



# How Schools' Transgender Policies Are Eroding Parents' Rights

By Luke Berg

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## Key Points

- Schools have a long-standing tradition and legal obligation to inform parents of their children's medical and behavioral issues and to honor their decisions about what's best for their kids. Yet, prompted by a well-organized lobby, many school districts have decided that minor students can change gender identity at school without any parental involvement.
- A gender identity transition is a major event in a child's life. It can have long-term effects on a child's psyche and sense of identity, and, as a result, many mental health professionals recommend a more cautious approach, first helping children process what they are feeling and why.
- The increasingly common practice of rushing to "affirm" and facilitate a transition at school without informing parents, and even refusing to follow their wishes, runs directly against a strong body of case law recognizing parents' constitutional right to raise their children.
- State lawmakers can and should clarify that school districts must defer to parents when children struggle with gender identity issues.

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In the past few years, school districts nationwide have quietly adopted policies requiring staff to facilitate and "affirm" gender identity transitions at school without parental notice or consent—and even in secret from parents. Certain groups are telling school boards and administrators that excluding parents from the decision about whether staff will treat their child as the opposite sex is not only best practice but required by law. Neither is true. Such policies fly in the face of how schools treat every other decision of similar significance.

From a legal perspective, these policies violate parents' constitutional rights to raise their children. They also conflict with science. Many professionals in the field believe that transitioning at a young age

can become self-reinforcing and do long-term harm. And these policies divide children against parents, communicating to kids that their parents' decisions should not be respected.

As parents become aware of these policies, some through personal experience, many are wondering what can be done. Fortunately, parents can raise strong objections with their school boards and administrators, which may persuade them to change course. If that doesn't work, these policies are vulnerable to legal challenge. Finally, there is a relatively simple legislative fix: Lawmakers can, and should, prohibit public schools from taking this major decision out of parents' hands.

## The Norm and How It Was Broken

When parents send their children to school, most expect open lines of communication and assume the school will defer to them on any significant decisions. That is, for the most part, the norm. As any parent of school-age kids can attest, schools require parental consent for just about everything, even seemingly insignificant matters: sports, field trips, extracurricular activities, alternate education programs, and taking any kind of medication at school. If something more serious arises during the school day, such as a medical or health-related issue, parents rightfully expect an immediate call before any sort of intervention.

Yet in the past few years, schools nationwide have carved out an exception to this expectation for one major and controversial issue: social gender identity transitions. Unbeknownst to many parents, schools are adopting policies that allow students to change gender identity at school, adopt a new name and pronouns, and even begin using opposite-sex facilities, without parental notice or consent and sometimes in secret from parents. This shift is happening under most parents' radar—until it affects their children, when it's often too late to fight.

In Madison, Wisconsin, for example, where I live and work, the public school district a few years ago posted to its website a 35-page document<sup>1</sup> that included policies allowing students of *any age* to adopt a new “affirmed name and pronouns” at school “regardless of parent/guardian permission,” prohibiting staff from “reveal[ing]” this to parents without the student’s consent and even requiring staff to deceive parents by using the student’s “affirmed name and pronouns” at school while reverting to “their legal name and pronouns with family.”<sup>2</sup> Another Wisconsin school district recently trained its teachers that parents are “not entitled to know their kids’ identities” and that “this knowledge must be earned.”<sup>3</sup> Similar policies are showing up in school districts nationwide, including in Chicago;<sup>4</sup> Los Angeles;<sup>5</sup> Milwaukee, Wisconsin;<sup>6</sup> Montgomery County, Maryland;<sup>7</sup> New York City;<sup>8</sup> and Washington, DC.<sup>9</sup> Even some state education departments have adopted similar policies, including in New Jersey<sup>10</sup> and Virginia.<sup>11</sup> This is by

no means a comprehensive survey. And these policies aren’t always written down, as a Wisconsin parent recently discovered.

This trend appears to be driven by a few groups telling school districts that this is the best practice—and even required by law. The Gay, Lesbian, and Straight Education Network (GLSEN), for example, promotes a “model” policy that declares children have the “right” to “be addressed by a name and pronoun that corresponds to [their] gender identity” and “to keep [their] transgender status private at school,” even emphasizing that “it is critical that parental/guardian approval is never a prerequisite for respecting a student’s gender identity, including their chosen name and pronouns.”<sup>12</sup> The Madison School District’s policy credits the GLSEN policy as its starting point. The language in this policy and the other multiple policies listed above mirrors the GLSEN policy.

Similarly, the National Education Association (NEA), with the Human Rights Campaign and the American Civil Liberties Union, in 2015 published a guidance document titled *Schools in Transition*, which states schools should first “ask whether the student’s family is accepting” of a transition before “discussing with the student’s family.”<sup>13</sup> And if the family does not “support” a transition, the guidance recommends that schools come up with a plan for “how to refer to the student when communicating with the student’s parents”—suggesting that this decision can be made at school without parents’ input or knowledge.

In 2016, the Department of Education under the Obama administration issued a document recommending various “example” policies and “emerging practices for supporting transgender students.” In a section about how schools should communicate with parents, the guidance endorsed policies openly stating that “parental participation is not required” for a transition at school.<sup>14</sup>

The logic behind these policies appears to go something like this: Children have a right to “be who they are.” If children say they’re transgender, they really are. The only appropriate response is to affirm their “true” identity, and any other response will harm them. And schools need to protect self-identifying transgender kids from parents who aren’t on board with an immediate transition.

But are these assumptions true? The short answer is no.

## Lifelong Implications

The medical science on children with gender dysphoria is not settled. There is currently an ongoing and lively debate in the mental health community about how to best respond when children experience a disconnect between their biological sex and self-perceived gender identity. This debate has been covered much more extensively than is possible in this report in the media and recent books, most notably Abigail Shrier’s highly praised book on the subject.<sup>15</sup>

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This view, as Dr. Zucker explains elsewhere, is based on the idea that a child’s sense of identity is formed by “messages from family, peers, and society.”<sup>17</sup> Thus, daily affirmation of an alternate identity by respected adults, such as teachers, reinforces a child’s belief that this is actually who he or she is, causing that identity to set in and reducing the chances of learning to find comfort with one’s

body. So, instead of immediate affirmation, Dr. Zucker and others recommend first attempting to help children identify the underlying cause of their feelings and hopefully resolve the conflict.

The recent explosion of children dealing with gender identity issues strongly suggests that this is driven largely by social messaging. The UK government, for example, recently reported a “4,400 per cent increase in girls being referred for transitioning treatment in the past decade.”<sup>18</sup> Canadian clinics have also seen “exponential growth in demand.”<sup>19</sup> In the United States, providers are also “reporting large upticks in new referrals,” though “solid numbers are harder to come by.”<sup>20</sup> A recent study documented a phenomenon it called “rapid onset gender dysphoria,” in which multiple adolescents in a social group (often teenage girls) decide they are transgender in a short period.<sup>21</sup>

The research we have at this point supports that these feelings eventually go away for most children. Multiple follow-up studies have assessed the degree to which childhood gender dysphoria “persists,” and they consistently find that the vast majority (70–90 percent) of children who struggle with this ultimately revert to identifying with their biological sex (that is, if they do not transition).<sup>22</sup> Even among adults, there are a growing number of “detransitioners,” proof alone that one’s self-perception at a given time does not necessarily predict how one will feel later in life.<sup>23</sup>

It should go without saying, but the best outcome is for children to learn to embrace the body they were born with. A life at war with one’s body comes with many challenges. It is not physically possible to change sex. The surgeries that attempt to imitate a body of the opposite sex are well-known to be sterilizing and to bring other complications. Studies have also found significantly worse mental health outcomes in the transgender population, even among those who have transitioned. One of the most robust long-term studies in this area found that a group of 324 Swedish individuals who had fully transitioned (including sex-reassignment surgery) were still 19.1 times more likely to commit suicide than was the general population over an extended period.<sup>24</sup>

Transitioning at a young age poses special risks and complications. A social transition prepuberty can result in significant awkwardness when puberty

arrives. The affirming crowd promotes puberty blockers and cross-sex hormones as a solution to this problem, but these can have irreversible effects on fertility and sexual response. It can also be particularly hard for school-age children to transition back if their feelings change. In one survey, students reported strong “fear of teasing and shame to admit they had been ‘wrong,’ result[ing] in a prolonged period of distress.”<sup>25</sup>

In light of the long-term implications and the risk that an early transition will set a child down a path to that end, many experts view a social transition as a significant psychotherapeutic intervention. A well-known expert, Dr. Stephen Levine, in an affidavit for a case on this topic that I am litigating, summarizes as follows:

Therapy for young children that encourages transition cannot be considered to be neutral, but instead is an experimental procedure that has a high likelihood of changing the life path of the child, with highly unpredictable effects on mental and physical health, suicidality, and life expectancy.<sup>26</sup>

Thus, when school staff affirm a minor student’s feelings that they are “really” a different gender, they are effectively making a *medical* decision for that child in place of the parents.

Even the World Professional Association for Transgender Health (WPATH) agrees that childhood gender identity transitions are “controversial.” For those unfamiliar, WPATH is an advocacy organization that publishes a set of guidelines for transgender care. It is not a neutral organization; it strongly advocates for an affirming approach. Yet, it openly acknowledges that health professionals have “divergent views” about childhood transitions and recognizes the lack of evidence at this point “to predict the long-term outcomes of completing a gender role transition during early childhood.”<sup>27</sup>

In the end, and in direct conflict with the school policies described above, WPATH encourages health professionals to *defer to parents* “as they work through the options and implications,” even if they “do not allow their young child to make a gender-role transition.”<sup>28</sup> And this is a recommendation from an *advocacy* organization to health care *professionals*. How much more of a reason do teachers and school administrators, who have no

expertise whatsoever in these matters, need to defer to parents?

## A Slender Reed

If even WPATH recommends deferring to parents, what are schools’ justifications for excluding parents from this decision (aside from ideological conviction or fear of bad press from special interest groups)? And do the justifications offered stand up to scrutiny?

The primary argument appears to be that children have a “right” to make this decision on their own. But this flies in the face of the traditional parent-child relationship. As the Supreme Court has explained, “Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.”<sup>29</sup> Or, in another case: “Th[e] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”<sup>30</sup> Parental authority is based on the commonsense recognition that “parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”<sup>31</sup> Thus, a minor’s disagreement with a parent’s decision does “not diminish the parents’ authority to decide what is best for the child.”<sup>32</sup> And government officials, including teachers and school administrators, generally cannot override or even “review such parental decisions.”<sup>33</sup>

While the Court has recognized that minors have some limited rights that supersede their parents’ objection (most notably, to get an abortion), the lead opinion in one of those cases emphasized that, generally, “the constitutional rights of children cannot be equated with those of adults,” due to their “inability to make critical decisions in an informed, mature manner” and the “importance of the parental role in child rearing.”<sup>34</sup> Thus, “Parental notice and consent are qualifications that typically may be imposed . . . on a minor’s right to make important decisions.”<sup>35</sup>

That is not to say that minors should have no say in this decision. Part of good parenting is helping your children learn to make good decisions on their own. But parenting also sometimes requires saying no, sometimes even to protect children from themselves. The question of *when* children

are ready to decide for themselves whether to take on a different gender identity is not easy (and the answer probably differs for each child), but that is ultimately a decision for the parents to make, not for schools to preempt.

A recent example, from a family in the Kettle Moraine School District in Wisconsin, illustrates this point. Their 12-year-old daughter began struggling with some mental health issues and became convinced rather abruptly that she was transgender. After this was promptly affirmed by a mental health provider, she told school staff that she wanted to socially transition to a male name and pronouns at school. But her parents decided that *immediately* transitioning would not be best for her—they wanted her to take time to be sure—and communicated this to her and her school. But the school refused to respect the parents’ decision, forcing them to withdraw their daughter from public school and search for a private school. After an extended absence from any messages of affirmation, their daughter changed her mind, agreeing that her parents were right to put the brakes on a transition. She later expressed to her mother that “affirmative care really messed me up.”

Another main argument in support of these policies is protecting students’ right to privacy, often invoking the Family Educational Rights and Privacy Act (FERPA) in support.<sup>36</sup> But minors do not generally have a right to privacy vis-à-vis *their parents*. As *Wyatt v. Fletcher* states, “There is no clearly established law holding that a student in a public secondary school has a privacy right . . . that precludes school officials from discussing *with a parent* the student’s private matters.”<sup>37</sup>

FERPA does not provide such a right either. If anything, FERPA supports parents’ role. That law generally gives parents full access to their children’s education records.<sup>38</sup> And under the implementing regulations, only *parents* (or students over age 18) can request to change education records, including a name-change request.<sup>39</sup> In other words, these policies frequently come close to *violating* FERPA. Some certainly do. The Madison School District’s policy, for example, directs teachers to keep a form recording a student’s new “affirmed name and pronouns” out of student records, so that parents can’t access it.

Another common argument is that these policies are necessary to protect transgender kids from parents who might not support affirmation. This rationale *assumes* that anything short of immediate affirmation is inherently abusive. But that is not remotely true, much less universally accepted; as explained above, many professionals believe *affirmation* is actually harmful. Regardless of who is right, courts have long recognized that the government “has no interest in protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.”<sup>40</sup> And even when the risk from parents rises to that level, parents are entitled to significant due process protections before the state can override their decisions.<sup>41</sup>

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Finally, some argue that adopting a new name and pronouns is no big deal; it’s just like a nickname, and it allows students to explore their identity. Experts disagree. Daily affirmation by authority figures—consistently treating a child as if he or she is actually the opposite sex—can profoundly affect a child’s psyche and sense of identity.

### Reasserting Parental Authority

So what can be done? First, parents should be actively engaged in their schools and push back against any policies like this, at school board meetings and wherever else they can. And parents should get involved even if their kids aren’t presently dealing with this. Many parents whose kids struggle with gender dysphoria don’t see it coming, and by then, it’s often too late to fight such policies. This may seem obvious and overly simplistic, but I believe many school boards are simply being duped by groups like GLSEN and the NEA that excluding parents from this issue is the accepted “best” practice to support transgender students. It may not always be policy extremism driving these policies;

school leaders may be hearing from only one side. If no one says otherwise, school boards may not be aware of the debate and risks associated with teachers affirming a transition or the legal arguments against such a policy. But if parents show up armed with accurate information, schools boards might reconsider.

This has already happened in Wisconsin. The Kenosha School District recently considered a policy that, like Madison's and others, would allow students to choose a new name and pronouns at school without parental consent.<sup>42</sup> But it ultimately rejected that part of the policy, after considering the lawsuit we filed against the Madison School District calling attention to this issue.<sup>43</sup> One student's father who is running for the school board said in a speech to the board that it was "important" to "stop and ponder" court decisions that "recogniz[e] that parents are the primary decision makers with respect to their children."<sup>44</sup>

Even if political pressure fails, these policies are vulnerable to lawsuits. As discussed briefly above, a long line of cases from the United States Supreme Court holds that parents have a fundamental right, under the 14th Amendment, to "direct the upbringing and education of children under their control."<sup>45</sup> This is "perhaps the oldest of the fundamental liberty interests recognized by" the Court.<sup>46</sup> A similar right may also be protected by state constitutions, as in Wisconsin. These cases emphatically reject as "statist" and "repugnant to American tradition" one of the major premises of these policies—the "notion that governmental power should supersede parental authority" because school officials know better than parents.<sup>47</sup>

Most of these cases do not involve schools excluding parents from a major decision affecting their child—primarily because schools generally don't do this—but one case out of the US Court of Appeals for the Third Circuit stands out. In *Gruenke v. Seip*, a high school swim coach suspected a team member was pregnant, but instead of notifying her parents, the coach discussed it with others and eventually pressured the team member to take a pregnancy test. The mother sued, arguing that by failing to promptly notify and defer to her, the coach violated her "parental right to choose the proper method of resolution." The court condemned this "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."<sup>48</sup>

The Wisconsin Institute for Law & Liberty,<sup>49</sup> in partnership with Alliance Defending Freedom, has brought two lawsuits challenging such policies as a violation of parents' constitutional rights, one against the Madison School District<sup>50</sup> and another against the Kettle Moraine School District.<sup>51</sup> These cases are still in the early stages, so there is no definitive ruling on the merits yet, but they have already won a partial injunction against the Madison School District that prevents staff from lying to or deceiving parents about the name and pronouns their children are using at school. The Wisconsin Supreme Court recently granted review of the Madison case to decide whether that injunction went far enough; the argument is set for April 12, 2022.<sup>52</sup> That an injunction against intentional deception is even necessary says something about where we are. Other groups have brought similar lawsuits in California,<sup>53</sup> Florida (two cases),<sup>54</sup> Maryland,<sup>55</sup> and Virginia.<sup>56</sup> These cases provide a template that others can follow to challenge policies like this.

One problem with both litigation and political pressure, however, is that these policies aren't always written down. School boards, administrators, and their lawyers might discuss this scenario internally and reach a position without parents' awareness or any opportunity for input. In the Kettle Moraine School District, for example, there was no written policy; the parents only learned that the school would not respect their decision in the middle of the crisis, leaving them no short-term option but to withdraw their daughter from the school. When school districts make such weighty decisions without committing them to writing, it short-circuits parents' ability to hold them accountable.

In light of this, the best solution may be legislative. It would not be hard to craft a simple bill requiring parental permission before minor students can change their gender identity at school. The focus of such a bill should be on teachers and staff and how they address students. It could read something like this:

School teachers and staff, while at school, may not knowingly address a minor student using a name and pronouns at odds

with the student’s biological sex, or allow minor students to use opposite sex bathrooms and locker rooms, without written permission from a parent or legal guardian.

This could even be included as part of a package of parents’ rights in education. The Wisconsin Legislature, on March 8, 2022, passed a parents’ rights bill codifying various rights of parents, including the right to “determine the names and pronouns used for the child while at school.” (The bill now goes to the governor.)<sup>57</sup>

To be clear, such a bill would not, as some will likely argue, *require* teachers to immediately “out” to parents any student who has questions about these issues and confides in a teacher (though teachers must be *permitted* to communicate openly with parents about this, because this can be a serious mental health issue). But if a student wants to take the major step to transition, asking all teachers and staff to treat him or her as the opposite sex while at school, *that* should require parental permission, just as taking medication at school does, because—as noted above—social affirmation is a medical intervention. Teachers can still be a safe space for students to process these issues while gently explaining to students who want to transition that this is a big decision and that they need to

involve their parents if they want to do so at school with the support of staff.

No parents should go through what Jay Keck<sup>58</sup> went through, suddenly discovering one day that his daughter had changed gender identity at school, with the school’s active participation and affirmation but without any notice to him. No parents should go through what the Kettle Moraine parents went through, being forced to withdraw their daughter from public school just to protect her and preserve their parental role.

A bill to prevent this should find broad support among parents and constituents. Most parents are outraged when they learn that school districts are excluding parents from this major decision. Even parents who ultimately would allow an immediate transition should want and expect to be involved. Those who support these policies should be forced to defend them publicly and explain why they believe it’s ever appropriate to hide such a serious issue from parents or to subvert the parents’ decision about what’s best for their child. These policies have been implemented quietly for a reason. A public debate that brings them to light may be all that’s needed to start eliminating them.

## About the Author

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## Notes

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