administered a pregnancy test to a student was sued by the student's parents in federal court for assault, battery, and invasion of privacy. The district court found that a pregnancy test administered in a coercive environment (i.e., a situation in which the student felt that she had no choice but to submit to the school

[32] *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 1990).
[33] *Id.* at 305
[34] *Id.* at 306 ("In reviewing the record, one is struck by the fact that the guidance counselor, aware of the situation, apparently did not advise Seip to notify the parents. Nor did the counselor herself undertake that responsibility.")

official's wishes) would constitute an unreasonable search and seizure in violation of the U.S. Constitution's Fourth Amendment. However, the San Marcos district's program made pregnancy tests available to students on a voluntary basis only. Since the district did not attempt to coerce the student, the court dismissed the complaint against the district.[35]

The plaintiffs continued to pursue a claim against the nurse in her individual capacity. However, deposition testimony showed that the student took the test voluntarily. Thus the court concluded that there was no evidence of a violation of a constitutional right. Moreover, the court found the actions of the nurse to be reasonable, entitling the nurse to qualified immunity:

> Contrary to Villanueva's allegation that [the nurse] harangued his daughter into submitting a urine sample, the record indicates no evidence of coercion on [the nurse's] part or any indication that Marisa did not voluntarily consent to testing. Even assuming *arguendo* that [the nurse's] administration of the pregnancy test violated a clearly established constitutional right, there is no record evidence to suggest that [the nurse's] behavior was unreasonable, that Marisa's decision was coerced, or that [the nurse] threatened or intimidated Marisa into submitting to the test.[36]

Notice one important distinction between the situation in *Gruenke* and the case in *San Marcos.* In the first case, the defendant was a coach with no medical training and no particular need to know if the girl was pregnant or not. The court seemed to think he acted out of curiosity. In *San Marcos* the defendant was the school nurse, inquiring about an important health issue.

Notification Policies

Some school districts, perhaps fearing a *Gruenke v. Seip* scenario, have adopted rules requiring employees to notify school authorities upon learning of a student's pregnancy. For example, a New York district's policy stated that employees who became aware of a student's pregnancy should immediately report to a school social worker. The social worker would encourage the student to talk to her parents; if the student was reluctant, the social worker could offer to facilitate the conversation. If the student continued to insist on confidentiality, the policy directed the social worker to inform the student that he or she would tell the parents, and then to disclose the pregnancy to the student's parents after consultation with the principal and superintendent. A school counselor and the teachers' union filed for a preliminary injunction, alleging the policy violated their students' constitutional rights to due process, privacy, and equal protection, as well as state confidentiality and privilege laws.[37] The district court ruled

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[35] *Villanueva ex rel. M.V. v. San Marcos Consol. Indep. Sch. Dist.*, No. A-05-CA-455 LY, 2006 WL 2591082 (W.D. Tex. 2006) (magistrate judge recommendation, approved by the court as to the school district).

[36] *Villanueva v. San Marcos CISD*, (unpublished and unreported, 5th Cir. 2007).

[37] *Port Washington Teachers Assoc. v. Board of Educ. of Port Washington Union Free Sch. Dist.*, No. 04-CV1357TCPWDW, 2006 WL 47447 (E.D.N.Y. Jan 4, 2006).

that the plaintiffs did not have standing to assert their students' rights. Furthermore, the court refused to issue an injunction because the plaintiffs were not likely to succeed on their argument that a pregnant student's right to privacy could override her parent's rights of access to information under FERPA and state laws.[38]

A note about Title IX: Title IX prohibits school districts from applying any policy or practice related to a student's parental, family, or marital status differently based on sex.[39] Therefore, an argument could be made that any policy or practice requiring school notification in the case of a pregnant student must apply equally in the case of a male student who impregnates someone. Title IX regulations also prohibit school districts from requiring students to take a pregnancy test as a condition of further attendance or participation in any school activity.[40] As a best practice, schools are typically exposed to less legal risk by policies requiring parental notification or medical verification apply neutrally (e.g., based on serious medical issues) rather than singling out pregnancy.

Abortion

As with pregnancy tests, the law does not prohibit providing information about abortion to students, but district employees should be cautious and refrain from actions that might be interpreted as coercive or invasive when discussing this issue with students. Minors in most states are prohibited from receiving an abortion without parental notification unless an exception applies.[41] In *Arnold v. Board of Education of Escambia County,* a well-publicized case decided by the Eleventh Circuit Court of Appeals, the parents of a high school couple alleged that a vice principal and a counselor forced their children to obtain an abortion when the employees procured a pregnancy test, paid the students money in exchange for tasks in order to raise money for the abortion, and paid a driver to transport the students to the abortion facility—all while requiring the students not to inform their parents of the pregnancy.[42] The court held that the plaintiffs' allegations were sufficient to state a legal claim of invasion into the privacy of the familial relationship between parents and children. Although the court did not find a constitutional duty on the part of the district employees to notify the parents, the court concluded that, as a matter of common sense, students should be encouraged to talk to their parents about these difficult decisions.

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[38] *Id.* at 80.
[39] 34 C.F.R. § 106.40(a).
[40] 34 C.F.R. § 106.40(b)(2).
[41] See https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions for a complete list of state laws requiring parental notification of abortion.
[42] *Arnold v. Board of Educ. of Escambia County, Ala.*, 880 F.2d 305 (11th Cir. 1989).

Medical Treatment

Educators should distinguish between providing a parent and student full information about a student's condition and becoming actively involved in a student's decision process regarding a pregnancy. In addition, while pregnancy-related decisions are a family matter, consider that state laws may grant pregnant or parenting minors broader rights in some situations, such as the right to consent to medical treatment of themselves or their children. For example, a pregnant minor in Texas has the right to consent to medical treatment, except abortion, related to her pregnancy.[43] State law also allows an unmarried minor who is a parent and has actual custody of his or her child to consent to medical treatments and immunizations of the child.[44] A minor who is pregnant, or who is a parent with actual custody of his or her child, may also consent to his or her own immunization if the U.S. Centers for Disease Control and Prevention recommends or authorizes that the initial dose of the immunization for a disease be given before the age of seven.[45]

Child Abuse

Due to mandatory reporting laws, an exception to the parent's right to know about a child's pregnancy may apply if a school employee has cause to believe that the pregnancy may be the result of child abuse by the parent. In limited circumstances, records of a licensed professional counselor (LPC) that qualify as sole possession records under FERPA may also be withheld from parents when the LPC determines that the release of the records would be harmful to the student's physical, mental or emotional health.[46] However, as discussed above, state laws may give parents a greater right to information than FERPA.

C. **Gay and lesbian students' expressions of sexual orientation**

Student privacy takes on a whole new meaning in the context of LGBT students, since parents may object to their children's expressions of identity to the point that students experience a real or perceived risk of harm if "outed" to their parents. The Third Circuit Court of Appeals faced this issue in a non-school related case that has strongly resonated with advocates for LGBT youth. In *Sterling v. Borough of Minersville,* a police officer looking for information related to a burglary found 18-year-old Marcus Wayman and a 17-year-old male friend in a parked car. The two young men acknowledged that they had been drinking and were in the car to engage in sexual activity. The officer arrested them for underage drinking and took them to the police station, where he lectured them about his religious views on homosexual activity and

[43] Tex. Fam. Code § 32.003(a)(4).
[44] Tex. Fam. Code § 32.003(a)(6).
[45] Tex. Fam. Code § 32.1011.
[46] *See, e.g.,* Op. Tex. Att'y Gen. No. JC-538 (2002). *Also see* 34 C.F.R. § 99.3, defining *sole possession* records as records that are "kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any person except a temporary substitute for the maker of the record."

threatened to inform Wayman's grandparent about his sexual orientation. Upon his release from custody, Wayman went home and committed suicide.[47] In the ensuing lawsuit, brought by Wayman's mother on behalf of his estate, the Third Circuit held that the police officer, chief of police and the Borough had violated Wayman's Fourteenth Amendment right to privacy. Further, the police officers were not entitled to qualified immunity because Wayman's right was clearly established. The court reasoned, "It is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity."[48]

Federal courts have also considered whether gay and lesbian students have a right to privacy that could prevent school officials from sharing information with the student's parent about the child's sexual orientation. Courts have not found a clearly established right to privacy in this context, but the cases demonstrate that students have a developing legal right to express themselves at school in a way that is different than how they express themselves at home.

In *Nguon v. Wolf,* a district court in California considered whether a student had a right to privacy in her sexual orientation when she made no attempt to hide her romantic relationship with another girl at school.[49] Charlene Nguon, a 16-year-old junior in high school, was suspended for violating her school's policy against excessive public displays of affection with her girlfriend. When the principal met with Nguon's mother to discuss the discipline, he explained that she had been kissing another girl. Nguon sued the school district and her principal, alleging violations of her First Amendment, Equal Protection, and privacy rights under the U.S. and California constitutions. The court found that Nguon had a reasonable expectation of privacy in her sexual orientation *at home*. Although her conduct at school was "inconsistent with any right to keep her sexual orientation private, . . . [i]t does not follow that disclosure in one context necessarily relinquishes the privacy right in all contexts."[50] The court went on to balance Nguon's privacy right with the principal's compelling state interest in disclosing facts to a parent to provide context for student discipline. On the balance, the court concluded that the principal did not violate Nguon's rights because he had a legitimate governmental purpose in describing the context of the suspension.[51]

In Kilgore, Texas, Barbara Wyatt sued the school district and coaches Rhonda Fletcher and Cassandra Newell after an incident involving her daughter, S.W. Wyatt claimed the coaches confronted the 16-year-old S.W. in an empty locker room after softball practice and questioned her about her relationship with an 18-year-old woman named Hillary Nutt. The coaches then met with Wyatt and told her about S.W.'s relationship with Nutt. Wyatt claimed she had not

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[47] *Sterling v. Borough of Minersville,* 232 F.3d 190 (3d Cir. 2000).
[48] *Id.* at 196.
[49] 517 F.Supp.2d 1177 (C.D. Cal. 2007); *also see Botello v. Morgan Hill Unified Sch. Dist.*, No. C09-02121 HRL, 2009 WL 3918930 (N.D. Cal. Nov. 18, 2009) (holding student had constitutionally protected privacy interest in her sexual orientation).
[50] *Nguon.* at 1191.
[51] *Id.* at 1195.

previously known her daughter's sexual orientation. In 2010, Wyatt filed a complaint in federal court against the Kilgore Independent School District and the coaches, claiming violations of S.W.'s Fourth and Fourteenth Amendment rights. The coaches raised the defense of qualified immunity, arguing that they had not violated S.W.'s clearly established constitutional rights. The district court rejected the coaches' defense, finding that S.W.'s constitutional right to privacy in her sexual orientation was clearly established. The Fifth Circuit Court of Appeals disagreed and reversed the trial court's decision. Regarding Wyatt's Fourteenth Amendment privacy claim, the court of appeals reviewed U.S. Supreme Court and federal circuit case law concerning whether S.W. had a clearly established constitutional right to the privacy of her sexual orientation, including the right that it not be disclosed to her parent. Finding no precedent to prohibit school officials from discussing a minor student's private sexual matters with the student's parents, the Fifth Circuit ruled that the coaches were protected by qualified immunity because they did not violate clearly established constitutional rights.[52]

D. **Transgender students**

Nothing brings these issues into sharper focus than a conflict between parent and student over transgender status. Schools are inevitably caught in the middle. If the parent and the student are aligned in what they seek from the school, the legal issue presented involves Title IX and Equal Protection. Even then, there are arguments to be made regarding parental rights and student privacy on both sides of the debate over accommodations for transgender students.[53] However, if the parent and the student who identifies as transgender are at odds, the school lawyer is faced with an additional dilemma—whose voice carries more weight?

There is considerable litigation about the rights of transgender students, summarized nicely in NSBA's Transgender Litigation Chart: http://www.nsba.org/transgender-litigation-chart. However, in the reported court cases, the students and parents are generally aligned. Thus, a parent versus child conflict will rarely find its way into the courthouse.[54]

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[52] *Wyatt v. Fletcher*, 718 F.3d 496 (5th Cir. 2013).

[53] For example, the plaintiffs in *Students and Parents for Privacy v. U.S. Dep't of Educ.,* No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016) argued that the U.S. Department of Education's former guidance regarding transgender student use of single-sex changing facilities, and a school district's implementation of the guidance violated both a student's fundamental right to privacy and a parent's constitutional right to direct the moral upbringing of his or her child. (However, in denying the plaintiffs' request for a preliminary injunction against a district policy allowing students to use bathrooms and locker rooms in accordance with gender identity, the court noted that this claim was waived because of the plaintiffs' failure to develop or support the argument. *Id.* at n. 21.).

[54] *Calgaro v. St. Louis County,* 2017 WL 2269500 (D. Minn. 2017) is one such rare case. A 17-year old transgender student, living on her own, obtained medical treatment to transition from male to female. The mother sued numerous parties, including the school district and the principal, alleging that she was wrongfully denied access to educational records, and shut out of educational decisions. The court dismissed the case against the district because there was no allegation of a policy or custom that caused any injury. The court dismissed the principal

Let us consider three hypothetical situations in which parent and student are at odds.

**Robert asks to be called Ashley at school, and asks that report cards, transcripts and other documents reflect the student's preferred name. Parent is insistent that you do no such thing.*

With regard to official records of the school, the attorney should first review state law. Some state laws will require the school to use the student's legal name, as reflected in a birth certificate or similar document. Even if there is no state law, however, FERPA allows the parent to request an amendment if the parent alleges that the school records are inaccurate, misleading, or in violation of the student's right to privacy.[55] If the birth certificate shows the student is a boy named Robert, and an official school record refers to the same student as a girl named Ashley, the parent would have a strong case that the school record is inaccurate and must be changed.

Keep in mind that, once the FERPA rights transfer to the adult student, the student becomes eligible to request that the school records be changed. Many transgender adults have requested changes to school records retroactively to protect their privacy in the context of future inquiries by schools or employers. In a 1991 opinion letter regarding a former male student who had graduated from a school district and thereafter transitioned to female, the U.S. Department of Education's Family Policy Compliance Office advised that FERPA did not require districts to amend students' education records to reflect a name and gender other than that of the students' name and gender during their attendance, because the request was "not based on allegations that their records contain recordkeeping errors but on the students' desire to have their education records changed to reflect the results of a surgical gender change."[56] Therefore, FERPA does not require a change in the record due to inaccuracy, but it also does not prohibit a district from deciding to change the record in the interests of protecting a current or former student's privacy.

In addition, FERPA does not govern what happens in the classroom, on the playground or the cafeteria. Teachers and administrators should use their discretion in such matters, taking into account the age of the child and other relevant factors.

**Student claims to be transgender and wants to use a bathroom corresponding to gender identity. Parent claims the student is going through a phase, and urges the school to ignore the student's request.*

From a legal perspective, this hypothetical will not present a problem to the district that requires all students to use a bathroom that corresponds to biology at birth. The district may

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from the cased based on qualified immunity. The court held that the law did not "clearly establish" that a parent has a liberty interest in access to educational records

[55] 34 C.F.R. §99.20(a).

[56] U.S. Dep't of Educ., Family Policy Compliance Office, *Letter from FPCO Director Leroy S. Rooker to Karol Johnson, Superintendent, Great Falls Public Schools* (Nov. 13, 1991).

be challenged under Title IX or the Equal Protection Clause, but it will not be facing a parent-student conflict. However, if the district does allow some students to use the bathroom that corresponds to gender identity, the district will have to choose a course of action that pleases one party, but not the other.

The primary consideration in dealing with any transgender student should be safety and privacy. Transgender students are far more likely than their peers to endure bullying, ostracism or harassment. So the legal analysis should be guided, first of all, by considerations of safety and privacy. Obviously, school officials in this situation would want to meet with the family and see if some acceptable course of action can be agreed upon. Common sense suggests that the age of the student should weigh in the equation; this is also evident in many of the policies cited by the U.S. Department of Education's Office for Civil Rights in its Resources for Transgender and Gender Non-Conforming Students Website.[57] As the student gets closer to adult status, the student's voice should carry more weight. If there is no middle ground to be found, the district may have to make a decision, and inform the other party of their options to appeal that decision through district channels.

**The student confides in a teacher that she believes she is a boy, and begs the teacher not to tell anyone—especially the parents.*

Again, safety and privacy should be the overriding concerns in dealing with this, but there are important legal factors to be considered as well. This particular request for confidentiality implicates important privacy interests for the student, as is discussed in *Wyatt v. Fletcher.* The request for confidentiality should be honored in general, but that does not mean that it should be honored with the child's parent. In the *Wyatt* case, the Fifth Circuit concluded that the disclosure of a student's sexual orientation *to the mother* and *in the context of a school-related discussion* did not violate a clearly established right of privacy. Thus, if the teacher in this hypothetical were to disclose this matter to the parent, there is legal support for the teacher's immunity from personal liability. Still, that does not mean that disclosure would be the right thing to do. School officials should consult the school lawyer in a situation like this and walk through it carefully, taking into account all relevant factors.

III. What To Do

In conclusion, here are some things for school officials and attorneys to think about when a parent's right to know conflicts with a student's desire for privacy:

Check state law regarding parent rights. Are there any broad statements regarding a parent's right to know? Are there specific lists of information to which parents are entitled?

Check school board policy for the same type of language.

[57] https://www2.ed.gov/about/offices/list/ocr/lgbt.html

Check materials provided to parents—handbooks, codes of student conduct, etc. While these may not have the force of law, they can be used to embarrass school officials in litigation.

If a matter implicates a need for medical treatment (i.e., pregnancy), check state law regarding circumstances under which minors can consent to treatment.

Make sure that the appropriate school official is involved in the decision. If it's a health issue, the school nurse should probably be involved; if it's a mental health issue, a counselor or psychologist.

Analyze the legal risks: parents have a constitutional right to direct the upbringing of their children. This is clearly established, although the exact scope of this right is not clear. Students have a constitutional right of privacy, but there is no definitive authority to establish that this right extends to the point that students can keep from their parents information that is school-related and important. It is riskier to keep information from the parents than to disclose information the student wants kept private.

Ask: Is this school related? Does it have an impact on the student's performance in school activities? How important is it? Is it a major life event (e.g., pregnancy) or a nasty remark made on Facebook last night?

The father-daughter authors of this paper humbly suggest the following default rule: If school officials have information about the student that is affecting the student at school and is important, they should tell the parents UNLESS there is reason to believe that involving the parents would likely subject the student to physical or emotional harm.

If the conclusion is reached that the information should be shared with the parent:

*Encourage the student to share the information with the parent.

*Offer to accompany the student and/or facilitate that conversation.

*If the student is not receptive to those suggestions, ask: Is there a reason to believe that disclosing the information to the parent will put the student at risk of including physical or emotional abuse or an immediate risk of self-harm? If yes, call the school's lawyer. If no, inform the student that the parents will be contacted.