



February 21, 2024

**Re: *Kansas School Districts' Continued Obligations to Protect LGBTQ+ Students Constitutional and Privacy Rights***

Dear Principal, Superintendent, or School Board Members:

On behalf of the ACLU of Kansas and the Kansas chapter of the National Education Association, we write to you because your school or school district may have received or heard about letters from the Kansas Attorney General's office addressing school districts' policies and procedures for supporting transgender and nonbinary students who have come out to a staff member or at school.

We believe these letters have the potential to mislead Kansas school districts about their continued obligations to protect and uphold LGBTQ+ students constitutional and statutory rights—as the letters briefly discuss parental rights, but do not address students' rights, existing federal statutes and case law that protect those student rights, nor provide an analysis of how those rights interact with parental rights in the education setting.

In light of these concerns, we felt it prudent to send this advisory letter clarifying that Kansas **does not** have a law requiring school districts to out students to their parents or guardians, and it **is not illegal** for school districts to adopt policies that address such situations on a case-by-case basis with consideration for the student's privacy and safety.

## **I. Background**

In December 2023, the Kansas Attorney General privately sent letters<sup>1</sup> to several Kansas school districts and the Kansas Association of School Boards ("KASB"), challenging district policies that consider student's safety and privacy concerns when addressing a student's decision to come out as transgender or nonbinary at school and demanding responses to various legal and procedural questions about those districts' policies.

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<sup>1</sup> RE: "*Socially Transitioning*" Minors Without Parental Consent, State of Kansas Office of the Attorney General (Dec. 7, 2023), [https://ag.ks.gov/docs/default-source/documents/letters-to-schools-and-kasb.pdf?sfvrsn=b413be1a\\_4](https://ag.ks.gov/docs/default-source/documents/letters-to-schools-and-kasb.pdf?sfvrsn=b413be1a_4).





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In early February 2024, the Attorney General publicly announced that he sent these letters to certain school districts and the KASB, and admonished four of those districts for declining to change their policies after his letter was sent.<sup>2</sup> Notably, the Attorney General did not state in his letters that such policies were illegal or point to a Kansas law that the districts were not compliant with—he merely analyzed each district’s policies for supporting transgender and nonbinary youth and labeled them as “problematic” for protecting students’ privacy rights and “surrender[ing] to woke gender ideology.”<sup>3</sup> While the Attorney General’s letters did acknowledge an important aspect of this legal issue—the existence of parental rights—his letters completely ignored other important aspects, like the constitutional privacy rights of minor students.

After the Attorney General’s public announcement, there was significant local and national media coverage regarding the Attorney General’s letters.<sup>4</sup> As the Attorney General’s announcement and letters failed to include a holistic legal analysis, we wanted to ensure Kansas school districts had a resource to assist them in understanding their duties to LGBTQ+ students who come out at school. The remainder of this advisory letter describes districts continued legal obligations to their LGBTQ+ students and discussed policy outcomes and best practices for creating safe and inclusive environments for all Kansas students.

## II. Legal Obligations to LGBTQ+ Students

The U.S. Constitution and Title IX of the Education Amendments of 1972 both place a legal duty on every Kansas school district to protect its students,

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<sup>2</sup> See *School districts ‘socially transitioning’ students without parental consent, despite AG warning*, State of Kansas Office of the Attorney General (Feb. 8, 2024), <https://ag.ks.gov/media-center/news-releases/2024/02/09/school-districts-'socially-transitioning'-students-without-parental-consent-despite-ag-warning>.

<sup>3</sup> See *RE: “Socially Transitioning” Minors Without Parental Consent*, State of Kansas Office of the Attorney General (Dec. 7, 2023), [https://ag.ks.gov/docs/default-source/documents/letters-to-schools-and-kasb.pdf?sfvrsn=b413be1a\\_4](https://ag.ks.gov/docs/default-source/documents/letters-to-schools-and-kasb.pdf?sfvrsn=b413be1a_4).

<sup>4</sup> See, e.g., Roxie Hammill, *Kobach pressures Olathe and Shawnee Mission over LGBTQ+ policies, but districts push back*, KCUR (Feb. 14, 2024), <https://www.kcur.org/education/2024-02-14/kris-kobach-pressures-olathe-schools-shawnee-mission-lgbtq-transgender-students>; John Hanna & Geoff Mulvihill, *Kansas’ AG is telling schools they must out trans kids to parents, even with no specific law*, Associated Press (Feb. 9, 2024), <https://apnews.com/article/forced-outing-transgender-students-public-schools-kansas-298ea48402fc70ed4363ff271b7235ba>.



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including LGBTQ+ students, from bullying and harassment.<sup>5</sup> In addition to this affirmative legal duty, school districts also must protect students’ privacy rights and cannot adopt policies that discriminate against or single out transgender or LGBTQ+ students.

And as explained in the National ACLU’s previous Open Letter to Principals and Superintendents,<sup>6</sup> students have a constitutional right to privacy with respect to information about their sexual orientation or gender identity, and it is unlawful for school officials to disclose, or compel students to disclose, that information. Federal courts have explicitly upheld these privacy rights with respect to minors.

Minors have a constitutionally protected interest in keeping intimate facts about themselves private, including sexual orientation.<sup>7</sup> This constitutional right to privacy also encompasses a minor’s private medical information.<sup>8</sup> While minors’ privacy rights are not always identical to adults’ privacy rights, parents’ rights to direct the upbringing of their children do not always trump their children’s independent privacy rights.<sup>9</sup> **Rather, “parental interests must be balanced with the child’s right to privacy, which is also protected under the Due Process Clause.”<sup>10</sup>**

And recent court cases affirm these privacy principles in the context of gender identity<sup>11</sup>—finding that **minors have independent privacy rights**

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<sup>5</sup> See, e.g., *Doe v. Hutchinson*, 728 Fed. Appx. 829, 832 (10th Cir. 2018); *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996).

<sup>6</sup> American Civil Liberties Union (Aug. 26, 2020), [https://www.aclu.org/sites/default/files/field\\_document/student\\_privacy\\_ltr\\_fall\\_2020.pdf](https://www.aclu.org/sites/default/files/field_document/student_privacy_ltr_fall_2020.pdf).

<sup>7</sup> See *C.N. v. Wolf*, 410 F. Supp. 2d 894 (C.D. Cal 2005) (finding that “the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of that information to others”); *C.N. v. Wolf*, No. SACV058JVSMLGX, 2007 WL 9702949, at \*5 (C.D. Cal. Dec. 14, 2007) (noting that subsequent courts are likely to find that “the right to privacy in one’s sexual identity is now clearly established”).

<sup>8</sup> See *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000).

<sup>9</sup> See *Doe v. Irwin*, 615 F.2d 1162, 1168-69 (6<sup>th</sup> Cir. 1980).

<sup>10</sup> *Anspach ex rel. Anspach v. City v. City of Philadelphia, Dep’t of Pub. Health*, 503 F.3d 256, 261 (3d Cir. 2007).

<sup>11</sup> See, e.g., *John & Jane Parents I v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 WL 3544256, at \*7 (D. Md. Aug. 18, 2022) (holding that parents do not have a fundamental constitutional right “to be promptly informed of their child’s gender identity, when it differs from that usually associated with their sex assigned at birth”); *Foote v. Town*



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regarding their gender identity, and that parents’ rights to direct the upbringing of their children do not *automatically* override those privacy rights.

In addition to these constitutional privacy rights minors maintain while at school, the Family Educational Rights and Privacy Act (“FERPA”) also protects students against the disclosure of personally identifiable information.<sup>12</sup> The National Association of Secondary School Principals (“NASSP”) has recognized that students’ “transgender status, legal name or sex assigned at birth is confidential medical information and considered ‘personally identifiable information’ under” FERPA and cautions that “[d]isclosure of that information to other school staff or parents could violate the school’s obligations under FERPA or constitutional privacy protections.”<sup>13</sup>

In short, there is no Kansas or federal law explicitly mandating that schools must out LGBTQ+ students to their parents or other staff—but there are significant statutory and constitutional protections in place making such forced outing unlawful, such that schools that adopt forced outing policies are likely opening themselves up to costly lawsuits and legal liability.

#### IV. Policy Outcomes and Best Practices for LGBTQ+ Students

Not only do school districts have constitutional and statutory obligation to protect their LGBTQ+ students’ privacy interests, but research shows that districts that adopt LGBTQ+-inclusive and affirming policies that consider the students’ safety and needs create safer, healthier environments for LGBTQ+ students.

School officials may often think they are doing the right thing by revealing a student’s sexual orientation or gender identity to their parents—but doing so can have dramatic and unforeseen consequences. In one particularly tragic

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*of Ludlow*, No. CV 22-30041-MGM, 2022 WL 18356421, at \*1, \*5 (D. Mass. Dec. 14, 2022) (holding that parents’ rights regarding making medical decisions for their children were not implicated merely by addressing students by their preferred name and pronouns—which “requires no special training or skill” but “simply accords the person the basic level of respect expected in a civil society generally”).

<sup>12</sup> See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. §§ 99.00, *et seq.*

<sup>13</sup> NASSP, Position Statement on Transgender Students (2016), <https://www.nassp.org/policy-advocacy-center/nassp-position-statements/transgender-students/>.



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case, a teenager died by suicide after an authority figure threatened to disclose his sexual orientation to his family.<sup>14</sup> While this is an extreme case, there are a range of serious harms that can arise from disclosing a student's sexual orientation or gender identity to their parents—such as verbal or physical abuse or being thrown out of the home.<sup>15</sup>

Additionally, we know that when schools adopt exclusionary policies or policies that target LGBTQ+ students for different treatment, it can lead to increased bullying and harassment of LGBTQ+ students, cause students to feel more stressed and scared while at school, and even lead to increased suicide attempts.<sup>16</sup> However, when schools adopt inclusive and affirming policies—such as policies allowing students and employees to use their chosen name and pronouns at school and protecting their privacy interests—it leads to a decrease in suicide attempts, an increase in feelings of safety at school, and better grades and health outcomes for LGBTQ+ students.<sup>17</sup>

Kansas school districts that desire to not only comply with their legal obligations to LGBTQ+ students, but to create safe and supportive learning environments for all students and staff should consider adopting comprehensive LGBTQ+-inclusive policies that protect students' constitutional and statutory privacy rights.<sup>18</sup>

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<sup>14</sup> See *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000).

<sup>15</sup> See *Guidance on Notifying Parents When a Student Has Been Bullied Based on Sexual Orientation or Gender Identity/Expression*, Mass Dep't of Educ. (Jan. 2011), <http://www.doe.mass.edu/sfs/bullying/PNGuidance.html>; Daiiana Griffith, *LGBTQ+ youth are at greater risk of homelessness and incarceration*, Prison Policy Initiative (Jan. 22, 2019), [https://www.prisonpolicy.org/blog/2019/01/22/lgbtq\\_youth/](https://www.prisonpolicy.org/blog/2019/01/22/lgbtq_youth/).

<sup>16</sup> See e.g., *New Poll Emphasizes Negative Impacts of Anti-LGBTQ Policies on LGBTQ+ Youth*, The Trevor Project, <https://www.thetrevorproject.org/blog/22881/>; *Transgender Athletes: A Research-Informed Fact Sheet*, KU School of Social Welfare, <https://socwel.ku.edu/sites/socwel/files/documents/Transgender-Sports-Youth-FactSheet.pdf>.

<sup>17</sup> See e.g., *Transgender Athletes: A Research-Informed Fact Sheet*, KU School of Social Welfare, <https://socwel.ku.edu/sites/socwel/files/documents/Transgender-Sports-Youth-FactSheet.pdf>.

<sup>18</sup> See e.g., *Model Laws & Policies*, GLSEN, <https://www.glsen.org/model-laws-and-policies>. GLSEN is a national nonpartisan nonprofit organization that works to ensure that every member of every school community is valued and respected regardless of sexual orientation, gender identity, or gender expression. GLSEN's website includes model policy for a school, a district, or a local education agency outline inclusive policy protections from bullying and harassment.



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Thank you for your prompt attention to this letter. Should you wish to discuss this or any other related issues, please do not hesitate to contact us at [dhiebert@aclukansas.org](mailto:dhiebert@aclukansas.org), [sbrett@aclukansas.org](mailto:sbrett@aclukansas.org) or [kimberly.vogelsberg@knea.org](mailto:kimberly.vogelsberg@knea.org).

Kind regards,

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