

**TOXIC PRIVACY: HOW THE RIGHT TO PRIVACY  
WITHIN THE TRANSGENDER STUDENT PARENTAL  
NOTIFICATION DEBATE THREATENS THE SAFETY OF  
STUDENTS AND COMPROMISES THE RIGHTS OF  
PARENTS**

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ABSTRACT

*Should schools be required to keep the gender identity of transgender<sup>1</sup> students private from their parents? Because federal law does not address this question, school districts get caught in the middle of two arguments. “Transgender Student Advocates” assert that the Constitutional privacy right allows students to keep their gender identity private from their parents. Conversely, “Parental Rights Advocates” argue that the Constitutional privacy right enables parents to control how schools address their child’s gender identity. This debate, and its focus on privacy, creates a seemingly intractable debate, pitting student rights against parental rights.*

*This Article demonstrates that the privacy right claimed by both parties obscures the actual rights at issue and threatens the welfare of all parties. Thus, instead of focusing on privacy, this Article proposes a “Parental Consultation/Student Control Process” to address this question. This Process identifies and upholds the fundamental rights of students and parents and incorporates social science regarding gender identity to address the concerns of all parties. Specifically, the proposed Process addresses the rights and concerns of parents by creating a procedure in which parents could be actively involved in their child’s gender identity journey. However, the Process also*

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1. This Article uses the term “transgender” to describe individuals who were (1) assigned female at birth and now identify as men or (2) assigned male at birth and now identify as women. See generally *Understanding Gender Identities*, THE TREVOR PROJECT (Aug. 23, 2021), <https://www.thetrevorproject.org/resources/article/understanding-gender-identities/> (discussing gender identity and gender as a social construct).

*upholds the rights and welfare of students by granting them the right to decide how to explore, identify, and express their gender identity. The result is a Process that creates an open and safe environment in which schools can honor and consider the interests of all parties and uphold the ultimate goal of protecting the well-being of all students.*

TABLE OF CONTENTS

INTRODUCTION .....329

I. THE LAW WITHIN THE TRANSGENDER STUDENT PARENTAL NOTIFICATION DEBATE .....337

    A. *Federal Law and Transgender Students*.....338

    B. *How State and Local Agencies Address Transgender Student Questions* .....340

    C. *The Current Legal Debate: Inaccurate Conceptions of the Right to Privacy and the Role of Educational Institutions* .....341

        1. *Differing misconceptions of the Fourteenth Amendment* .....341

        2. *Differing conceptions of the role of educational institutions* .....344

            a. *How the Personal Decision Right affects educational institutions* .....345

            b. *How the Upbringing Right affects educational institutions*.....349

        3. *The Fourteenth Amendment establishes a clear role for educational institutions* .....354

II. THE SOCIAL SCIENCE ROLE IN THE TRANSGENDER STUDENT PARENTAL NOTIFICATION DEBATE.....355

    A. *Gender Dysphoria* .....357

    B. *Privacy from Parents: Unnecessary, Unhealthy, and Unrealistic* .....359

        1. *Privacy can do more harm than good*.....361

        2. *Educational institutions cannot guarantee privacy to students* .....365

    C. *The Role of Parents*.....368

        1. *Upholding parental involvement, but not granting total control* .....369

        2. *Addressing parental concerns* .....371

            a. *Biological acceptance* .....371

2023]	<i>TOXIC PRIVACY</i>	329
	b. Social influence .....	374
	D. <i>How Educational Institutions Can Help Address Gender Identity Questions</i> .....	378
	1. <i>Foster parental acceptance</i> .....	378
	2. <i>Guide students through their gender identity journey</i> .....	380
	III. THE PROPOSED PARENTAL CONSULTATION/STUDENT CONTROL PROCESS .....	382
	CONCLUSION .....	395

## INTRODUCTION

A twelve-year-old sixth grader, who was assigned female at birth, has been exploring gender identity and is now ready to come out at school as a boy. Thus, he prefers to be referred to by his chosen name, Saul, and he/him/his pronouns. He also wants to use boys' bathrooms and locker-rooms. However, Saul tells his principal that he has not informed his parents of this change. Saul confesses that his parents would likely disown him if they found out. Therefore, Saul asks that the school keep his transition a secret from his parents. He plans to dress in "girl clothes" on his way to school then, before class, change into his "boy clothes" and repeat the process before going home.<sup>2</sup> Saul asks that the school refrain from informing his parents of his gender identity or his plan to present as Saul at school.

This scenario exemplifies the gender identity situations schools may face throughout the United States.<sup>3</sup> Federal law generally requires educational institutions to honor a student's gender identity.<sup>4</sup> Thus, educational institutions must allow students to use the name and pronouns consistent with their gender identity and participate in programs and use facilities based on their gender identity, regardless of their sex assigned

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2. *See id.* (highlighting societal norms associated with gender).

3. *See infra* Section I.B; *see also* 34 C.F.R. § 106.2 (2022) (defining the phrase "educational institution" as a local educational agency, preschool, and private elementary or secondary school receiving federal funds).

4. *See infra* Section I.A.

at birth.<sup>5</sup> However, the ramifications of these requirements have yet to be fully addressed by the law. One of the most prevalent and challenging legal issues related to gender identity involves this “transgender student parental notification”<sup>6</sup> debate. Specifically, should students be allowed to require schools to keep their gender identity private from their parents?<sup>7</sup>

This question has become increasingly prevalent as statistics show an increasing number of students identify with genders different from their sex assigned at birth.<sup>8</sup> In these cases, parents may be unsupportive of their child’s gender identity journey for various reasons, including religious and cultural beliefs.<sup>9</sup> As a result, students often want to explore their gender identity at school but keep their exploration private from their parents.<sup>10</sup> However, parents may want to know this information about their child. Thus, educational institutions across the nation must determine how to address this “transgender student parental notification debate.”

Because federal law does not directly address this issue, educational institutions are left to develop general policies to

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5. See *infra* notes 62–63 and accompanying text.

6. See Adam Clark, *N.J. Schools Can Keep Transgender Kids’ Secret from Parents, State Says*, NJ.COM (Oct. 7, 2018, 12:00 PM), [https://www.nj.com/education/2018/10/nj\\_transgender\\_students\\_parental\\_notification.html](https://www.nj.com/education/2018/10/nj_transgender_students_parental_notification.html) (noting conflicting opinions regarding whether schools should notify parents of students’ gender identity); see also 6 C.F.R. § 115.5 (defining “transgender” as “a person whose gender identity (i.e., internal sense of feeling male or female) is different from the person’s assigned sex at birth”).

7. See Clark, *supra* note 6.

8. See JODY L. HERMAN, ANDREW R. FLORES & KATHRYN K. O’NEILL, *HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES?* 5 (2022) (noting that the youngest age group (thirteen to seventeen) has the highest estimated percentage of individuals who identify as transgender).

9. Fausta Rosati, Jessica Pistella, Maria Rosaria Nappa & Roberto Baiocco, *The Coming-Out Process in Family, Social, and Religious Contexts Among Young, Middle, and Older Italian LGBTQ+ Adults*, 11 FRONT. PSYCH. at 1, 3 (2020); Dani E. Rosenkrantz, *Factors Impacting Parental Acceptance of an LGBT Child* (Apr. 11, 2018) (Ph.D. dissertation, University of Kentucky) (on file with UKnowledge, University of Kentucky).

10. See Donna St. George, *Gender Transitions at School Spur Debate over When, or if, Parents Are Told*, WASH. POST (July 18, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/07/18/gender-transition-school-parent-notification/> (noting students may feel safer by first disclosing their gender identity at school and later at home).

address student privacy and parental rights.<sup>11</sup> In response, several states have proposed laws to address this issue.<sup>12</sup> These policies, in turn, have led to controversy and debate within the legal and social realms.<sup>13</sup> Thus, the transgender student parental notification debate has become one of the most prevalent and complex issues that states and educational institutions must address.<sup>14</sup>

Both sides of the transgender student parental notification debate claim the Fourteenth Amendment's "right to privacy" and social science support their respective positions. On one side, "Transgender Rights Advocates" suggest that students have a constitutional privacy right to keep their gender identity private, even from their parents.<sup>15</sup> They claim that this privacy right is often necessary to protect the mental health and well-being of transgender students.<sup>16</sup> As in Saul's situation,

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11. See *infra* notes 69–71 and accompanying text.

12. See *infra* notes 70–71 and accompanying text. There is also proposed legislation at the federal level which would prohibit schools from "receiv[ing] federal funding unless they receive parental consent when it comes to affirming a transgender student's gender identity," but such legislation is unlikely to pass with Democratic control in Congress. See also Ryan Tarinelli, *Cotton's Bill Would Require Parental OK for Schools to Use Transgender Student's Preferred Pronouns*, ARK. DEMOCRAT GAZETTE (Nov. 28, 2021, 2:50 AM), <https://www.arkansasonline.com/news/2021/nov/28/cottons-bill-would-require-parental-ok-for/>.

13. See *infra* Section I.C.

14. See Stephen Sawchuk, *Are Teachers Obligated to Tell Parents Their Child Might Be Trans? Courts May Soon Decide*, EDUC. WEEK (Apr. 28, 2022), <https://www.edweek.org/policy-politics/are-teachers-obliged-to-tell-parents-their-child-might-be-trans-courts-may-soon-decide/2022/04> (discussing difficulties parents and teachers face in deciding how to best approach parental notification).

15. NAT'L EDUC. ASS'N, LEGAL GUIDANCE ON TRANSGENDER STUDENTS' RIGHTS 19–20 (2016), [https://www.nea.org/sites/default/files/2020-07/2018\\_Legal%20Guidance\\_Transgender%20Student%20Rights.pdf](https://www.nea.org/sites/default/files/2020-07/2018_Legal%20Guidance_Transgender%20Student%20Rights.pdf).

16. See Samantha Allen, *How 'Parental Permission' Could Destroy Transgender Kids' Privacy*, DAILY BEAST (July 10, 2018, 5:07 AM), <https://www.thedailybeast.com/how-parental-permission-could-destroy-transgender-kids-privacy> (describing that policies requiring schools to notify parents of their children's gender identity "pose a potential threat to transgender health," as "[r]esearchers have found that social support plays a significant role in reducing the risk of suicide among the marginalized population").

many students fear their parents will disown them, or worse, if they find out about their true gender identity.<sup>17</sup>

On the other side, “Parental Rights Advocates” argue that the right to privacy grants parents the right to guide the upbringing of their children without interference from governmental agencies such as educational institutions.<sup>18</sup> Thus, Parental Rights Advocates claim parents have a right to determine how educational institutions address their child’s gender identity.<sup>19</sup> According to Parental Rights Advocates, this “Upbringing Right” is necessary to allow parents to ensure their child develops a healthy gender identity, unpolluted by “societal influences.”<sup>20</sup>

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17. See *id.* For example, many parents decide to send their children to conversion therapy upon becoming uncomfortable with their LGBTQ+ identities. See *id.* As of January of 2023, twenty-one states do not partially or wholly ban conversion therapy. Conversion “Therapy” Laws, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/conversion\\_therapy](https://www.lgbtmap.org/equality-maps/conversion_therapy) (Jan. 5, 2023).

18. See *The Justice Foundation Supports Parental Rights in Education*, JUST. FOUND., <https://thejusticefoundation.org/info/parental-rights> (last visited Dec. 30, 2022) (“We believe that parents have the fundamental right to direct the education and upbringing of their own children.”); see also Sarah Parshall Perry & Alexander Phipps, *School Districts Are Hiding Information About Gender-Transitioning Children from Their Parents. This Is Unconstitutional*, HERITAGE FOUND. (Mar. 24, 2021), <https://www.heritage.org/gender/commentary/school-districts-are-hiding-information-about-gender-transitioning-children-their>.

19. See Parshall Perry & Phipps, *supra* note 18 (“To raise and educate a child as parents see fit is . . . [a] fundamental, constitutionally guaranteed right[.]”); see also *The Justice Foundation Supports Parental Rights in Education*, *supra* note 18 (“Parents are the best protectors of children and have the natural right and duty to care for their children. We seek to protect governmental encroachment on parental authority. We oppose the evolution of children’s ‘rights,’ which undermine parental rights and allow outsiders to usurp the natural and constitutional rights of parents. Children are naturally incapable of exercising self-government until reaching the age of majority.”).

20. See *The Justice Foundation Supports Parental Rights in Education*, *supra* note 18 (“Parental rights are fundamental to the family and a healthy culture.”); see, e.g., *Parental Rights Cases to Know*, ABA (Feb. 1, 2016), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-35/february-2016/parental-rights-cases-to-know/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/february-2016/parental-rights-cases-to-know/) (collecting cases that “recognize parents’ constitutional rights to the care, custody, and control of their children”); Kim Parker, Juliana Menasce Horowitz & Anna Brown, *Americans’ Complex Views on Gender Identity and Transgender Issues*, PEW RSCH. CTR. (June 28, 2022), <https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/> (detailing survey responses where participants thought “that changing views on gender identity are merely a fad that’s being pushed by the media”).

Thus, the transgender student parental notification debate is often presented as a battle between two intractable interpretations of the privacy right. On one side, Transgender Rights Advocates argue that students have a constitutional privacy right to keep their gender identity private from their parents, and violating this right could subject transgender students to significant psychological trauma.<sup>21</sup> Transgender Rights Advocates argue that unsupportive parents force transgender children to reject their true gender identity, which is dangerous to the child's health.<sup>22</sup> Conversely, Parental Rights Advocates argue that parents have a constitutional privacy right to guide their child's upbringing.<sup>23</sup> They suggest that violating this "Upbringing Right" will rob parents of their ability to protect their children from the confusion that results from differing societal messages on gender.<sup>24</sup> Parental Rights Advocates often suggest that Transgender Rights Advocates are trying to push their "transgender agenda" on children

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21. See generally Evan Ettinghoff, Note, *Outed at School: Student Privacy Rights and Preventing Unwanted Disclosures of Sexual Orientation*, 47 LOY. L.A. L. REV. 579, 603–05 (2014) (making this point in the context of schools prematurely revealing a child's sexual orientation); *Outing*, AM. C.L. UNION, <https://www.aclu.org/issues/lgbtq-rights/lgbtq-youth/outing> (last visited Dec. 30, 2022) ("[R]evealing a student's sexual orientation or gender identity to their parents not only violates the student's privacy rights, but can open an LGBT child to hostility, rejection, and even violence from their parents."); Tony Renning, *Transgender, Non-Binary and Gender Expansive Students: Student Privacy v. Parental Rights*, RENNING LEWIS & LACY (July 13, 2021), <https://law-rl.com/transgender-non-binary-and-gender-expansive-students-student-privacy-v-parental-rights/> ("The argument in favor of non-disclosure [of a student's gender identity] is that transgender, non-binary and gender expansive students have the right to decide when, with whom and to what extent to share private information, including their gender identity.").

22. See MOVEMENT ADVANCEMENT PROJECT, TALKING ABOUT FAMILY ACCEPTANCE & TRANSGENDER YOUTH 2 (2019), <https://www.lgbtmap.org/file/talking-about-family-acceptance-transgender-youth.pdf> ("[W]hen parents reject a transgender child or try to force them to reject the gender their child knows themselves to be, it can contribute to depression, suicidal behavior and other negative health outcomes."). A Pew Research Center study found that some believe societal views on gender identity are not evolving quickly enough, in part because "too many people in our society aren't open to change when it comes to these issues." Parker et al., *supra* note 20.

23. See Parshall Perry & Phipps, *supra* note 18; see also LUKE BERG, AM. ENTER. INST., HOW SCHOOLS' TRANSGENDER POLICIES ARE ERODING PARENTS' RIGHTS 1 (2022), <https://www.aei.org/research-products/report/how-schools-transgender-policies-are-eroding-parents-rights/>.

24. See Parshall Perry & Phipps, *supra* note 18.

unprepared to handle navigating their gender identity.<sup>25</sup> As a result, the primary goal of protecting the safety, well-being, and rights of students and parents often gets lost in the debate in which both sides suggest the other carries nefarious and harmful motives.<sup>26</sup>

However, a closer look at the law and social science surrounding the transgender student parental notification debate suggests that both sides rely on incomplete and antiquated legal arguments and social science to support their positions.<sup>27</sup> As a result, the positions of both sides threaten the fundamental rights and well-being of everyone involved.<sup>28</sup>

Regarding the law, Transgender Rights Advocates suggest the constitutional right of privacy established through the Fourteenth Amendment requires educational institutions to keep a student's gender identity private from parents upon the student's request.<sup>29</sup> However, the courts have not extended this privacy right to grant students or educational institutions the absolute right to withhold information from parents about their child's educational experience generally or their gender identity specifically.<sup>30</sup> Instead, this privacy right suggests that students have a right to determine and express their gender identity without limits or control by school districts or parents.<sup>31</sup> Similarly, the Upbringing Right claimed by Parental Rights Advocates based on the Fourteenth Amendment does not give parents the right to dictate or control the gender identity policies of school districts.<sup>32</sup> However, it does give parents the

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25. See Parker et al., *supra* note 20 (“[T]hose who say [views on gender identity] are changing too quickly . . . [say] that changing views on gender identity are merely a fad that’s being pushed by the media.”).

26. See *supra* notes 22–25 and accompanying text (providing examples of Transgender Rights Advocates suggesting nefarious motives of Parental Rights Advocates and vice versa).

27. See *infra* Section I.C; *infra* Part II.

28. See *infra* Section I.C; *infra* Part II.

29. See *infra* Section I.C.1.

30. See *infra* Section I.C.2.

31. See *infra* Section I.C.2.a.

32. See *infra* Section I.C.2.b.



right to make informed decisions about their child's education.<sup>33</sup>

Transgender Rights Advocates and Parental Rights Advocates also mispresent social science research regarding gender identity.<sup>34</sup> Transgender Rights Advocates suggest that a student's right to privacy is necessary to protect the safety and mental well-being of transgender students.<sup>35</sup> However, some social science research demonstrates that the key to the healthy development of gender identity is not privacy but instead creating an open environment where students can explore, find, and express their gender identity.<sup>36</sup> Promising and promoting privacy can do more harm than good, as it suggests gender identity can and should be held in private, and it discounts the role parents play in a child's development.<sup>37</sup> Conversely, Parental Rights Advocates use social science to suggest that parental guidance is necessary to help students develop a healthy and natural gender identity.<sup>38</sup> However, the social science regarding gender identity demonstrates that children as young as four years old develop a personal sense of their gender and develop a need to express it.<sup>39</sup> Thus, parental efforts to dictate or control a child's gender identity can stifle the ability of children to develop their own gender identity.<sup>40</sup>

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33. See *infra* Section I.C.2.b.

34. See *infra* Part II.

35. Elizabeth J. Meyer, *Coming Out at School: Do Parents Need to Know?*, PSYCH. TODAY (Oct. 27, 2021), <https://www.psychologytoday.com/us/blog/gender-and-schooling/202110/coming-out-school-do-parents-need-know>.

36. See *infra* Section II.B.1.

37. See *infra* Section II.B.1.

38. See *infra* Section II.C.

39. Jason Rafferty, *Gender Identity Development in Children*, HEALTHYCHILDREN.ORG, <https://www.healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Identity-and-Gender-Confusion-In-Children.aspx> (May 11, 2022) [hereinafter Rafferty, *Gender Identity Development in Children*].

40. See *Transgender Children & Youth: Understanding the Basics*, HUM. RTS. CAMPAIGN FOUND., <https://www.hrc.org/resources/transgender-children-and-youth-understanding-the-basics> (last visited Dec. 30, 2022) ("Trying to change your child's gender identity—either by denial, punishment, reparative therapy or any other tactic—is not only ineffective; it is dangerous and can do permanent damage to your child's mental health.").

To address the transgender student parental notification issue, this Article proposes the “Parental Consultation/Student Control Process.” This Process removes the right to privacy argued by both sides of the debate.<sup>41</sup> Instead, it takes note of social science and legal rights at issue to create a procedure that upholds the rights and concerns of everyone involved.<sup>42</sup> The Parental Consultation/Student Control Process allows educational institutions to involve parents in their child’s gender identity journey actively but grants students the ultimate right to decide how educational institutions address their gender identity.<sup>43</sup> This Process upholds the rights of parents by allowing them to be actively involved in how educational institutions assess their child’s gender identity.<sup>44</sup> However, transgender students retain the right to decide how their school addresses their gender identity.<sup>45</sup> Ultimately, this Process creates an open, transparent, and safe environment for students to explore their gender identity while considering the rights and interests of parents.<sup>46</sup>

To develop this Parental Consultation/Student Control Process, Part I of this Article starts with summarizing the current law surrounding the transgender student parental notification debate.<sup>47</sup> This section demonstrates that the current law does not definitively address the transgender student parental notification debate.<sup>48</sup> However, case law addressing

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41. See *infra* text accompanying notes 343–45.

42. See *infra* Part III.

43. See *infra* Part III.

44. See *infra* Part III.

45. See *infra* notes 359–64 and accompanying text.

46. See *infra* Part III. But see *Outing*, *supra* note 21 (“[R]evealing a student’s sexual orientation or gender identity to their parents . . . can open an LGBT child to hostility, rejection, and even violence from their parents.”); Arielle P. Schwartz, *Why Outing Can Be Deadly*, NAT’L LGBTQ TASK FORCE, <https://www.thetaskforce.org/why-outing-can-be-deadly/> (last visited Dec. 30, 2022) (“[O]uting—the act of exposing an individual’s sexual orientation and/or gender identity—has been linked to suicide.”); Meyer, *supra* note 35 (“In some cases, [students] know quite clearly that they could be subject to violence, rejection, or even homelessness if their parents or guardians find out [about their gender identity or sexual orientation].”).

47. See *infra* Part I.

48. See *infra* Sections I.A–B.

related legal issues establishes that both sides of the discussion misrepresent the right to privacy.<sup>49</sup> Next, Part II of this Article summarizes the social science related to the transgender student parental notification debate, demonstrating that the privacy rights claimed by both parties are unnecessary to protect students and pose significant risks to their development.<sup>50</sup> Finally, the Article concludes in Part III with a proposal to address the transgender student parental notification debate by inserting the Parental Consultation/Student Control Process into federal law.<sup>51</sup> Through this Parental Consultation/Student Control Process, this Article provides a pathway to enable educational institutions to address the transgender student parental notification debate in a way that upholds the rights of everyone involved and incorporates social science to protect the health, safety, and well-being of all students.<sup>52</sup>

#### I. THE LAW WITHIN THE TRANSGENDER STUDENT PARENTAL NOTIFICATION DEBATE

Federal law does not directly address how educational institutions must address the gender identity of their students.<sup>53</sup> Instead, various federal directives and court actions attempt to address this issue.<sup>54</sup> These actions collectively provide insight into the legal issues surrounding the transgender student parental notification debate.<sup>55</sup>

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49. See *infra* Section I.C.

50. See *infra* Part II.

51. See *infra* Part III.

52. See *infra* Part III. *But see* sources cited *supra* note 44 (explaining that for some students, outing them to their parents can lead to hostility, rejection, violence, homelessness, and even suicide).

53. See 20 U.S.C. § 1681. The language of Title IX prohibits discrimination based on “sex” but does not define sex or otherwise explicitly address gender identity. See *id.*

54. See *infra* notes 62–63.

55. See *infra* Section I.A.

*A. Federal Law and Transgender Students*

On the federal level, the issue of transgender rights within educational institutions revolves around Title IX of the Educational Amendments (“Title IX”), which generally protects against discrimination based on sex as follows: “No person in the United States shall, on the *basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”<sup>56</sup> Title IX’s prohibition against sex discrimination is implemented and enforced by the United States Department of Education’s Office for Civil Rights (“OCR”).<sup>57</sup> Specifically, OCR receives its authority through the implementing regulations.<sup>58</sup> In sum, these implementing regulations grant the Department of Education the authority to determine remedies necessary to address Title IX violations and overcome effects of sex discrimination.<sup>59</sup>

The Title IX implementing regulations do not directly address gender identity.<sup>60</sup> However, OCR has declared that it interprets and enforces Title IX implementing regulations to protect against discrimination based on gender identity.<sup>61</sup> Further, the courts have upheld OCR’s general interpretation of Title IX to protect against gender identity discrimination.<sup>62</sup> Perhaps most famously, in the “Virginia bathroom case” the United States Court of Appeals for the Fourth Circuit found that Title IX protected against sex discrimination and therefore, required

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56. 20 U.S.C. § 1681 (emphasis added).

57. *Title IX and Sex Discrimination*, DEP’T OF EDUC., [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (Aug. 20, 2021) (summarizing OCR’s role in enforcing Title IX).

58. *See* 34 C.F.R. § 106.1.

59. *Id.* § 106.3(a)–(b).

60. *See* 34 C.F.R. §§ 106.1–.82. For example, the term “gender identity” or “transgender” does not appear in the implementing regulations. *Id.*

61. Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637, 32637–39 (Jun. 22, 2021).

62. *See, e.g., Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 869–70 (S.D. Ohio 2016).

2023]

TOXIC PRIVACY

339

schools to allow students to use bathrooms consistent with their gender identity.<sup>63</sup> In finding that Title IX's protection against sex discrimination applies to discrimination based on gender identity, the Court cited to the Supreme Court's decision that found the federal protection against workplace sex discrimination also included gender identity discrimination.<sup>64</sup>

Despite OCR's general proclamation that Title IX protects against discrimination based on gender identity,<sup>65</sup> OCR has yet to address the transgender student parental notification debate directly or precisely how educational institutions should balance the protection of transgender students with the rights of parents. Instead, the Title IX implementing regulations generally indicate that protections against sexual discrimination cannot be used or interpreted to "[d]eprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution."<sup>66</sup> Further, the Title IX implementing regulations generally state that educational institutions must comply with other federal laws while protecting against sex discrimination, including the Family Educational Rights and Privacy Act, which addresses student records access.<sup>67</sup> Thus, educational institutions have little specific legal guidance to handle the transgender student parental notification debate.<sup>68</sup>

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63. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616–19 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 210 L. Ed. 2d 977 (2021).

64. *Id.* at 616–17 (citing *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741–42 (2020)).

65. Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. at 32637–39.

66. 34 C.F.R. § 106.6(d)(2) (2022).

67. *Id.* § 106.6(e); 20 U.S.C. § 1232(g).

68. OCR has yet to issue formal guidelines requirements addressing parental notification and the Title IX implementing regulations do not address parental notification. 34 C.F.R. §§ 106.1–82.

B. *How State and Local Agencies Address Transgender Student Questions*

Because federal law and OCR provide no definitive guidance regarding how to address the transgender student parental notification debate, states and local educational institutions must address this issue and the applicable underlying laws.<sup>69</sup> The lack of guidance has led to an assortment of local policies and proposed state laws regarding how to handle requests by students to keep their gender identity private from their parents.<sup>70</sup> As a result, the transgender student parental notification debate has become a politicized issue, with both sides claiming the other is endangering the safety of students.<sup>71</sup> To resolve this issue, it is necessary to take a fresh look at the actual laws and rights at issue.

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69. *Compare NJDOE Issues New Guidance on Rights of Transgender Students*, N.J. SCH. BDS. ASS'N (Oct. 2, 2018), <https://www.njsba.org/news-publications/school-board-notes/october-2-2018-vol-xlii-no-10/new-guidance-issued-by-njdoe-on-rights-of-transgender-students/> (noting that the New Jersey Department of Education released guidance stating that schools “shall accept a student’s asserted gender identity, and parental consent is not required . . .”), *with* H.B. 1557 (Fla. 2022) (“The bill specifies how a parent’s fundamental right to make decisions regarding the care and upbringing of his or her child must be addressed in the public school setting. The bill requires that school districts adopt procedures for notifying parents if there is a change in their student’s services or monitoring related to a student’s mental, emotional, or physical health or well-being. Such procedures must reinforce the fundamental right of parents to make decisions regarding the upbringing and control of their children by requiring school district personnel to encourage students to discuss issues related to their well-being with their parent.”).

70. *See, e.g., NJDOE Issues New Guidance on Rights of Transgender Students*, *supra* note 69 (explaining the New Jersey Department of Education’s guidelines, which require New Jersey school districts to respect a student’s gender identity even without parental consent); *Frequently Asked Questions*, CAL. DEP’T OF EDUC., <https://www.cde.ca.gov/re/di/eo/faqs.asp#accordionfaq> (Sept. 16, 2021) (“Disclosing that a student is transgender without the student’s permission may violate California’s antidiscrimination law by increasing the student’s vulnerability to harassment and may violate the student’s right to privacy.”); H.B. 658, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (requiring any government agent or entity, including teachers, that “has knowledge that a child under its care or supervision has exhibited symptoms of gender dysphoria or otherwise demonstrates a desire to be treated in a manner opposite of the child’s biological sex,” to inform the child’s parents).

71. *See infra* Section I.C (detailing how students and parents believe the right to privacy applies to them); *infra* Part II (explaining how students and parents apply social science to their respective views).

C. *The Current Legal Debate: Inaccurate Conceptions of the Right to Privacy and the Role of Educational Institutions*

To determine how to address the transgender student parental notification debate from a legal perspective, it is necessary to assess the legal arguments made by both Transgender Rights Advocates and Parental Rights Advocates. Both Transgender Rights Advocates and Parental Rights Advocates use the “right to privacy” created by the Fourteenth Amendment to support their positions.<sup>72</sup> However, both sides misrepresent the right to privacy and its application to transgender students.<sup>73</sup> Instead, the legal rights of both students and parents can and should be upheld through different pathways.

1. *Differing misconceptions of the Fourteenth Amendment*

Transgender Rights Advocates generally use the “right to privacy” to challenge laws or policies that force individuals to expose their gender identity without consent.<sup>74</sup> The courts have yet to apply this general privacy right to the transgender student parental notification debate.<sup>75</sup> However, case law regarding the privacy right concerning transgender status generally, and the privacy right in educational institutions specifically, demonstrates how privacy applies to the transgender student parental notification debate.<sup>76</sup>

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72. See *infra* Section I.C.1 (discussing how Transgender Rights Advocates rely on the Fourteenth Amendment’s right to privacy to support their position); *infra* Section I.C.2 (discussing how Parental Rights Advocates rely on the Fourteenth Amendment’s right to privacy to support their position).

73. See *infra* Section I.C.1 (discussing how Transgender Rights Advocates rely on the Fourteenth Amendment’s right to privacy to support their position); *infra* Section I.C.2 (discussing how Parental Rights Advocates rely on the Fourteenth Amendment’s right to privacy to support their position).

74. See NAT’L EDUC. ASS’N, *supra* note 15, at 20 (“Disclosure of a student’s transgender status or requiring students to produce records of the student’s transgender status may violate the constitutional right to privacy.”).

75. The cases discussed in Section I.C.2.b discuss privacy issues involved with gender identity but do not address situations in which students request privacy from their parents.

76. See discussion *infra* Section I.C.2.

Although the Constitution does not explicitly establish a right to privacy, the Supreme Court has interpreted the Fourteenth Amendment's protection of liberty to include a broad privacy right.<sup>77</sup> The Supreme Court further clarified the right to privacy within the Fourteenth Amendment to protect two distinct sets of interests: (1) "Private Information Right," the right to keep personal information private; and (2) "Personal Decision Right," the right to make important decisions privately.<sup>78</sup> Thus, both rights must be assessed separately within the transgender student parental notification debate.

The courts have analyzed the Private Information Right to transgender status generally.<sup>79</sup> For example, in *Carcaño v. McCrory*, the court assessed a North Carolina law that limited access to restrooms based on biological sex.<sup>80</sup> Specifically, the court in *Carcaño* analyzed claims that the North Carolina law violated the right of privacy by "forcing transgender individuals to use bathrooms in which they will appear out of place, thereby disclosing their transgender status to third parties."<sup>81</sup>

The court in *Carcaño* provided a detailed analysis of this "right to privacy" concerning transgender rights, noting that several other courts found that "an individual's transgender status qualifies for constitutional protection because such information is of a private, sexual nature and disclosure of this information could subject a transgender person to ridicule, harassment, or even bodily harm."<sup>82</sup> However, the court in

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77. Doug Linder, *The Right of Privacy*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/rightofprivacy.html> (last visited Dec. 30, 2022).

78. *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."); see also *Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174, 182–83 (1st Cir. 1997).

79. See, e.g., *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 646–48 (M.D.N.C. 2016).

80. *Id.* at 621. Under the statute, biological sex was "defined as the sex listed on [an individual's] birth certificate." *Id.*

81. *Id.* at 646.

82. *Id.*



*Carcaño* refused to follow this case law, noting it did not apply to the Fourth Circuit.<sup>83</sup> Instead, the court found that the right to privacy only applies if a reasonable expectation of privacy exists.<sup>84</sup> Based on the specifics of the case at issue, the Court found no such expectation of privacy because a person's biological sex is listed on an individual's birth certificate which is "freely available in public records."<sup>85</sup>

Thus, the *Carcaño* decision demonstrates that the courts have not definitively applied the Private Information Right to transgender status.<sup>86</sup> Other courts are still deciding whether the Private Information Right applies to an individual's transgender identity.<sup>87</sup> The court in *Carcaño* acknowledged a potential court split in the issue of privacy and transgender status and further relied on the specifics of North Carolina law to determine that no reasonable expectation of privacy exists for gender identity status.<sup>88</sup> Thus, the *Carcaño* decision suggests that the Private Information Right only applies to transgender status if a reasonable expectation of privacy exists within the specific situation.<sup>89</sup>

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83. *Id.* at 647.

84. *Id.*

85. *Id.* (citing N.C. GEN. STAT. § 130A-93(b) (2020)).

86. *See id.* at 646-48 (establishing that different circuits have addressed the privacy issue differently and showing that the court's decision was not based on the definitive application of the privacy right to transgender status but instead based on the specifics of the situation).

87. *See, e.g., Doe v. Wash. State Dept' of Corr.*, No. 4:21-CV-5059-TOR, 2021 WL 2453099, at \*6 (E.D. Wash. May 17, 2021) ("Defendants assert those cases are inapplicable because they do not stand for the proposition that transgender status is a protected category and no other authority within the Ninth Circuit has identified transgender status as a protected status . . . . While Defendants are correct to the extent that the Ninth Circuit has not directly addressed the issue, it is not beyond the realm of possibility that the Ninth Circuit would find transgender status a protected class given its treatment of transgender issues in other areas of the law.").

88. *Carcaño*, 203 F. Supp. 3d at 646-47 ("None of these cases applied Fourth Circuit law, however, and the Fourth Circuit's decision in *Walls* casts doubt on the validity of these cases in this circuit.").

89. *Id.*

## 2. *Differing conceptions of the role of educational institutions*

Assessing the Private Information Right within the context of the transgender student parental notification debate involves considering whether educational institutions provide a reasonable expectation of privacy for students. In 2013, the United States Court of Appeals for the Fifth Circuit addressed students' privacy rights concerning sexual orientation and parental notification.<sup>90</sup> In *Wyatt v. Fletcher*, a student brought a claim against high school coaches, claiming the coaches violated the student's constitutional right to privacy by disclosing the student's sexual orientation to the student's parents during a disciplinary meeting.<sup>91</sup> The student argued that the Fourteenth Amendment granted her a privacy right that precluded the school from discussing private matters with her parents without her consent, including sexual matters.<sup>92</sup>

The court in *Wyatt* analyzed this claim by reviewing the general right of privacy established by the Supreme Court, which, according to the court, generally created an "'individual interest in avoiding disclosure of personal matters' by the government."<sup>93</sup> However, the court in *Wyatt* explained there was little other Supreme Court guidance on this individual interest.<sup>94</sup> Thus, the court concluded there was no clearly established constitutional right to "privacy . . . under the Fourteenth Amendment that forbids school officials from discussing student sexual information during meetings with parents."<sup>95</sup>

From a real-world perspective, as discussed below, students cannot reasonably expect educational institutions to keep their gender identity private from their parents in a school setting.<sup>96</sup>

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90. *Wyatt v. Fletcher*, 718 F.3d 496, 500 (5th Cir. 2013).

91. *Id.* at 500–01.

92. *Id.* at 499, 504–05.

93. *Id.* at 505 (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

94. *Id.*

95. *Id.* at 509–10.

96. See discussion *infra* Section II.B.

2023]

TOXIC PRIVACY

345

Even if an educational institution does everything within its power to keep information from a student's parents, the fact that the student is presenting as a different gender, including dressing differently and using a different name, will make keeping this information private almost impossible.<sup>97</sup> Thus, despite claims by Transgender Rights Advocates, the Private Information Right likely does not require school districts to refrain from informing parents of their children's gender identity.<sup>98</sup> However, the "Personal Decision Right" plays a different role within the transgender student parental notification debate.

a. How the Personal Decision Right affects educational institutions

Educational institutions must also address the Personal Decision Right established through the Fourteenth Amendment, which generally grants people the right to make personal decisions free from governmental interference.<sup>99</sup> The courts have not yet applied the Personal Decision Right to the transgender student parental notification debate though courts have become generally involved.<sup>100</sup> However, case law suggests students have the right to decide how educational institutions address their gender identity, even in the face of parental opposition.

Regarding gender identity generally, the Personal Decision Right grants individuals the right to explore, determine, and

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97. See U.S. DEP'T OF EDUC., EXAMPLES OF POLICIES AND EMERGING PRACTICES FOR SUPPORTING TRANSGENDER STUDENTS 4 (2016), <https://www2.ed.gov/about/offices/list/oese/osh/emergingpractices.pdf> (discussing some difficulties schools experience when maintaining gender identity privacy).

98. See *Wyatt*, 718 F.3d at 510.

99. See *Whalen v. Roe*, 429 U.S. 589, 598–600, 600 n.26 (1977).

100. See Evan Gerstmann, *Court Enjoins School District from Withholding Information from Parents About Their Childrens' Gender Identity*, FORBES (Oct. 1, 2020, 2:01 PM), <https://www.forbes.com/sites/evangerstmann/2020/10/01/court-enjoins-school-district-from-withholding-information-from-parents-about-their-childrens-gender-identity/?sh=365c14bc48e9>; St. George, *supra* note 10.

establish their gender identity without governmental limit.<sup>101</sup> Courts have invalidated laws that ban incarcerated individuals from receiving hormone therapy or sex-reassignment surgery.<sup>102</sup> Some scholars believe this supports the proposition that the Fourteenth Amendment prevents legislatures from restricting access to medical treatment.<sup>103</sup> This reasoning falls in line with the Supreme Court's interpretation of the Personal Decision Right as protecting the right of all people to express their personal identity.<sup>104</sup> This may suggest that people have a fundamental right to make decisions about their self-concept, including their gender identity.<sup>105</sup> The question remains, though: does this Personal Decision Right regarding gender identity apply to children?

Another line of evidence suggests that children may hold this Personal Decision Right even in the case of parental opposition. Depending on the context, children have the right to make various personal decisions without the consent of their parents, including the right to obtain contraception and seek mental

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101. See *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (striking down a state law prohibiting contraceptive use because choosing to use contraceptives “concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down a state law prohibiting interracial marriage because “the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“[I]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”); see also *The Rights of Lesbian, Gay, Bisexual and Transgender People*, AM. C.L. UNION, <https://www.aclu.org/other/rights-lesbian-gay-bisexual-and-transgender-people> (last visited Dec. 27, 2022).

102. See *Fields v. Smith*, 712 F. Supp. 2d 830, 836, 869 (E.D. Wis. 2010).

103. Esinam Agbemenu, Note, *Medical Transgressions in America's Prisons: Defending Transgender Prisoners' Access to Transition-Related Care*, COLUM. J. GENDER & L., June 2015, at 1, 35 & n.154.

104. See *Griswold*, 381 U.S. at 487; *Loving*, 388 U.S. at 12; *Eisenstadt*, 405 U.S. at 453; *Lawrence*, 539 U.S. 578; see also *Kelley v. Johnson*, 425 U.S. 238, 250–51 (1976) (Marshall, J., dissenting).

105. See *Kelley*, 425 U.S. at 250–51 (Marshall, J., dissenting).

health treatment.<sup>106</sup> In general, children have the same constitutional rights as adults unless the specific right: (1) exposes the vulnerability of children; (2) exposes their inability to make mature decisions; or (3) involves the importance of the parental role in child-rearing.<sup>107</sup>

The transgender student parental notification debate does not implicate any exceptions that would justify reducing a student's Personal Decision Right. Regarding the "vulnerability of children" exception, experts in the field say that children as young as four developed a sense of gender identity and, therefore, have the capacity to explore, discover, and define their gender identity independently.<sup>108</sup> Further, the Parental Consultation/Student Control Process proposed by this Article provides students with guidance from professionals and even parents in their gender identity journey.<sup>109</sup> Therefore, the Process does not require or suggest that students will be addressing their gender identity without support and guidance.<sup>110</sup> Thus, children will not be especially vulnerable when addressing their gender identity in the educational institution context.<sup>111</sup>

Regarding the "inability to make mature decisions" exception, evidence suggests that children can make mature

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106. See, e.g., "Do You Have to Tell My Mom?" *Minors, Health Care & the Law*, AM. C.L. UNION OF PA., <https://www.aclupa.org/en/do-you-have-tell-my-mom-minors-health-care-law> (last visited Dec. 27, 2022) ("[A] federal court in Pennsylvania has interpreted the Minor's Consent Act to include a right of minors' to receive contraception on their own consent."); *What Types of Care Can You Receive Without Parental Consent?*, N.Y. C.L. UNION, <https://teenhealthny.org/what-types-of-care-can-you-receive-without-parental-consent/> (last visited Dec. 27, 2022) ("In New York State, you have the right to get birth control from a clinic or your health care provider without involving a parent. . . . You are able to consent to mental health services and counseling in certain settings. Mental health services related to gender identity follow the same rules as general mental health care."). But see *Parental Involvement in Minors' Abortions*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions> (Jan. 1, 2023) ("[Thirty-six] states require parental involvement [different from consent] in a minor's decision to have an abortion.").

107. *Bellotti v. Baird*, 443 U.S. 622, 634–37 (1979).

108. Rafferty, *Gender Identity Development in Children*, *supra* note 39.

109. See *infra* Part III.

110. See *infra* Part III.

111. See *infra* Part III.

decisions with the aid of professionals.<sup>112</sup> Again, the Parental Consultation/Student Control Process proposed by this Article requires educational institutions to provide students with resources to help guide them on their gender identity journey, assisting them with mature decisions.<sup>113</sup> Finally, the courts reduce children's rights if the issue "involves the importance of parental role in child-rearing" because they assume parents are both able to determine what is in the best interest of their child and subsequently act in this best interest.<sup>114</sup> However, when a third party, specifically a professional, is involved, courts may be willing to supplant the parental judgment with the professional judgment or incorporate both judgments.<sup>115</sup> As explained below, the Parental Consultation/Student Control Process proposed by this Article involves a degree of parental input and, therefore, does not suggest blanketly eliminating the parental role in child-rearing.<sup>116</sup>

Thus, students do not have a Private Information Right under the Fourteenth Amendment that would allow them to require educational institutions to keep their gender identity private from their parents.<sup>117</sup> Since educational institutions do not establish a reasonable expectation of privacy for students, the Private Information Right likely does not apply to gender identity parental notification.<sup>118</sup> However, the Personal Decision Right suggests that students have the right to make decisions regarding their gender identity and specifically how educational institutions address their gender identity.<sup>119</sup> Thus,

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112. See Federica Vergani, Comment, *Why Transgender Children Should Have the Right to Block Their Own Puberty with Court Authorization*, 13 FIU L. REV. 903, 921 (2019).

113. See *infra* Part III.

114. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

115. See William Adams, *But Do You Have to Tell My Parents? The Dilemma for Minors Seeking HIV-Testing and Treatment*, 27 J. MARSHALL L. REV. 493, 510 (1994) ("The social science research thus far supports the assumptions that most adolescent minors are legally competent and that they often consult parents and other adults when making significant personal decisions.").

116. See *infra* Part III.

117. See *supra* Section I.C.1.

118. See *supra* Section I.C.2.

119. See *supra* notes 101–108 and accompanying text.

2023]

TOXIC PRIVACY

349

students' constitutional rights can be upheld through the Personal Decision Right by ensuring students have the right to decide how educational institutions address their gender identity.<sup>120</sup> By upholding this right, the law will not interfere with the parental Upbringing Right also established under the Fourteenth Amendment, as discussed below.<sup>121</sup>

b. How the Upbringing Right affects educational institutions

The courts have also interpreted the Fourteenth Amendment to grant parents the right to guide their child's upbringing without interference.<sup>122</sup> This constitutional Upbringing Right gives parents the fundamental constitutional liberty right to "make decisions concerning the care, custody, and control of their children."<sup>123</sup>

Parental Rights Advocates cite this Upbringing Right to support their position that educational institutions must involve parents in their child's gender identity.<sup>124</sup> Specifically, Parental Rights Advocates claim that the Fourteenth Amendment gives parents the right to guide their child's upbringing free from governmental interference, and therefore, parents should have control over how public educational

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120. See *infra* Part III (discussing how the proposed Parental Consultation/Student Control Process creates a process to uphold the student's constitutional rights by granting them the Personal Decision Right to control how their educational institution addresses their gender identity); see also GAY, LESBIAN & STRAIGHT EDUC. NETWORK & NAT'L CTR. FOR TRANSGENDER EQUAL., MODEL DISTRICT POLICY ON TRANSGENDER AND GENDER NONCONFORMING STUDENTS (2016), <https://transequality.org/sites/default/files/GLSEN%20Trans%20Model%20Policy%202016.pdf>.

121. See *infra* Section I.C.2.b.

122. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (describing "the interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court").

123. *Id.* at 66 ("In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

124. See Mary Rice Hasson, *The War on Parents' Rights*, WASH. EXAM'R (Jan. 23, 2020, 11:00 PM), <https://www.washingtonexaminer.com/opinion/the-war-on-parents-rights>.

institutions address gender identity.<sup>125</sup> By withholding information about their child's gender identity, Parental Rights Advocates argue that educational institutions rob parents of their right to counsel their child regarding gender identity questions or determine how to address their child's gender identity questions.<sup>126</sup>

Although the courts have consistently recognized and upheld this Upbringing Right as part of the Fourteenth Amendment's liberty protections, the courts have yet to definitively apply it to the transgender student parental notification debate.<sup>127</sup> However, the court's application of the Upbringing Right in other contexts establishes its role in the transgender student parental notification debate.<sup>128</sup> Specifically, case law indicates parents should not have control over their child's gender identity but should be involved in the process.<sup>129</sup>

The Upbringing Right is often brought up in the context of challenges to school policies allowing students to use facilities based on gender identity.<sup>130</sup> For example, in *Parents for Privacy v. Barr*, the plaintiffs alleged that an Oregon Public School's policy allowing students to use facilities based on their gender identity violated the Upbringing Rights of parents who found the policy objectionable.<sup>131</sup> Specifically, the plaintiffs claimed that the transgender school policy violated parents' Upbringing Right because it infringed on their ability to "raise their children with a respect for traditional modesty" and offended their own "sincerely-held religious beliefs."<sup>132</sup>

The court in *Barr* recognized the Upbringing Right but found that this right did not give parents the authority to dictate the

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125. *Id.*; see also Parshall Perry & Phipps, *supra* note 18.

126. See St. George, *supra* note 10.

127. See Hasson, *supra* note 124.

128. See *infra* notes 130–43.

129. See *infra* notes 130–43.

130. See, e.g., *Parents for Priv. v. Dall. Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1083–84, 1108 (D. Or. 2018).

131. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1217, 1230 (9th Cir. 2020).

132. *Id.* at 1230.



2023]

TOXIC PRIVACY

351

curriculum or control how educational institutions address gender identity.<sup>133</sup> Instead, the court found that the Upbringing Right granted parents the right to decide whether to send their child to a specific school.<sup>134</sup>

Similarly, in *Students and Parents for Privacy v. School Directors of Township High School District 211*, the court assessed the Upbringing Right concerning a school district policy allowing students to use the facilities corresponding with their gender.<sup>135</sup> Again, parents argued that this policy violated the Upbringing Right by infringing on the parents' right to guide their children's education and specifically protect them from gender identity practices they found objectionable.<sup>136</sup> The court found that the Upbringing Right did not grant parents the right to control the gender identity policy of educational institutions but instead gave parents the right to decide whether to send their child to a public educational institution based on the curriculum offered by the institution.<sup>137</sup> Thus, the court summarized the Upbringing Right as the "right to provide supplemental education or to choose an alternative to public education rather than a right to overrule aspects of public education."<sup>138</sup> In other words, the Upbringing Right allowed parents to decide if they wanted to send their child to a particular school.<sup>139</sup> However, the Upbringing Right does not grant parents the right to dictate or control educational institutions' handling of gender identity.<sup>140</sup>

Thus, case law addressing gender identity questions in educational institutions distinguish between controlling the policies of an educational institution—which Upbringing Right

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133. *Id.* at 1231.

134. *Id.*

135. *Students & Parents for Priv. v. Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891, 903 (N.D. Ill. 2019).

136. *See id.* at 894–96.

137. *See id.* at 904.

138. *Id.*

139. *See id.*

140. *Id.*

does not grant—and the right of parents to make informed decisions about whether to send their child to public schools—which the Upbringing Right provides.<sup>141</sup> Moreover, the courts have established this distinction when interpreting the Upbringing Right in other contexts, finding that the Fourteenth Amendment grants parents the right to remove their children from public schools for various reasons, including based on parental beliefs that the curriculum or policy of the school district was morally objectionable.<sup>142</sup> In sum, the Upbringing Right grants parents the right to determine where to send their child for education but does not grant parents the right to control, dictate, or determine the policies of the selected school.<sup>143</sup>

The courts have not directly applied the Upbringing Right to the transgender student parental notification debate.<sup>144</sup> However, cases that apply the Upbringing Right to gender identity questions generally suggest that parents do not have the right to dictate how educational institutions address their child's gender identity.<sup>145</sup> If the law gives parents this right, it would be akin to allowing parents to dictate the educational institution's policy for handling students' gender identity.<sup>146</sup> Instead, the Upbringing Right grants parents the ability to make informed decisions about where to send their child for an education.<sup>147</sup>

For parents to make informed decisions as granted by the Upbringing Right, parents may believe that educational institutions must disclose their policies regarding gender

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141. See, e.g., *id.*; *Parents for Priv. v. Barr*, 949 F.3d 1210, 1230–31 (9th Cir. 2020).

142. See, e.g., *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1205–06 (9th Cir. 2005), *amended on denial of reh'g*, 447 F.3d 1187 (9th Cir. 2006).

143. See, e.g., *Barr*, 949 F.3d at 1229–33.

144. See discussion *supra* Section I.C.2.b (discussing the role of the Upbringing Right in the transgender student parental notification debate).

145. See, e.g., *Barr*, 949 F.3d at 1230–31; *Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. at 904.

146. See *Barr*, 949 F.3d at 1231.

147. See *id.* at 1230–32.

identity.<sup>148</sup> Specifically, parents may believe that they must know if the school allows their child to identify with a gender different from their sex assigned at birth.<sup>149</sup> If the parent objects, the Upbringing Right grants parents the right to remove the child from the educational institution.<sup>150</sup>

Thus, to uphold the Upbringing Right within the transgender student parental notification debate, parents may argue that the law must require educational institutions to inform them of their gender identity policies generally and how their child's gender identity will be, or is, addressed specifically.<sup>151</sup> However, the law should clarify that this Upbringing Right does not grant parents the right to dictate or control how their child's gender identity is addressed.<sup>152</sup> The Parental Consultation/Student Control Process proposed by this Article upholds the Upbringing Right by requiring educational institutions to inform parents of their child's gender identity and involve them in the process of developing a plan to address their child's gender identity.<sup>153</sup> However, as discussed in the

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148. See Hannah Farrow, *Parents Want to Know How Children Identify Their Gender, National Survey Finds*, TAMPA BAY TIMES, <https://www.tampabay.com/news/education/2020/07/24/parents-want-to-know-how-children-identify-their-gender-national-survey-finds/> (July 24, 2020) ("When it comes to schools informing parents of their children's gender identities, [70%] of parents say they believe they should be informed 'that their child identifies as transgender or has questions' about their gender identity."); see generally Erik M. Zimmerman, *Defending the Parental Right to Direct Education: Meyer and Pierce as Bulwarks Against State Indoctrination*, 17 REGENT U. L. REV. 311, 325, 347 (2005) (discussing the tension between parents' constitutional rights to raise their children and the government's interest in childhood education).

149. See Farrow, *supra* note 148.

150. See Heather M. Good, Comment, "*The Forgotten Child of Our Constitution*": *The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641, 646–48 (2005) (summarizing the enforcement of the Upbringing Right to allow parents to raise their children as they see fit by removing their children from educational institutions). *But see* Jessica Valenti, *Homophobic, Transphobic Parents Make Abusive Homes. Let's Help LGBT Kids Get Out*, THE GUARDIAN (Jan. 5, 2015, 12:30 PM), <https://www.theguardian.com/commentisfree/2015/jan/05/homophobic-transphobic-parents-abusive-homes-lgbt-kids> (discussing the impact of decisions by unsupportive parents on their transgender children).

151. Farrow, *supra* note 148.

152. The Parental Consultation/Student Control Process, proposed by this Article, creates a process that requires educational institutions to inform parents of their gender identity policy, but it does not grant parents the right to dictate how the educational institution addresses their students' gender identity. See *infra* Part III.

153. See *infra* Part III.

proposed law in Part III below, the Process does not allow parents to dictate how educational institutions ultimately manage gender identity.<sup>154</sup>

3. *The Fourteenth Amendment establishes a clear role for educational institutions*

As explained above, parents and transgender students hold constitutional rights that apply to the transgender student parental notification debate.<sup>155</sup> However, by solely focusing on privacy rights, the issue becomes an intractable debate between two seemingly conflicting sets of rights.<sup>156</sup> By focusing on the Personal Decision Right, Transgender Rights Advocates suggest the constitutional rights of transgender students will be violated if educational institutions involve parents in their child's gender identity journey without consent from the child.<sup>157</sup> Conversely, Parental Rights Advocates suggest that giving students the right to explore their gender identity without parental consent violates the parents' constitutional Upbringing Right.<sup>158</sup> Instead of focusing on privacy, the Parental Consultation/Student Control Process proposed by this Article focuses on the rights and concerns of both parties.<sup>159</sup>

Once the rights of both sides are established, the law can develop a system that upholds and protects the rights and interests of all involved.<sup>160</sup> Specifically, the law can honor the parents' Upbringing Right by requiring educational institutions to inform parents of their child's gender identity and involve them in the process of determining how to address their child's gender identity.<sup>161</sup> At the same time, the law can uphold the

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154. *See infra* Part III.

155. *See supra* Section I.C.

156. *See supra* Sections I.C.1–2.

157. *See supra* Section I.C.2.a.

158. *See supra* Section I.C.2.b.

159. *See infra* Part III.

160. The Parental Consultation/Student Control Process set forth in Part III proposes a process that upholds the rights of the parents and the students. *See infra* Part III.

161. *See supra* Section I.C.2.b (discussing the Upbringing Right).

2023]

TOXIC PRIVACY

355

Personal Decision Right of transgender students by granting students the ability to decide how educational institutions will address their gender identity.<sup>162</sup>

Social science can help further develop this Parental Consultation/Student Control Process and explain precisely how the law can balance the rights of parents and students.<sup>163</sup> As with the legal issues, social science tends to be interpreted differently in the eyes of Transgender Rights Advocates and Parental Rights Advocates.<sup>164</sup> This difference of view contributes to the current “all or nothing” portrayal of the transgender student parental notification debate.<sup>165</sup> However, when actual social science is viewed from both sides’ perspectives, it can also support and develop the Parental Consultation/Student Control Process suggested by the law.<sup>166</sup>

## II. THE SOCIAL SCIENCE ROLE IN THE TRANSGENDER STUDENT PARENTAL NOTIFICATION DEBATE

Social science provides vast insight into the key components necessary to protect the safety and health of children through their gender identity journey.<sup>167</sup> Both Transgender Rights Advocates and Parental Rights Advocates cite social science research to support their respective positions.<sup>168</sup> Transgender Rights Advocates cite social science demonstrating that students’ ability to keep their gender identity status private is vital to ensuring the healthy development of gender identity.<sup>169</sup> Conversely, Parental Rights Advocates cite social science

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162. See *supra* Section I.C.2.a. (discussing the Personal Decision Right).

163. See *infra* Part II.

164. See *supra* notes 15–20 and accompanying text (discussing the distinct legal and social science arguments).

165. See *supra* notes 15–20 and accompanying text.

166. Part III establishes how social science can be used to develop the Parental Consultation/Student Control Process. See *infra* Part III.

167. See, e.g., Diane Ehrensaft, *From Gender Identity Disorder to Gender Identity Creativity: True Gender Self Child Therapy*, 59 J. HOMOSEXUALITY 337, 338–40 (2012).

168. See *supra* notes 15–20.

169. See, e.g., Dane Menkin & Dalmacio Dennis Flores, *Transgender Students: Advocacy, Care, and Support Opportunities for School Nurses*, 34 NASN SCHOOL NURSE 172, 174 (2019).

suggesting the essential role parents play in guiding their children through their gender identity journey and the harm parental non-involvement can cause.<sup>170</sup> While both cite legitimate research, both provide incomplete pictures of social science.<sup>171</sup> As a result, the insight social science can provide to the transgender student parental notification debate often gets lost as both sides suggest that the health of students requires the law to uphold their position.<sup>172</sup> However, a complete look at the relevant social science can be used to develop a process that honors the legal rights of parents and their trans or gender-nonconforming children.<sup>173</sup>

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170. See, e.g., Brooke Migdon, *Mother Says Her Daughter's School 'Manipulated' Her into Changing Her Gender Identity*, THE HILL (Jan. 24, 2022), <https://thehill.com/changing-america/respect/diversity-inclusion/591107-mother-says-her-daughters-school-manipulated-her/>. But see Heather Boerner, *What the Science on Gender-Affirming Care for Transgender Kids Really Shows*, SCI. AM. (May 12, 2022), <https://www.scientificamerican.com/article/what-the-science-on-gender-affirming-care-for-transgender-kids-really-shows/> (“Of the 2,242 people [out of 17,151 people studied] who reported that they reverted to living as the gender associated with the sex they were assigned at birth, just [15.9%] said they did so because of internal factors such as questioning their experienced gender but also because of fear, mental health issues and suicide attempts. The rest reported the cause was social, economic and familial stigma and discrimination. A third reported that they ceased living openly as a trans person because doing so was ‘just too hard for [them].’”); Liam Knox, *Media's 'Detransition' Narrative is Fueling Misconceptions, Trans Advocates Say*, NBC News (Dec. 19, 2019, 8:23 AM), <https://www.nbcnews.com/feature/nbc-out/media-s-detransition-narrative-fueling-misconceptions-trans-advocates-say-n1102686> (“No one disputes that transition regret does exist and that there are trans people who return to the sex they were assigned at birth. However, trans advocates say some of the recent coverage around the topic portrays detransitioning as much more common than it actually is, fueling misconceptions about the gender transition process and painting trans people as just temporarily confused or suffering from a misdiagnosed psychological disorder. This misleading information, they say, can have serious real-world consequences, from misguided policy proposals to social stigma.”).

171. See, e.g., Amy N. Farley & Bethy Leonardi, *Beyond Bathroom Bills and the Gender Identity Debate: Complicating the Policy Conversation About Supporting Trans Students in School*, 35 EDUC. POL'Y 274, 274 (2021) (“Schools and districts across the country have been thrust into the political limelight as they grapple with sometimes competing policy messages about the education of transgender and gender expansive students. . . . [A] focus on bathroom bills and policies regarding trans accessibility have distracted from a conversation that needs to be elevated to address broader structural issues and should ultimately be driven by families and trans youth.”).

172. See Allen, *supra* note 16; Parshall Perry & Phipps, *supra* note 18.

173. See *infra* Section II.B.1 (summarizing the insight provided by social science in the context of legal privacy rights).

### A. Gender Dysphoria

Social science uses the term “gender dysphoria” to identify the difficulties many transgender and gender-nonconforming people face.<sup>174</sup> Specifically, gender dysphoria is defined as “the feeling of discomfort or distress that might occur in people whose gender identity differs from their sex assigned at birth or sex-related physical characteristics.”<sup>175</sup> Social science clarifies that being transgender or gender nonconforming is not a mental disorder.<sup>176</sup> Thus, social science provides insight into how to help people generally develop a healthy gender identity by exploring the possibility that a person’s gender identity may not match their sex assigned at birth.<sup>177</sup>

The distress of gender dysphoria can manifest itself in many ways, including depression, suicidal thoughts, and social withdrawal.<sup>178</sup> According to a national survey on mental health

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174. See *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (Aug. 2022).

175. *Gender Dysphoria*, MAYO CLINIC (Feb. 26, 2022), <https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/symptoms-causes/syc-20475255> [hereinafter *Gender Dysphoria*, MAYO CLINIC].

176. See, e.g., AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA 1 (2013), [https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA\\_DSM-5-Gender-Dysphoria.pdf](https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf) (“It is important to note that gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition.”).

177. See Zowie Davy & Michael Toze, *What is Gender Dysphoria? A Critical Systematic Narrative Review*, 3 *TRANSGENDER HEALTH* 159, 160–61 (2018).

178. See *Gender Dysphoria*, MAYO CLINIC, *supra* note 175; *Data on Transgender Youth*, TREVOR PROJECT (Feb. 22, 2019), <https://www.thetrevorproject.org/research-briefs/data-on-transgender-youth/>; Ashley Austin, Shelley L. Craig, Sandra D’Souza & Lauren B. McInroy, *Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors*, J. INTERPERSONAL VIOLENCE, Apr. 2020, at 1 (“Data indicate that 82% of transgender individuals have considered killing themselves and 40% have attempted suicide, with suicidality highest among transgender youth.”); THE TREVOR PROJECT, 2022 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 4, 8 (2022), [https://www.thetrevorproject.org/survey-2022/assets/static/trevor01\\_2022survey\\_final.pdf](https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf) [hereinafter THE TREVOR PROJECT] (“[Fifty-eight percent] of LGBTQ youth reported experiencing symptoms of depression including nearly two-thirds of transgender and nonbinary youth . . . .”); see also Sarah D. Sparks, *Transgender Students Need Adult Support in School. Is it Slipping?*, EDUC. WK. (Nov. 17, 2021), <https://www.edweek.org/leadership/transgender-students-need-adult-support-in-school-is-it-slipping/2021/11> (“Transgender students, who make up nearly [one] in [fifty] U.S. high school students, have been among the most isolated groups during the pandemic . . . .”).

of LGBTQ youth, “[n]early [one] in [five] transgender and nonbinary youth attempted suicide.”<sup>179</sup> This distress can also be caused by several different events including bullying, harassment, social rejection, or the need to hide one’s true self.<sup>180</sup> Thus, navigating gender dysphoria will depend on the individual and circumstances.<sup>181</sup>

Generally, social science research suggests transgender children navigate gender dysphoria either through “transitioning” or affirming their gender assigned at birth.<sup>182</sup> Gender-nonconforming children are fluid in how they identify and may neither transition from nor affirm their gender assigned at birth.<sup>183</sup> The process of transitioning can occur through “medical transitioning,” in which the child undergoes medical procedures to change their birth gender, or through “social transitioning,” in which the child changes their social “presentation” to match their gender identity.<sup>184</sup> Some children resolve gender dysphoria by identifying with their gender

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179. THE TREVOR PROJECT, *supra* note 178.

180. *LGBTQI+ Youth*, STOPBULLYING.GOV, <https://www.stopbullying.gov/bullying/lgbtq> (Sept. 10, 2021); Ariane Resnick, *What Does it Mean to Be in the Closet?*, VERYWELL MIND, <https://www.verywellmind.com/what-does-it-mean-to-be-in-the-closet-5192426> (July 31, 2021); see Letter from Ilona M. Turner, Legal Dir., Transgender L. Ctr., to Sue Savaglio-Jarvis, Superintendent, Kenosha Unified Sch. Dist. (Apr. 19, 2016) (on file with author) [hereinafter Letter from Ilona M. Turner to Sue Savaglio-Jarvis] (“Because transgender people face such high rates of discrimination, harassment, and violence, courts have recognized that revealing a person’s transgender status without their explicit and voluntary consent is plainly prohibited.”).

181. See WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 9 (2012); see also Arlene Istar Lev, *Gender Dysphoria: Two Steps Forward, One Step Back*, 41 CLINICAL SOC. WORKJ. 288, 289–91 (2013) (“Transgender people represent an enormous diversity of humanity, crossing all racial, ethnic, class, and cultural populations, all ages, dis/abilities, and religions.”).

182. See WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 181, at 2.

183. See *id.* at 9.

184. Shelley Evans, Jamie Crawley, Debbie Kane & Kathryn Edmunds, *The Process of Transitioning for the Transgender Individual and the Nursing Imperative: A Narrative Review*, 77 J. ADVANCED NURSING 4646, 4653 (2021); see also WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 181, at 9–10.



2023]

TOXIC PRIVACY

359

assigned at birth, becoming comfortable with, and affirming that gender over time.<sup>185</sup>

Within the transgender student parental notification debate, Transgender Rights Advocates suggest that granting students the right to keep their gender identity private from potentially hostile parents is important in allowing them to healthily and safely embark on their gender identity journey.<sup>186</sup> Conversely, Parental Rights Advocates suggest that parents must have control over their child's gender identity to enable their children to explore gender identity in a healthy and safe way.<sup>187</sup> While social science provides bases for both viewpoints regarding the experiences of transgender and gender-nonconforming children, a full picture of social science also suggests both viewpoints do not take into account the complexity of gender identity questions.<sup>188</sup>

B. *Privacy from Parents: Unnecessary, Unhealthy, and Unrealistic*

Transgender Rights Advocates generally argue that allowing transgender students to maintain privacy from their parents is often necessary to protect children's health and safety.<sup>189</sup> Specifically, in legal proceedings, those fighting for the privacy of transgender students cite the need to maintain privacy as a key to protecting against psychological trauma as transgender and gender-nonconforming children explore and discover their

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185. See WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 181, at 11 (citing research demonstrating that biological acceptance is statistically common among different subsets of children).

186. See AM. C.L. UNION & GAY, LESBIAN & STRAIGHT EDUC. NETWORK, KNOW YOUR RIGHTS: A GUIDE FOR TRANSGENDER AND GENDER NONCONFORMING STUDENTS 5 (2016); see also Misha Valencia, *Why We Need to Stop Outing LGBTQIA+ Students*, PARENTS, <https://www.parents.com/parenting/dynamics/lgbtq/stop-outing-queer-teens/> (May 11, 2022).

187. See generally *The Justice Foundation Supports Parental Rights in Education*, *supra* note 18 ("Parental rights are fundamental to the family and a healthy culture. If no child is to be left behind, then no parent should be left out.").

188. See *infra* Section II.B.

189. See, e.g., Letter from Ilona M. Turner to Sue Savaglio-Jarvis, *supra* note 180, at 4.

gender identity.<sup>190</sup> As evidence to support this privacy right, Transgender Rights Advocates cite studies suggesting the anxieties transgender and gender-nonconforming children feel are often related to the unacceptance and rejection that they face.<sup>191</sup> Thus, Transgender Rights Advocates argue that granting transgender youths the ability to keep their gender identity private is a crucial component to protecting transgender and gender-nonconforming children as they explore their gender identity and potentially address gender dysphoria.<sup>192</sup>

The courts have generally acknowledged that allowing individuals to keep their gender identity private from the public at large may be necessary for their safety.<sup>193</sup> However, the courts have not explicitly found that this privacy extends to children and parents.<sup>194</sup> When children are involved, the courts generally acknowledge that parents often play a crucial role in helping their children deal with other people's responses to their gender identity.<sup>195</sup> Furthermore, the social science research into the causes and solutions of gender dysphoria, as well as transgender and gender-nonconforming children's anxieties surrounding their gender, suggests that offering privacy to

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190. See *Hecox v. Little*, 479 F. Supp. 3d 930, 987 (D. Idaho 2020) ("When Jane tries out for Boise High's women's soccer team, she will be subject to the possibility of embarrassment, harassment, and invasion of privacy through having to verify her sex.").

191. See, e.g., Rita Giordano, *Transgender Kids Vulnerable to Bullying, Long-Term Depression, Large Study Finds*, PHILA. INQUIRER (Apr. 16, 2018), <https://www.inquirer.com/philly/health/kids-families/trans-kids-much-more-like-to-suffer-depression-bullying-suicidal-thoughts-study-says-20180416.html>.

192. See, e.g., AM. C.L. UNION & GAY, LESBIAN & STRAIGHT EDUC. NETWORK, *supra* note 186, at 5, 7, 12; Letter from James D. Esseks, Dir., Am. C.L. Union Lesbian Gay Bisexual Transgender & HIV Project, to Principal or Superintendent (Aug. 26, 2020) (on file with author) (describing the potential harms of disclosing a child's gender identity to unknowing and hostile parents).

193. See, e.g., *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999); *Love v. Johnson*, 146 F. Supp. 3d 848, 855 (E.D. Mich. 2015).

194. See, e.g., *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 647 (M.D.N.C. 2016) (noting that sex is public information); see also *supra* Section I.C.1.

195. See Daliah Silver, *Transforming America's Perspective: How Recognizing the Rights of Transgender Youth Will Empower the Next Generation*, 39 CHILD.'S LEGAL RTS. J. 233, 240 (2019) (discussing the key role parents play in transitioning of their transgender children); see also *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir. 2017).

2023]

TOXIC PRIVACY

361

students from their parents will not help, and indeed could harm, the well-being and safety of students.<sup>196</sup>

1. *Privacy can do more harm than good*

When courts generally apply the right to privacy to gender identity, they often rely on the idea that a change in one's gender identity is a "disorder" or sickness entitled to privacy protection similar to those provided to individuals diagnosed with AIDS.<sup>197</sup> Indeed, until 2013, the American Psychiatric Association identified "gender identity disorder" as a treatable psychological disorder.<sup>198</sup> Thus, courts often likened transgender and gender-nonconforming people's experiences with gender to a sickness to be kept private to avoid the hostility that people with certain sicknesses may face.<sup>199</sup> As a result, the right to privacy concerning gender identity is often connected to the outdated belief that gender identity questions constitute sickness or disease.<sup>200</sup> Thus, the application of privacy to gender identity is often tinged with the discredited idea that transgender and gender-nonconforming people's gender experiences result from a psychological or medical disorder and should be maintained private like other medical conditions.<sup>201</sup>

Further, the distress associated with disclosing one's gender identity is not directly caused by disclosing transgender status but rather people's response to it.<sup>202</sup> Specifically, transgender

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196. See *infra* Section II.B.1.

197. See, e.g., *Powell*, 175 F.3d at 111 (citing *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994)). But see Elizabeth Boskey, *What Is Gender Non-Conforming?*, VERYWELL HEALTH, <https://www.verywellhealth.com/gender-non-conforming-5087006> (Nov. 28, 2022) ("Gender nonconformity is not a medical issue. However, exposure to bullying and discrimination is associated with an increased risk of both physical and mental health concerns.").

198. See AM. PSYCHIATRIC ASS'N, *supra* note 176, at 1 ("DSM-5 aims to avoid stigma and ensure clinical care for individuals who see and feel themselves to be a different gender than their assigned gender. It replaces the diagnostic name 'gender identity disorder' with 'gender dysphoria', as well as makes other important clarifications in the criteria.").

199. See, e.g., *Powell*, 175 F.3d at 111 (citing *Doe*, 15 F.3d at 267).

200. See *id.*

201. See *id.*

202. See *id.* at 111–12 (citing *Doe*, 15 F.3d at 267).

individuals report that the fear of rejection, bullying, and general mistreatment by others causes gender dysphoria.<sup>203</sup> In other words, it is not the disclosure of one's gender identity that causes the ailments related to gender identity but instead the response—or anticipated response—from others that causes the harm.<sup>204</sup>

Thus, the social science research does not suggest that privacy, in and of itself, is necessary, or even sufficient, to protect the safety and well-being of transgender individuals or address gender dysphoria.<sup>205</sup> Instead, privacy serves to temporarily shield transgender individuals from the potential harmful responses to their gender identity, which itself causes gender dysphoria.<sup>206</sup> Keeping one's gender identity private is, at best, a temporary solution to the threat of gender dysphoria.<sup>207</sup>

According to social science, children must freely express their true selves to the public, including their parents, to develop a healthy gender identity.<sup>208</sup> Thus, instead of promoting privacy, social science suggests the ultimate solution to gender dysphoria is to help individuals express their gender identity freely and openly.<sup>209</sup> Offering and promoting privacy, specifically concerning parents, can cause or exacerbate gender dysphoria in children in the long run.<sup>210</sup>

In fact, the promise of privacy itself can be harmful to children with gender identity questions.<sup>211</sup> Social science establishes that

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203. See *supra* notes 191–92.

204. See *supra* notes 191–92.

205. See, e.g., Kate Cooper, Ailsa Russell, William Mandy & Catherine Butler, *The Phenomenology of Gender Dysphoria in Adults: A Systematic Review and Meta-Synthesis*, CLINICAL PSYCH. REV., June 2020, at 1, 7.

206. See *id.* at 7.

207. See *id.* at 6–8.

208. See Ehrensaft, *supra* note 167, at 338–40.

209. See, e.g., *id.*

210. See Elizabeth Anne Riley, Gomathi Sitharthan, Lindy Clemson & Milton Diamond, *The Needs of Gender-Variant Children and Their Parents: A Parent Survey*, 23 INT'L J. SEXUAL HEALTH 181, 193 (2011); see also *supra* Section II.B.1.

211. See Ehrensaft, *supra* note 167, at 338–40.

the key to healthy gender identity development is the ability to express gender identity openly as a part of one's true self instead of trying to keep it secret.<sup>212</sup> Even when family members are not supportive, social science suggests that expressing one's gender identity fully and honestly is necessary for healthy self-development.<sup>213</sup> In other words, the healthy development of gender identity does not rely on the response of others but instead the ability to express gender identity openly and handle the responses, good or bad.<sup>214</sup>

Promoting the idea that transgender individuals can or should seek privacy reinforces the notion that identifying as transgender can or should be concealed.<sup>215</sup> As will be discussed, educational institutions are often the only resource available to students to address their gender identity if they are unsure how their parents will respond.<sup>216</sup> Thus, educational institutions offering privacy do not help student development because it does not encourage students to express their gender identity as part of their true selves on the path towards healthy self-development.<sup>217</sup> Instead, offering privacy encourages students to avoid the self-expression process and rely on the

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212. *See id.*

213. *See id.* at 343–44; Leah E. Lurye, Kristina M. Zosuls & Diane N. Ruble, *Gender Identity and Adjustment: Understanding the Impact of Individual and Normative Differences in Sex Typing*, NEW DIRECTIONS FOR CHILD AND ADOLESCENT DEV., Summer 2008, at 31, 31 (discussing the importance of belonging to a social group, which can facilitate positive gender identity and overall development).

214. *See Ehrensaft, supra* note 167, at 343–44.

215. *See* Wouter J. Kiekens & Ethan H. Mereish, *The Association Between Daily Concealment and Affect Among Sexual and Gender Minority Adolescents: The Moderating Role of Family and Peer Support*, 70 J. ADOLESCENT HEALTH 650, 650–51 (2022).

216. ASAF ORR & JOEL BAUM, SCHOOLS IN TRANSITION: A GUIDE FOR SUPPORTING TRANSGENDER STUDENTS IN K-12 SCHOOLS 1, 31 (n.d.), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf> (“[T]ransgender youth experience high levels of family rejection. . . . The school environment may be the only place a transgender student feels safe enough to be themselves.”).

217. *See Ehrensaft, supra* note 167; Lurye et al., *supra* note 212 at 31, 42. *But see* Letter from Ilona M. Turner to Sue Savaglio-Jarvis, *supra* note 180, at 1, 4–5 (describing the harms of outing trans and gender nonconforming children).

hope that their parents will never find out.<sup>218</sup> Further, by attempting to hide their true selves from their parents, children can harm their relationship with their parents and avoid focusing on navigating their gender identity and developing a healthy self-concept.<sup>219</sup> Once more, offering privacy is a temporary solution that could create more harm by encouraging children to focus on hiding their gender identity instead of seeking and pursuing a way to express their gender identity as part of the process of self-development.<sup>220</sup>

Thus, instead of developing policies focusing on privacy, educational institutions should focus on helping students feel comfortable with expressing their gender identity to everyone, even parents.<sup>221</sup> When a student comes forward with gender identity questions and unsupportive parents, educational institutions can help the student face and address their parents' concerns instead of offering or suggesting students keep their gender identity secret.<sup>222</sup> The Parental Consultation/Student Control Process enables educational institutions to develop such a process in which students receive support to thoroughly discuss their gender identity with their parents and address the response, good or bad, from their parents.<sup>223</sup>

Even when privacy from parents seems like a valid temporary option to help students, social science and

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218. See Ehrensaft, *supra* note 167, at 343–44 (expounding on the benefits of being accepted in a group); Kiekens & Mereish, *supra* note 215, at 655–56; Adriene M. Beltz, Amy M. Loviska & Alexander Weigard, *Daily Gender Expression is Associated with Psychological Adjustment for Some People, But Mainly Men*, SCI. REPS., Apr. 2021, at 1, 1.

219. See James Michael Brennan, *Hiding the Authentic Self: Concealment of Gender and Sexual Identity and Its Consequences for Authenticity and Psychological Well-Being* (2021) (Ph.D. dissertation, University of Montana) (on file with ScholarWorks at University of Montana).

220. See Ariel S. Bloshinsky & Madhavi Menon, *Personal Narratives and Gender Identity*, 8 INT'L J. SOC. SCIS. REV. 250, 250–52 (2020) (discussing how gender identity is a key component of people's personal narrative).

221. See Kiekens & Mereish, *supra* note 215, at 655.

222. The Parental Consultation/Student Control Process discussed in Part III proposes how Educational Institutions can help students address their parents' concerns about gender identity. See *infra* Part III.

223. See *infra* Part III.

real-world analysis demonstrate that educational institutions cannot realistically promise privacy to students.<sup>224</sup>

2. *Educational institutions cannot guarantee privacy to students*

Even if educational institutions attempt to maintain students' gender identity private from their parents, such attempts would be highly difficult, if not impossible, to maintain.<sup>225</sup> In states requiring privacy, local educational institutions have struggled to develop a process that addresses all the specific situations that could lead to accidental disclosure.<sup>226</sup> For example, students often request to use a new name without their parents' knowledge as part of their gender identity journey.<sup>227</sup> In these situations, educational institutions must maintain a set of documents with the student's original legal name and their new name.<sup>228</sup> The educational institution must then determine how to maintain records with the student's legal name and the new name, while keeping the new name records private from parents.<sup>229</sup> This issue becomes especially difficult with laws that generally grant parents access to student records, such as the Family Educational Rights and Privacy Act.<sup>230</sup> Again, the federal regulations do not provide much guidance to these

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224. See *infra* Section II.B.2.

225. See generally OFF. OF YOUTH ENGAGEMENT, D.C. PUB. SCHS., TRANSGENDER & GENDER-NONCONFORMING POLICY GUIDANCE (2015), <https://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/DCPS%20Transgender%20Gender%20Non%20Conforming%20Policy%20Guidance.pdf> (highlighting the vast array of school-environment accommodations that would be needed to provide privacy for trans and gender nonconforming children).

226. See, e.g., *Frequently Asked Questions*, *supra* note 70 (listing the frequently asked questions that have emerged as a result of California's attempt to ensure students' gender identity statuses are kept private generally and from parents specifically under Assembly Bill 1266); see also Assemb. 1266, 2013 Sess. (Ca. 2013).

227. See, e.g., Migdon, *supra* note 170 (describing a student who wanted his school to affirm his gender identity without his mother's knowledge).

228. See *Frequently Asked Questions*, *supra* note 70 (discussing the question: "[w]hat is a school or school district's obligation when a student's stated gender identity is different than the student's gender marker in the school's or district's official records?"); Assemb. 1266.

229. See *Frequently Asked Questions*, *supra* note 70.

230. See 20 U.S.C. § 1232(g); 34 C.F.R. § 106.6(e) (2000); 34 C.F.R. pt. 99 (2009).

issues, leaving it to states and educational institutions to develop processes that will protect students, comply with all related laws, and maintain adequate student records.<sup>231</sup>

Further, to protect the safety of the transgender student, certain school staff members will likely need to know the student's gender identity, such as physical education teachers and staff members who will address any bullying or harassment issues.<sup>232</sup> Educational institutions will have to identify these staff members and train them on how to maintain the student's privacy when interacting with parents.<sup>233</sup> Even if the educational institution dedicates resources to identifying these staff members and creating a process to protect against the disclosure, they cannot guarantee total privacy over a long-term period.<sup>234</sup>

Also, protecting the student from bullying or harassment would be much more difficult, if not impossible, without the parents' knowledge of their student's gender identity.<sup>235</sup> For example, if a student is threatened with physical harm based on their gender identity, a privacy policy would prohibit the educational institution from informing the student's parents about the reasons behind the threat.<sup>236</sup> By requiring privacy, educational institutions must keep important information from

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231. See 34 C.F.R. § 106.6(d)–(e).

232. The District of Columbia Public Schools provided a discussion of the issues involving educational institution staff and privacy for its students. See *generally* OFF. OF YOUTH ENGAGEMENT, *supra* note 225. The Gay, Lesbian & Straight Education Network ("GLSEN") has also provided a model guide with similar discussion for educators without statewide guidance. See *generally* GAY, LESBIAN & STRAIGHT EDUC. NETWORK, MODEL DISTRICT POLICY ON TRANSGENDER AND GENDER NONCONFORMING STUDENTS (2014), [https://www.glsen.org/sites/default/files/2020-04/Trans\\_ModelPolicy\\_2014.pdf](https://www.glsen.org/sites/default/files/2020-04/Trans_ModelPolicy_2014.pdf).

233. See GAY, LESBIAN & STRAIGHT EDUC. NETWORK, *supra* note 232, at 8.

234. Cf. Ettinghoff, *supra* note 21, at 613.

235. Cf. *id.* (discussing outing gay, lesbian, and bisexual students as a consequence of parental notification of bullying); GAY, LESBIAN & STRAIGHT EDUC. NETWORK, *supra* note 232 (discussing outing trans and gender nonconforming students as a consequence of parental notification of bullying).

236. But see *Frequently Asked Questions*, *supra* note 70 (citing 34 C.F.R. § 99.36 (2009)) (stating that gender identity can be disclosed if the educational agency determines that "there is an articulable and significant threat to the health or safety of a student"); see also Assemb. 1266, 2013 Sess. (Ca. 2013).



parents that could compromise their ability to protect students against future or potential harassment.<sup>237</sup> In addition, even if the student is not subject to adverse reactions from other students, those who know of the student's gender identity may ask questions or gather information that could eventually get back to the student's parents.<sup>238</sup>

Based on these real-world issues, the prospect of keeping a student's gender identity private from their parents, at least for a long time, is almost impossible.<sup>239</sup> Moreover, the burden to address all these issues and maintain a process over a long time to essentially withhold information from parents could overwhelm educational institutions or at least take valuable resources and focus away from the primary goal of protecting students and guiding their development.<sup>240</sup>

By suggesting that educational institutions can protect students' privacy from parents, educational institutions create a false sense that students can keep their gender identity hidden from their parents.<sup>241</sup> But even if the school district takes all steps within its power to keep the information from the student's parent, they cannot guarantee the parents will not find out from another source or a "hole" in the privacy system that the educational institutions create.<sup>242</sup> If a parent finds out accidentally, the student may be unprepared to handle the fallout.<sup>243</sup> In addition, the educational institution will likely lose credibility with the parents for withholding the information,

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237. See Ettinghoff, *supra* note 21, at 606–09.

238. See *id.*; see also Jill Palermo, 'I Want School to Remain Safe for Transgender Students', PRINCE WILLIAM TIMES, [https://www.princewilliamtimes.com/news/i-want-school-to-remain-safe-for-transgender-students/article\\_5d04fde0-3ef1-11ed-821e-7310e35eb640.html](https://www.princewilliamtimes.com/news/i-want-school-to-remain-safe-for-transgender-students/article_5d04fde0-3ef1-11ed-821e-7310e35eb640.html) (Dec. 20, 2022) ("[A trans student is] most concerned [that] the new [parental notification] policies [in Virginia concerning trans and non gender conforming students] would 'out' students to unsupportive families.").

239. Cf. Ettinghoff, *supra* note 21, at 604–12.

240. Cf. *id.* (providing examples of policies that show the complexity of maintaining privacy).

241. Cf. *id.*; see also Palermo, *supra* note 238.

242. See Ettinghoff, *supra* note 21, at 604–12.

243. See, e.g., Austin et al., *supra* note 178; THE TREVOR PROJECT, *supra* note 178.

compromising the ability of the educational institution to help either the parent or student address the situation.<sup>244</sup>

Thus, social science, along with real-world circumstances, can suggest that privacy is not required to protect, and could in fact harm, the psychological health of transgender students.<sup>245</sup> However, social science research does not imply that parents should be granted total control over their child's gender identity.<sup>246</sup> Therefore, it is necessary to consider the social science research regarding the parents' potential role in addressing and exacerbating gender dysphoria.<sup>247</sup>

### C. *The Role of Parents*

Social science also provides insight into the role of parents in their child's gender identity development.<sup>248</sup> As discussed in Section II.A, the distress associated with questioning one's gender identity, known as gender dysphoria, can surface in different ways, including, as mentioned above, depression, suicidal thoughts, and social withdrawal.<sup>249</sup> Social science generally suggests that supportive parental involvement can significantly help eliminate gender dysphoria.<sup>250</sup> Of course, the

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244. See Migdon, *supra* note 170 (describing parents perturbed by a school withholding information on their children's gender identities).

245. See *supra* Section II.B. However, maintaining privacy can also protect, rather than harm, the psychological health of transgender students. See *Outing*, *supra* note 21 (noting that even if a student is open about their gender identity at school, "revealing a student's sexual orientation or gender identity to their parents . . . can open an LGBT child to hostility, rejection, and even violence from their parents."); see also HUM. RTS. CAMPAIGN, 2018 LGBTQ YOUTH REPORT 7 (2018), <https://assets2.hrc.org/files/assets/resources/2018-YouthReport-0514-Final.pdf> ("A stranger, even a school counselor, is very dangerous to LGBTQ+ people and children. They can ruin your entire life, get you kicked out of your home by your parents, or make other teachers treat you awfully and make your school experience miserable. They can even get you killed by outing you without your permission, which they are usually 'expected' to do.").

246. See *supra* notes 189–244 and accompanying text; see also *infra* Section II.C.

247. See *infra* Section II.C; see also *supra* notes 189–244 and accompanying text.

248. See generally Riley et al., *supra* note 210, at 184–85 (theorizing transgender and gender nonconforming children's needs from their parents).

249. See *supra* notes 178–81 and accompanying text.

250. See Riley et al., *supra* note 210, at 57–59, 61; see also Silver, *supra* note 195, at 248 (explaining that parents can be supportive through gender affirming physical interventions as

transgender student parental notification debate usually arises when parents are unsupportive of the possibility that their child's gender identity differs from their sex assigned at birth.<sup>251</sup> In these situations, Transgender Rights Advocates suggest that children must have the right to keep their gender identity private from their parents to protect against the harm of the parents' adverse reaction.<sup>252</sup> Conversely, Parental Rights Advocates suggest parents should have the right to dictate how educational institutions address their child's gender identity to enable parents to guide the healthy development of their child's gender identity.<sup>253</sup>

1. *Upholding parental involvement, but not granting total control*

Social science research shows that even unsupportive parents can, and should, have a role in their child's gender development.<sup>254</sup> However, this research also does not support the idea that parents can or should be able to dictate how the educational institution addresses their child's gender

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well); see also Jason Rafferty, *Gender-Diverse and Transgender Children*, HEALTHY CHILD., <https://www.healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Diverse-Transgender-Children.aspx> (June 28, 2022) [hereinafter Rafferty, *Gender-Diverse and Transgender Children*] ("Research has shown that if a transgender teen has even just one supportive person [in] their life, it greatly reduces their risk of suicide.").

251. See, e.g., Migdon, *supra* note 170.

252. See, e.g., Tori Truscheit, *When You're Trans, Living with Your Parents Can be Complicated*, BUZZFEED NEWS (July 1, 2019, 12:28 PM), <https://www.buzzfeednews.com/article/toritruscheit/young-transgender-millennials-living-at-home-homelessness> (discussing homelessness caused by parents removing their transgender children from their homes after they came out).

253. See Migdon, *supra* note 170. But see, e.g., Melinda Wenner Moyer, *How to Support a Child on the Transgender Spectrum*, N.Y. TIMES, <https://www.nytimes.com/2022/03/15/well/family/support-child-gender-identity-trans-non-binary.html> (Mar. 17, 2022) (discussing healthy ways a parent can get involved in a child's gender identity journey, such as by finding treatment and using gender-affirming language).

254. See, e.g., Arnold H. Grossman, Anthony R. D'Augelli, Nicholas P. Salter & Steven M. Hubbard, *Comparing Gender Expression, Gender Nonconformity, and Parents' Responses to Female-to-Male and Male-to-Female Transgender Youth: Implications for Counseling*, 1 J. LGBT ISSUES COUNSELING 41, 54 (2006); see also Wenner Moyer, *supra* note 253 (noting that the mother's involvement, although involuntary, partially helped alleviate the daughter's pain); Rafferty, *Gender-Diverse and Transgender Children*, *supra* note 250.

identity.<sup>255</sup> Instead, social science suggests the best way to protect students' psychological well-being is to develop a process in which parents are actively involved in, but do not control, their child's gender identity journey.<sup>256</sup>

Specifically, social science suggests that parental involvement can be accomplished by: (1) legitimately considering the concerns of the child's parents; (2) providing parents with resources to identify and potentially resolve their underlying concerns; and (3) ultimately allowing students to control their gender identity journey.<sup>257</sup> Educational institutions can play a role in this process by working with students to reveal their gender identity questions to parents and involve outside professionals to assist with addressing parental concerns, as discussed below.<sup>258</sup>

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255. See Boerner, *supra* note 170 ("Of the 2,242 people [out of 17,151 people studied] who reported that they reverted to living as the gender associated with the sex they were assigned at birth, just [15.9%] said they did so because of internal factors such as questioning their experienced gender but also because of fear, mental health issues and suicide attempts. The rest reported the cause was social, economic and familial stigma and discrimination. A third reported that they ceased living openly as a trans person because doing so was 'just too hard for [them].'"); see also WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 181, at 18 ("An adolescent's shift towards gender conformity can occur primarily to please the parents and may not persist or reflect a permanent change in gender dysphoria."). *But see* Azeen Ghorayshi, *Few Transgender Children Change Their Minds After 5 Years, Study Finds*, N.Y. TIMES (May 4, 2022), <https://www.nytimes.com/2022/05/04/health/transgender-children-identity.html> ("The vast majority of the group still identified with their [affirmed] gender five years later, according to the study, and many had begun hormonal medications in adolescence to prompt biological changes to align with their gender identities. The study found that [2.5%] of the group had reverted to identifying as the [sex] they were assigned at birth. As tension mounts in courtrooms and statehouses across the country about the appropriate health care for transgender children, there's been little hard data to draw on about their long-term development. The new study provides one of the first large data sets on this group. The researchers plan to continue following this cohort for [twenty] years after their social transitions began.").

256. See *infra* Part III (discussing the proposed Parental Consultation/Students Control Process which demonstrates how educational institutions can assist students discuss their gender identity with their parents); see also *supra* Section II.B (stating that parents play a critical role in helping children deal with other people's responses to the child's gender identity).

257. See *infra* Part III.

258. See WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 181, at 17 ("Regardless of a family's decisions regarding transition (timing, extent), professionals should counsel and support them as they work through the options and implications. If parents do not allow their young child to make a gender-role transition, they may need counseling to assist them with meeting their child's needs in a sensitive and nurturing way, ensuring that the child has ample

## 2. Addressing parental concerns

When a student suggests their gender identity does not match their sex assigned at birth, and they may want to initiate a gender transition, parents may be unsupportive of the transition.<sup>259</sup> However, instead of treating unsupportive parents as a reason to keep a student's gender identity private or a basis for allowing parents to control their child's gender identity, social science suggests the underlying causes for the parents' hesitancy should be openly discussed and considered.<sup>260</sup>

### a. Biological acceptance

Social science studies suggest that some children who experience gender dysphoria may at some point resolve their gender identity without transitioning to a gender identity different from their sex assigned at birth.<sup>261</sup> Specifically, these cases of gender dysphoria resolve as part of the maturation process, ending with children accepting or becoming comfortable with their sex assigned at birth.<sup>262</sup> In other words, gender identity questions in children may not necessarily mean their gender identity is different from their biology.<sup>263</sup> Instead,

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possibilities to explore gender feelings and behavior in a safe environment. If parents do allow their young child to make a gender role transition, they may need counseling to facilitate a positive experience for their child.”); *see also infra* Section II.C.2.

259. *See, e.g.,* Migdon, *supra* note 170 (recounting the story of a mother who did not support her daughter's transition).

260. *See infra* Part III (discussing the proposed Parental Consultation/Students Control Process which demonstrates how educational institutions can assist students in discussing their gender identity with their parents); *see also* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 181, at 17.

261. *See* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 181, at 11. *But see* Boerner, *supra* note 170; Ghorayshi, *supra* note 255.

262. *See Overview: Gender Dysphoria*, NAT'L HEALTH SERV., <https://www.nhs.uk/conditions/gender-dysphoria/> (May 28, 2020) (noting that while children may be unhappy with their physical sex characteristics and become “interest[ed] in clothes or toys that society tells us is more often associated with the opposite gender,” these feelings and behaviors are “reasonably common in childhood” and may not indicate continued gender dysphoria, though a “small number of children may feel lasting and severe distress, which gets worse as they get older”); WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 181, at 12. *But see* Ghorayshi, *supra* note 255.

263. *See Overview: Gender Dysphoria*, *supra* note 262.

children may respond to gender dysphoria through “biological acceptance,” through which the child becomes comfortable with their sex assigned at birth.<sup>264</sup>

Gender dysphoria that ceases through biological acceptance may have various causes.<sup>265</sup> For some, gender dysphoria could be part of the natural maturation process where children generally struggle to understand and come to terms with their true selves.<sup>266</sup> However, in other situations, children may misinterpret other psychological difficulties or hardships as a sign of questioning their gender identity, when the discomfort develops from another cause.<sup>267</sup>

Parents who are hesitant to support their child’s transition may believe their child’s gender dysphoria can or should be resolved through biological acceptance instead of a gender transition.<sup>268</sup> Social science demonstrates that biological acceptance is a valid way to address gender dysphoria that should at least be considered.<sup>269</sup> In addition, parents may provide critical insight into their child’s struggles that may help demonstrate that biological acceptance is the best path to helping their child address gender dysphoria.<sup>270</sup>

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264. See *id.* But see WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 181 (noting that “the persistence of gender dysphoria into adulthood appears to be much higher for adolescents,” and that “formal epidemiologic studies on gender dysphoria—in children, adolescents, and adults—are lacking” and more research is needed).

265. See Richard A. Carroll, *Outcomes of Treatment for Gender Dysphoria*, 24 J. SEX EDUC. & THERAPY, 128, 130 (1999); Boerner, *supra* note 170.

266. See Carroll, *supra* note 266, at 130 (discussing the possible outcomes of gender dysphoria, including acceptance of one’s sex assigned at birth); *Overview: Gender Dysphoria*, *supra* note 262; see also Boerner, *supra* note 170.

267. See Roberto D’Angelo, Ema Syruinik, Sasha Ayad, Lisa Marchiano, Dianna Theadora Kenny & Patrick Clarke, *One Size Does Not Fit All: In Support of Psychotherapy for Gender Dysphoria*, 50 ARCHIVES SEXUAL BEHAV. 7, 10 (2020) (discussing research demonstrating that people with other mental health issues may misinterpret gender dysphoria).

268. See *supra* notes 261–67 and accompanying text.

269. See *supra* notes 261–67 and accompanying text.

270. See Susan Bradley, *How Trans Activists Are Unethically Influencing Autistic Children to Change Genders*, NAT’L POST (Jan. 12, 2017), <https://nationalpost.com/opinion/susan-bradley-how-trans-activists-are-unethically-influencing-autistic-children-to-change-genders> (discussing the possibility that autistic children may be influenced to seek social gender

If the law requires educational institutions to keep a student's gender identity private from parents, they will prevent professionals from receiving the insight that parents may provide about their child's gender identity journey.<sup>271</sup> Specifically, parents may provide information about their child's maturation process, or other difficulties the child is facing that will lead professionals to explore the possibility of addressing gender dysphoria through biological acceptance instead of a transition.<sup>272</sup> For example, the parents may express insight that outside social forces underlie their child's gender

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transition without their parents' consent). *But see* Renuka Rayasam, *The Transgender Care that States Are Banning, Explained*, POLITICO (Mar. 25, 2022, 7:00 PM), <https://www.politico.com/newsletters/politico-nightly/2022/03/25/the-transgender-care-that-states-are-banning-explained-00020580> ("In all states, minors who seek transgender treatment [to biologically transition] need parental consent."); Florence Ashley, *Trans Activists and Autism: A Response to Susan Bradley*, MEDIUM (Feb. 10, 2017), <https://medium.com/@florence.ashley/trans-activists-and-autism-a-response-to-susan-bradley-ccb440c122db> (noting that respecting the autonomy of transgender and autistic individuals is paramount and "autistic people are perfectly capable of making healthcare decisions . . . includ[ing] transition-related care" such as utilizing puberty blockers, which "allow trans and questioning teens to make an informed decision regarding hormone replacement therapy[] freed from the pressures of puberty.").

271. *Overview: Gender Dysphoria*, *supra* note 262 (describing that transgender or gender nonconforming "[c]hildren may show an interest in clothes or toys that society tells us are more often associated with the opposite gender"); *Signs*, NAT'L HEALTH SERV., <https://www.nhs.uk/conditions/gender-dysphoria/symptoms/> (May 28, 2020) (describing ways that parents can identify gender dysphoria in children).

272. Lisa Littman, *Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, PUB. LIBR. SCI. ONE, August 16, 2018, at 1, 35–37 [hereinafter *Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*] ("[P]arents uniquely can provide details of their child's early development and the presence or absence of readily observable childhood indicators of gender dysphoria are especially relevant to the diagnosis."). *But see Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, *supra*, at 39 ("It is possible that some of the participating parents may not have noticed symptoms of gender dysphoria before their [adolescent and young adult child]'s disclosure of a transgender identity; could have been experiencing shock, grief, or difficulty coping from the disclosure; or even could have chosen to deny or obscure knowledge of long term gender dysphoria."); Kristina R. Olson, Lily Durwood, Madeleine Demeules & Katie A. McLaughlin, *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 AM. ACAD. PEDIATRICS 6 (2016) (stating it is possible the study behind ROGD could be skewed because "parents of transgender children could have biased reporting, reflecting a desire for their children to appear healthier than they are" but no evidence was found to suggest biased reporting).

dysphoria, a concept known as “Rapid Onset Gender Dysphoria.”<sup>273</sup>

b. Social influence

The term “Rapid Onset Gender Dysphoria” (“ROGD”) developed from an anecdotal study based on parental observations and interpretations exploring situations in which youths who have shown no prior signs of discomfort with their biological sex seem to suddenly identify themselves as transgender.<sup>274</sup> Based on these parental reports, the researcher, Lisa Littman, theorized that social influence might cause some forms of gender dysphoria.<sup>275</sup> For example, Littman suggests that children who spend time with a peer group in which questioning gender identity is common often develop gender dysphoria, implying that gender dysphoria can develop as a peer-influenced coping mechanism rather than as the result of actual gender identity questions.<sup>276</sup> Similarly, the prevalence of gender identity questions in larger society may cause children to interpret hardships caused by the maturation process as gender dysphoria.<sup>277</sup>

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273. *Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, *supra* note 272, at 1–2.

274. *Id.* It should be noted, however, that

[t]his report did not collect data from the adolescents and young adults (AYAs) or clinicians and therefore does not validate the phenomenon. Additional research that includes AYAs, along with consensus among experts in the field, will be needed to determine if what is described here as rapid-onset gender dysphoria (ROGD) will become a formal diagnosis. Furthermore, the use of the term, rapid-onset gender dysphoria should be used cautiously by clinicians and parents to describe youth who appear to fall into this category. The term should not be used in a way to imply that it explains the experiences of all gender dysphoric youth nor should it be used to stigmatize vulnerable individuals.

Lisa Littman, *Correction: Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria*, PUB. LIBR. SCI. ONE, Mar. 19, 2019, at 1, 1.

275. *Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, *supra* note 272, at 4.

276. *Id.* at 10, 32.

277. *Id.* at 32.



The concept of ROGD is relatively recent and has been the subject of much controversy.<sup>278</sup> Researchers who are critics of ROGD note that children often experience a “lengthy internal process” in navigating their gender identity that may not be apparent to their parents, so what may be described as “rapid” by parents may be part of a long-term hidden process.<sup>279</sup> Moreover, many believe ROGD is a faulty and dangerous concept because it “risks both stigmatizing and further isolating transgender young people from their peers and from the resources that could support them.”<sup>280</sup> Transgender Rights Advocates believe ROGD research is an “attack” by the “anti-trans lobby.”<sup>281</sup> Conversely, Parental Rights Advocates believe ROGD is evidence that the “transgender agenda” is having an undue influence on children, justifying their calls to allow parents to control the gender identity experience of their children to protect them from this harmful influence.<sup>282</sup>

However, ROGD can suggest the principle that gender identity and gender dysphoria are complex concepts that defy simple explanations or solutions, necessitating an examination that “does not inherently pathologize gender identity.”<sup>283</sup> The

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278. See Ariane Resnick, *The “Rapid Onset Gender Dysphoria” Controversy*, VERYWELL MIND, <https://www.verywellmind.com/the-rapid-onset-gender-dysphoria-controversy-5210551> (Dec. 1, 2021).

279. Meredith Wadman, *New Paper Ignites Storm Over Whether Teens Experience ‘Rapid Onset’ of Transgender Identity*, SCI. (Aug. 30, 2018), <https://www.science.org/content/article/new-paper-ignites-storm-over-whether-teens-experience-rapid-onset-transgender-identity>; Samantha Riedel, *A New Study Debunks the Myth that Kids Become Trans Through “Social Contagion”*, THEM (Aug. 4, 2022), <https://www.them.us/story/a-new-study-debunks-the-myth-that-kids-become-trans-through-social-contagion>.

280. Wadman, *supra* note 279.

281. See Liz Duck-Chong, *‘Rapid-Onset Dysphoria’ Is a Poisonous Lie Used to Discredit Trans People*, THE GUARDIAN (Oct. 21, 2018, 3:00 PM), <https://www.theguardian.com/commentisfree/2018/oct/22/rapid-onset-gender-dysphoria-is-a-poisonous-lie-used-to-discredit-trans-people>.

282. See Walt Heyer, *It’s Not Just ‘Gender Dysphoria.’ It’s Now ‘Rapid Onset Marxism.’*, DAILY SIGNAL (Jan. 26, 2021), <https://www.dailysignal.com/2021/01/26/its-not-just-gender-dysphoria-its-now-rapid-onset-marxism>.

283. See Elizabeth Boskey, *The Rapid Onset Gender Dysphoria Controversy*, VERYWELL HEALTH, <https://www.verywellhealth.com/rapid-onset-gender-dysphoria-4685597> (Aug. 24, 2021) [hereinafter *The Rapid Onset Gender Dysphoria Controversy*] (noting that while “[r]apid onset gender dysphoria is not a [medically recognized] diagnosis” but instead a “research hypothesis,” the theory brings up many important questions about gender identity).

concept of ROGD suggests that some people believe that gender dysphoria could be caused by social influence or other underlying issues that children misinterpret or misrepresent.<sup>284</sup> Therefore, some believe that keeping a child's gender identity journey private from parents could harm the child.<sup>285</sup> As noted in the ROGD study, some parents suggest that some children may actively mislead medical professionals about their conditions to receive the medical services necessary to make a transition.<sup>286</sup> Parents may identify factors that will help professionals determine whether their child's self-reports of gender dysphoria result from gender identity questions or perhaps another cause, either social influence or another underlying psychological reason.<sup>287</sup>

ROGD does not justify granting parents total authority over how educational institutions address their child's gender identity.<sup>288</sup> As noted, the research supporting it largely relies on self-reporting from parents.<sup>289</sup> Thus, parents may simply refuse to accept that their child identifies with a gender other than

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284. See *Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, *supra* note 272, at 32–33 (“For some individuals, the drive to transition may represent an ego-syntonic but maladaptive coping mechanism to avoid feeling strong or negative emotions similar to how the drive to extreme weight loss can serve as an ego-syntonic but maladaptive coping mechanism in anorexia nervosa.”).

285. See *id.* at 34.

286. See *id.* (“In this study, 22.3% of AYAs had been exposed to online advice about what to say to doctors to get hormones, and 17.5% to the advice that it is acceptable to lie to physicians; and the vast majority of parents were reasonably sure or positive that their child misrepresented their history to their doctor or therapist.”).

287. See *id.* at 35–37.

288. See Wadman, *supra* note 279 (indicating that ROGD is largely based on parental reports and, therefore, could be based on parents' misunderstanding of their child's gender identity); see also *Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, *supra* note 272, at 37 (stating the “limitations to relying solely on parent report” and that “future stud[ies] in this area should include both parent and child input”).

289. See Wadman, *supra* note 279; see also *Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, *supra* note 272, at 1 (stating the study's survey was placed on websites for parents to access and “[t]here were 256 parent-completed surveys that met study criteria”).

their sex assigned at birth or reject the possibility that their child needs to transition to reveal their true selves.<sup>290</sup>

The concept of ROGD itself may demonstrate how the social science regarding gender identity is often polluted with politics, which ultimately prohibits an open and honest discussion to benefit the child as they navigate their gender identity.<sup>291</sup> Instead of being diminished as a political concept, ROGD can and should be used as another tool to confirm the complexity of gender identity that cannot be resolved through a one-size-fits-all resolution. The research surrounding ROGD suggests that it is important to parents to at least consider parental input when assessing a child's potential gender dysphoria.<sup>292</sup> Simply stated, parental involvement may be necessary to wade through the complexity of gender identity.<sup>293</sup> Collectively, the social science research suggests that school districts should involve experts with knowledge of gender identity questions to assess the student's needs, address parental concerns, and ultimately determine the best pathway to help students navigate their gender identity journey.<sup>294</sup>

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290. *The Rapid Onset Gender Dysphoria Controversy*, *supra* note 283; *see also Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, *supra* note 272, at 37 ("It is possible that some of the participating parents may not have noticed symptoms of gender dysphoria before their AYA's disclosure of a transgender identity; could have been experiencing shock or grief from the disclosure; or even could have chosen to deny or obscure knowledge of long term gender dysphoria.").

291. *See* Lee Jussim, *Rapid Onset Gender Dysphoria: A Saga of Outrage and Science Reform*, PSYCH. TODAY (Mar. 20, 2019), <https://www.psychologytoday.com/us/blog/rabble-rouser/201903/rapid-onset-gender-dysphoria>.

292. *See supra* notes 274–87 and accompanying text (discussing the complexity of the ROGD issue and the insight parents can provide regarding their child's gender identity).

293. *See supra* notes 283–86 and accompanying text (discussing the complexity of the ROGD issue and the insight parents can provide regarding their child's gender identity).

294. *See The Rapid Onset Gender Dysphoria Controversy*, *supra* note 283; *see also* WORLD PRO. ASS'N FOR TRANSGENDER HEALTH, *supra* note 181, at 14.

D. *How Educational Institutions Can Help Address Gender Identity Questions*

1. *Foster parental acceptance*

Of course, there may be situations in which the best pathway for a child to address their gender dysphoria is through transition, even though their parents remain unsupportive.<sup>295</sup> Educational institutions are not involved in a child's desire to pursue a hormonal or surgical transition because this is a decision between doctors, the parents, and the child, independent of the school.<sup>296</sup> However, if the child wishes to conduct a social transition at school against their parents' wishes, the educational institution can help address the parents' underlying reasons for remaining unsupportive.<sup>297</sup> These situations do not justify requiring educational institutions to

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295. See Samuel Dubin, Megan Lane, Shane Morrison, Asa Radix, Uri Belkind, Christian Vercler & David Inwards-Breland, *Medically Assisted Gender Affirmation: When Children and Parents Disagree*, 46 J. MED. ETHICS 295, 298 (2020).

296. Emily Ikuta, Note, *Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent Under the Mature Minor Doctrine*, 25 S. CAL. INTERDISC. L.J. 179, 187–88 (“All states require parental consent for most medical care provided to minors, and many courts adopt the view that a minor child cannot consent to medical or surgical treatment.”); WORLD PRO. ASS’N FOR TRANSGENDER HEALTH, *supra* note 181, at 19 (“In order for adolescents to receive puberty-suppressing hormones . . . when the adolescent has not reached the age of medical consent, the parents or other caretakers or guardians [must] have consented to the treatment . . .”); *Developments in the Law: Intersections in Healthcare and Legal Rights*, 134 HARV. L. REV. 2158, 2165–67 (“Gender confirmation surgery (GCS), which involves changing a transgender person’s reproductive anatomy to the anatomy usually associated with their identified gender, is rarely performed for trans youth because the [Standards of Care published by the World Professional Association for Transgender Health (WPATH SOC)] require the patient to have attained the age of majority to be eligible for surgery.”).

297. See *Using the Gender Support Plan*, GENDER SPECTRUM, <https://www.genderspectrum.org/articles/using-the-gsp> (last visited Dec. 26, 2022) (discussing various ways that schools can work with parents to ensure that a “student’s authentic gender will be accounted for and supported at school.”); see generally NAT’L RES. CTR. FOR MENTAL HEALTH PROMOTION & YOUTH VIOLENCE PREVENTION, *ADOPTING A TRAUMA-INFORMED APPROACH FOR LGBTQ YOUTH* (2014), [https://healthysafechildren.org/sites/default/files/Trauma\\_Informed\\_Approach\\_LGBTQ\\_Youth\\_1.pdf](https://healthysafechildren.org/sites/default/files/Trauma_Informed_Approach_LGBTQ_Youth_1.pdf) (discussing the adoption of “a trauma-informed approach” in schools “to provide adequate support for all youth exposed to trauma, including LGBTQ youth” who are more likely to experience “victimization and discrimination in school”).

keep gender identity private from parents, as Transgender Advocates suggest.<sup>298</sup> Similarly, these situations do not justify granting ultimate authority to parents over their child's gender identity, as Parental Rights Advocates suggest.<sup>299</sup> Instead, social science suggests processes to help address the parents' concerns and uphold the child's right to proceed with social transition in the school context.<sup>300</sup>

Social science research suggests that parental lack of support for their child's gender transition can come from a variety of sources.<sup>301</sup> Some parents may not be supportive because they fear their concerns about gender identity will not be considered.<sup>302</sup> As noted above, if the process legitimately considers parental concerns about social influence and the possibility of biological acceptance, parents may be less likely to feel like their child was coerced into a gender transition.<sup>303</sup>

The parents' lack of support may also come from a lack of understanding of gender identity.<sup>304</sup> Thus, instead of dismissing parents' concerns as a nefarious attempt to deny gender identity, social science suggests parents should be provided with support to help them understand and come to terms with

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298. See *supra* Section II.B (discussing how attempting to keep gender identity private from parents can cause harm); *infra* Part III (discussing how the proposed Parental Consultation/Student Control Process can be used to involve parents while upholding their child's right to explore their gender identity without parental limitation).

299. See *supra* Section II.C (discussing how parent involvement can help guide a student's gender identity journey).

300. See *supra* Sections II.A–C (discussing how social science suggests parents should be involved in their child's gender identity process but the student's right to ultimately decide how to explore their personal gender identity should also be retained).

301. See Claire Gregor, Helen Hingley-Jones & Sarah Davidson, *Understanding the Experience of Parents of Pre-pubescent Children with Gender Identity Issues*, 32 CHILD & ADOLESCENT SOC. WORK J. 237, 238–39 (2015).

302. MOVEMENT ADVANCEMENT PROJECT, *supra* note 22, at 3 (“When parents and family of transgender youth talk openly about [their] concerns, it can provide support to those who are still struggling with their own fears—and it can provide a pathway for understanding concrete ways in which they can be supportive.”).

303. See *supra* Section II.C.2 (discussing parents' concerns and biological acceptance and social influence).

304. See Bradley, *supra* note 270; Gregor et al., *supra* note 301, at 239.

gender identity.<sup>305</sup> For example, parental lack of consent may result from the hopes or expectations parents have for their child.<sup>306</sup> Once a child's biological sex is known during pregnancy or at birth, parents may construct an image of their child's life involving stereotypical male actions, such as being a football player, or female activities, such as being a cheerleader.<sup>307</sup> Parents may need help to let go of these images, so they can embrace the experience that their child will have once they transition.<sup>308</sup> Instead of dismissing these images as naive hopes based on unevolved images of gender roles, social science suggests a process in which the parents' concerns and viewpoints are respected and addressed so the parent can ultimately accept their child's true identity.<sup>309</sup> Although educational institutions may not be fully equipped to provide this support, they can initiate the process by helping students discuss their gender identity with their parents and other outside experts.<sup>310</sup> The Parental Consultation/Student Control Process, outlined in Part III below, establishes such a process.

## 2. *Guide students through their gender identity journey*

If, after this process, parents remain unsupportive and openly hostile towards their child's social transition, social science still supports the right of students to explore their gender identity, even with unsupportive parents.<sup>311</sup> Educational institutions

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305. See *supra* Section II.C (discussing how social science suggests parents can and should be involved in their child's gender identity process).

306. Lori Gottlieb, *Dear Therapist: I Love My Trans Daughter, but I'm Still Struggling*, THE ATLANTIC (July 6, 2020), <https://www.theatlantic.com/family/archive/2020/07/i-love-my-trans-daughter-but-im-still-struggling/613786/>.

307. See *id.*

308. *Id.*

309. See *supra* Section II.C (discussing how social science suggests parents can and should be involved in their child's gender identity process).

310. See *infra* Part III (discussing the proposed Parental Consultation/Student Control Process which involves educational institutions helping students initiate discussions about their gender identity with their parents).

311. See *supra* Sections I.C.2.a, II.C.2 (discussing how the Personal Decision Right and educational institutions can support children, while balancing parental concerns).

cannot control parents' responses.<sup>312</sup> Still, they can provide an invaluable resource to help guide the child through managing their parents' response by providing outside resources to address any physical or mental threats their parents may pose.<sup>313</sup>

While the situation in which a child goes through a social gender transition without parental support is more often than not the best option for anyone involved, the policies supported by both Transgender Rights Advocates and Parental Rights Advocates will not change this result and could exacerbate the harm.<sup>314</sup> If students are granted privacy, parents will feel robbed of the opportunity to address their child's gender identity experience.<sup>315</sup> Their negative response may be magnified by the fact that the educational institution and the child tried to hide information from them.<sup>316</sup> If parents are allowed to block their child from exploring their gender identity through transitioning, it could harm the child's gender identity development and lead the child to resent and distrust both their parents and the educational institution itself.<sup>317</sup>

In the alternative, the process of facilitating a discussion between parents, children, and outside professionals could allow both parents and students to express their needs and

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312. See *infra* notes 360–64 (discussing the proposed Parental Consultation/Student Control Process which involves discussing gender identity with parents without trying to dictate or control parental responses).

313. See Emily A. Greytak, Joseph G. Kosciw & Madelyn J. Boesen, *Putting the "T" in "Resource": The Benefits of LGBT-Related School Resources for Transgender Youth*, 10 J. LGBT YOUTH 45, 46–47 (2013); see also THE TREVOR PROJECT, *supra* note 178, at 4 ("LGBTQ youth who found their school to be LGBTQ-affirming reported lower rates of attempting suicide").

314. See *supra* Section II.B.1 (discussing how keeping the gender identity of children private from parents is harmful); see also *supra* Section II.C (discussing how granting parents control over their child's gender identity is harmful).

315. See *supra* Section II.C.1 (discussing the beneficial role parents can play in their child's gender identity journey).

316. See Migdon, *supra* note 170 (discussing the conduct of two middle school teachers "that led the student on a path toward transitioning as a boy and drove a wedge between mother and child").

317. See Allen, *supra* note 16 (discussing the implications of proposals in Ohio and Delaware that would require schools to out children to their parents).

concerns in a safe environment.<sup>318</sup> If, after the process, the professional concludes that the child's parents simply will not accept their child's gender identity and may pose a threat to the safety or health of the child, the professional can help provide services to the child.<sup>319</sup> However, with the approaches advocated by Transgender Rights Advocates and Parental Rights Advocates, the student could be left without support to address the inevitable conflict with their parents.<sup>320</sup>

Although educational institutions may not be fully equipped to provide the professional guidance and counseling necessary to complete this process, they can serve as conduits to start the process, as many students do not have anywhere else to turn for support.<sup>321</sup> Instead of spending time and resources developing and implementing a policy that attempts to keep gender identity private from parents, educational institutions can focus on creating a process that initiates the discussion to help address the concerns of all involved.

### III. THE PROPOSED PARENTAL CONSULTATION/STUDENT CONTROL PROCESS

The current social science regarding gender identity, gender dysphoria, and the relationship between children and parents suggests both policies proffered by Transgender Rights Advocates and Parental Rights Advocates are inadequate.<sup>322</sup> Requiring educational institutions to keep students' gender

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318. See Jamie E. Mehringer & Carol A. Ford, *Clinicians' Roles in Supporting Caregivers of Transgender and Gender-Expansive Youth*, 68 J. ADOLESCENT HEALTH, 1031, 1033 (2021) (discussing how clinicians can foster a safe environment between caregiver and adolescent by modeling behavior); *infra* Part III (discussing the proposed Parental Consultation/Student Control Process which provides a process for allowing both parents and students to express their concerns).

319. See Mehringer & Ford, *supra* note 318, at 1032–33.

320. See Rin Reczek & Emma Bosely-Smith, *How LGBTQ Adults Maintain Ties with Rejecting Parents: Theorizing "Conflict Work" as Family Work*, 83 J. MARRIAGE & FAM. 1134, 1136 (2021).

321. See ORR & BAUM, *supra* note 216, at 10–12.

322. See *supra* Part II (discussing the social science and showing that the positions of both Transgender Rights Advocates and Parental Rights Advocates fail to account for specific social science research).



identity private from their parents is unrealistic and potentially harmful to the child's gender identity development.<sup>323</sup> However, granting parents control over their child's gender identity is also unrealistic and detrimental.<sup>324</sup> Social science demonstrates that parents' role in developing their child's gender identity must be acknowledged and addressed by schools, possibly by taking advantage of the support schools can provide, helping parents learn to accept their child's gender identity, or helping children manage unsupportive parents.<sup>325</sup> Educational institutions can play a vital role as facilitators to address parental involvement.<sup>326</sup>

Thus, social science suggests that, in an ideal situation, the best pathway to protect the health and safety of students may be to create a process in which parents are actively involved in, but do not dictate, the process for addressing their child's gender identity.<sup>327</sup> To incorporate this social insight into the laws and rights involved in the transgender student parental notification debate, this Article proposes a Parental Consultation/Student Control Process. This proposed process incorporates and honors social science research by acknowledging and utilizing the critical role parents play in the gender identity development of their child without robbing students of the ultimate ability to explore their gender identity on their terms. Ultimately, the Parental Consultation/Student Control Process proposed by this Article will allow professionals to assess and develop a plan to address gender identity development based on a complete account of the facts and circumstances surrounding the child's unique perspective by consulting with the parent, child, and the educational institution.

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323. *See supra* Section II.B.

324. *See supra* Section II.C.

325. *See supra* Section II.D.

326. *See supra* Section II.D.

327. *See supra* Part II.

As demonstrated above, both sides of the transgender student parental notification debate hold legitimate social science and legal support for their respective positions.<sup>328</sup> For Transgender Rights Advocates, the law generally supports the idea that children have the right to make decisions about their gender identity.<sup>329</sup> Further, social science suggests young children can and should be allowed to explore, find, and express their gender identity without parental control.<sup>330</sup> For Parental Rights Advocates, the law generally upholds the right of parents to be intimately involved in their child's upbringing, and social science suggests parents play a primary role, for better or worse, in their child's gender identity development.<sup>331</sup>

While both Parental Rights Advocates and Transgender Rights Advocates ultimately seek to protect the safety and well-being of students, their positions are often presented as conflicting.<sup>332</sup> However, by removing the political overtones polluting the transgender student parental notification debate, the law can create a process to uphold the various rights at issue and incorporate current social science to address the transgender student parental notification debate.<sup>333</sup>

To develop such a policy, it is necessary to identify and uphold the specific legal rights and social science at issue.<sup>334</sup> The Fourteenth Amendment can be upheld with respect to transgender students by ensuring students have the ultimate

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328. See *supra* Part I (discussing the legal support for both student and parent positions); *supra* Part II (discussing the social science research supporting both student and parent positions).

329. See *supra* Section I.C.2.a (discussing how the Personal Decision Right affects educational institutions).

330. See *supra* Section II.C.1.

331. See *supra* Sections I.C.2.b, II.C.

332. See *supra* Section I.C (discussing the conflicting legal rights between transgender children and parents); *supra* Part II (discussing parents' and students' conflicting social science views).

333. See *supra* notes 357–76 (discussing the proposed Parental Consultation/Student Control Process which upholds children's rights to make decisions about their gender identity while respecting parents' rights to be involved in their child's gender identity journey).

334. See Part III (discussing how the Parental Consultation/Student Control Process upholds the rights of student and parents).

right to decide how educational institutions address their gender identity, thereby maintaining their Personal Decision Right.<sup>335</sup> However, the Personal Decision Right does not establish that transgender students have a right to require educational institutions to keep their gender identity private from their parents.<sup>336</sup> Similarly, social science indicates students can, and should, have the right to ultimately determine how their educational institution addresses their gender identity.<sup>337</sup> However, social science also suggests that giving students the right to keep their gender identity private from their parents is unnecessary to help students navigate gender identity and could also contribute to the harm associated with gender dysphoria.<sup>338</sup>

The Fourteenth Amendment also creates an Upbringing Right that grants parents the right to make informed decisions about where to send their child for an education.<sup>339</sup> This Upbringing Right can be upheld by giving parents the right to be informed of, and participate in, how educational institutions address their child's gender identity.<sup>340</sup> However, this Upbringing Right does not give parents the right to dictate or control the gender identity policy of educational institutions generally or how it handles their child's gender identity.<sup>341</sup> Social science also suggests that parental involvement is vital to address gender dysphoria, but granting parents control over their child's gender identity could create or exacerbate gender dysphoria.<sup>342</sup>

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335. *See supra* Section I.C.2.a.

336. *See supra* Section I.C.2.a.

337. *See, e.g.,* Elaine Tassy, *More Colorado Kids Are Coming Out as Trans and Nonbinary – And Staking a Claim to be Themselves at School*, CPR NEWS (May 2, 2022, 4:00 AM), <https://www.cpr.org/2022/05/02/trans-nonbinary-kids-school-policies/>.

338. *See supra* Section II.B.1 (discussing how privacy can do more harm than good in certain contexts).

339. *See supra* Section I.C.2.b.

340. *See supra* Section I.C.2.b.

341. *See supra* Section I.C.2.b.; *see also* *Parents for Priv. v. Barr*, 949 F.3d 1210, 1231 (9th Cir. 2020).

342. *See supra* Section II.C.

The “right to privacy” within the transgender student parental notification debate threatens the actual rights of the parties involved.<sup>343</sup> It also leads to policies that ignore and contradict the insight social science provides to support the health and well-being of all students and obscures the actual rights at issue.<sup>344</sup> Thus, both the legal rights and social science surrounding the transgender student parental notification debate suggest the privacy right should be removed.<sup>345</sup>

Instead of focusing on privacy, the law and social science can be combined to create a Parental Consultation/Student Control Process in which parents are informed of and involved in their child’s gender identity journey but do not control or dictate it.<sup>346</sup> This procedure involves professionals discussing and considering the parents’ concerns to determine the best pathway to address their child’s gender identity, and giving students the ultimate right to decide how educational institutions address their gender identity.<sup>347</sup> This Parental Consultation/Student Control Process can be established in federal law by revising the Title IX implementing regulations.<sup>348</sup>

As explained above, the Title IX implementing regulations generally protects the right of students to identify and express their gender identity within educational institutions.<sup>349</sup> It also generally requires educational institutions to ensure this protection of gender identity does not conflict with other constitutional rights.<sup>350</sup> However, federal law does not address the conflict that arises when students want to express a gender identity different from their biological gender but face opposition from their parents.<sup>351</sup> As a result, states and local

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343. *See supra* Section I.C.

344. *See supra* Parts I–II.

345. *See supra* Parts I–II.

346. *See supra* notes 357–76 and accompanying text.

347. *See supra* notes 357–64 and accompanying text.

348. *See supra* notes 57–68 (discussing the Title IX implementing regulations and their lack of guidance on the transgender student parental notification debate).

349. *See supra* notes 60–64 and accompanying text.

350. *See supra* note 66 and accompanying text.

351. *See supra* Section I.A.

2023]

TOXIC PRIVACY

387

educational institutions are left to address the transgender student parental notification debate, which often leads to legal action and feeds the divisiveness.<sup>352</sup> This lack of clarity created the controversy that clouds the transgender student parental notification debate and morphs it into an “all or nothing” battle.<sup>353</sup>

To address the lack of clarity and conflicting guidance regarding the transgender student parental notification debate, this Article proposes revisions to the Title IX implementing regulations to establish the Parental Consultation/Student Control Process.<sup>354</sup> The Process will address situations in which students request a social gender identity transition, meaning any request by a student to change the gender they identify with on school grounds.<sup>355</sup> For example, this transition can occur through changing the student’s name, using different pronouns, or seeking access to facilities or programs associated with a different gender.<sup>356</sup>

In sum, the Parental Consultation/Student Control Process is comprised of three steps: (1) the initial intake meeting; (2) the disclosure meeting; and (3) the gender identity support plan.<sup>357</sup> First, the Parental Consultation/Student Control Process starts with educational institutions conducting an “initial intake meeting” upon receiving an inquiry from any student regarding their gender identity.<sup>358</sup> During this initial intake

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352. See *supra* Sections I.B–C.

353. See *supra* notes 21–26 and accompanying text.

354. See *supra* Section I.A (discussing the current Title IX Regulations); *infra* notes 357–74 (explaining the proposed Parent Consultation/Student Control Process).

355. See *supra* notes 182–84 (discussing the meaning of “social transition”); *supra* notes 295–300 (discussing how children can socially transition at school even if parents are unsupportive); *infra* notes 357–76 (discussing the proposed solution, the Parental Consultation/Student Control Process).

356. See Evans et al., *supra* note 184, at 4653; *supra* notes 182–84 (discussing “social transitioning”).

357. See *infra* notes 359–73 and accompanying text (explaining the proposed three-part Parent Consultation/Student Control process).

358. See *supra* notes 221–22 and accompanying text (describing the unique position schools have in helping students come forward with gender identity questions when students have

meeting, the educational institution will provide knowledgeable staff—including counselors and others involved in student policies as appropriate—to review the student’s gender identity questions and requests and discuss if the student’s parents know about, and are supportive of, the child’s gender identity.<sup>359</sup>

The educational institution will set up a “disclosure meeting” with the student, parents, and a professional, such as a counselor, who can help facilitate the meeting and discuss the student’s gender identity.<sup>360</sup> During this “disclosure meeting,” parents will be encouraged to express their opinions and thoughts on their child’s gender identity.<sup>361</sup> The professionals involved will assess the parents’ thoughts to help develop a process to address the child’s gender identity, gender dysphoria, and any related questions.<sup>362</sup> Although this “disclosure meeting” will allow parents to discuss and express their opinions about their child’s gender identity, educational institutions will be required to ultimately comply with the student’s request regarding how the educational institution addresses their gender identity.<sup>363</sup> Thus, even though parents will be informed of and involved with identifying and addressing their child’s gender identity concerns, parents will not have the right to dictate or change their gender identity process within the educational institution.<sup>364</sup>

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unsupportive families); ORR & BAUM, *supra* note 216, at 32 (stating transgender students who do not feel supported by family may seek support from their school and how schools can handle transgender students’ initial outreach).

359. See ORR & BAUM, *supra* note 216, at 32; *supra* note 232 and accompanying text (outlining the necessity for school officials to have the correct gender identity information of students to protect those students from bullying).

360. See ORR & BAUM, *supra* note 216, at 32; *supra* notes 208–14 and accompanying text (describing that healthy gender identity development requires children to freely express themselves to their parents even if their parents are not supportive of that identity).

361. See *supra* Section II.C.2 (discussing the importance of addressing parental concerns).

362. See *supra* Sections II.B–C (discussing the importance of free expression in healthy gender identity development and the importance of addressing parents’ concerns with their child’s gender identity).

363. See *supra* Sections I.C.2, II.D.2.

364. See *supra* Sections I.C.2, II.D.2.

If the parents are unsupportive and the student or the educational institution believes that the student is, or will be, in danger because of their parents' response,<sup>365</sup> the educational institution will have an affirmative duty to provide the student with resources and help to address these concerns.<sup>366</sup> Specifically, mental health concerns must be considered because a lack of parental support can have a significant and severe impact on mental health and suicide.<sup>367</sup> Parental support "can be the difference between life and death."<sup>368</sup> In addition to mental health concerns, a lack of parental support can lead to significant consequences such as homelessness.<sup>369</sup> Depending on the circumstances, schools may be required to report

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365. See THE TREVOR PROJECT, *supra* note 178, at 4 ("Fewer than [one] in [three] transgender and nonbinary youth found their home to be gender-affirming."); *LGBTQI*, NAT'L ALL. ON MENTAL ILLNESS, <https://www.nami.org/Your-Journey/Identity-and-Cultural-Dimensions/LGBTQI> (last visited Dec. 26, 2022) ("For many in the LGBTQI community, coming out can be a difficult or even traumatic experience.").

366. See SARAH SCHMANKE & BETSEY HELFRICH, NAT'L SCH. BDS. ASS'N COUNCIL OF SCH. ATT'YS, *STUDENT MENTAL HEALTH: THE PUBLIC SCHOOL'S LEGAL ROLE* 1–2, 14–16 (2016), <https://cdn-files.nsba.org/s3fs-public/10.%20Schmanke%20Helfrich%20Student%20Mental%20Health.pdf> (discussing the legal obligations schools generally have in providing mental health services); see also AM. C.L. UNION OF N. CAL., CALIFORNIA HEALTH YOUTH ACT SEXUAL HEALTH EDUCATION TOOLKIT: LGBTQ-INCLUSIVITY REQUIREMENTS AND HOW THEY INTERACT WITH PARENTAL OPT-OUT 2 (2018), [https://www.aclunc.org/docs/lgbtq\\_inclusivity\\_requirements\\_and\\_how\\_they\\_interact\\_with\\_parental\\_opt\\_out.pdf](https://www.aclunc.org/docs/lgbtq_inclusivity_requirements_and_how_they_interact_with_parental_opt_out.pdf) ("School districts have an affirmative obligation to protect LGBTQ students from discrimination and harassment and to promote inclusivity.").

367. The Trevor Project's 2022 National Survey on LGBTQ Youth Mental Health found that "45% of LGBTQ youth seriously considered attempting suicide in the past year." THE TREVOR PROJECT, *supra* note 178, at 4. The Survey also found that "60% of LGBTQ youth who wanted mental health care in the past year were not able to get it." *Id.* It is important to note that "LGBTQ youth are not inherently prone to suicide risk because of their . . . gender identity but rather placed at higher risk because of how they are mistreated and stigmatized in society." *Id.* at 5.

368. *Transgender Children & Youth: Understanding the Basics*, *supra* note 40; THE TREVOR PROJECT, *supra* note 178, at 4 ("LGBTQ youth who felt high social support from their family reported attempting suicide at less than half the rate of those who felt low or moderate social support.").

369. *LGBTQI*, *supra* note 365 ("It is estimated that LGBTQI youth and young adults have a 120% higher risk of experiencing homelessness—often the result of family rejection or discrimination based on gender identity or sexual orientation. This risk is especially high among Black and Native American/Alaska Native LGBTQI youth. Many members of the LGBTQI community face the added challenge of finding homeless shelters that will accept them, and experience elevated rates of harassment and abuse in these spaces.").

potential abuse to the appropriate State authority.<sup>370</sup> Schools may also help students contact outside agencies who are equipped to assist children with gender identity questions.<sup>371</sup>

Ultimately, the educational institution will create a “gender identity support plan” to establish how the student’s gender identity will be addressed by the educational institution in the future, along with any additional support measures the educational institution deems necessary to address the response of the student’s parents.<sup>372</sup> For example, depending on the student’s requests, this “gender identity support plan” will involve changing the student’s records to the student’s chosen name and pronoun, allowing the student to use facilities and participate in programs consistent with the student’s gender identity, and informing staff and other students of the changes, as appropriate.<sup>373</sup>

Thus, the Parental Consultation/Student Control Process will include: (1) an “initial intake meeting” between students and the educational institution’s staff, during which students express their gender identity concerns and needs, and the educational institution develops a plan to discuss the child’s

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370. See CYNTHIA CROSSON-TOWER, ADMIN. FOR CHILD. & FAMS., U.S. DEP’T OF HEALTH & HUM. SERVS., THE ROLE OF EDUCATORS IN PREVENTING AND RESPONDING TO CHILD ABUSE AND NEGLECT 30–32 (2003), <https://www.childwelfare.gov/pubpdfs/educator.pdf>.

371. For example, the California Department of Education provides a resources webpage that includes links to resources and organizations that can help school districts with gender identity concerns based on their location within the state. See *Supporting LGBTQ+ Students*, CAL. DEP’T OF EDUC., <https://www.cde.ca.gov/pd/ee/supportlgbtq.asp> (Nov. 02, 2022). Similarly, the Nevada Department of Education and Maryland State Department of Education offer references to school districts. See *Supporting Sex/Gender Diverse Students*, STATE OF NEV. DEP’T OF EDUC., [https://doe.nv.gov/SafeRespectfulLearning/Supporting\\_Sex\\_Gender\\_Diverse\\_Students/](https://doe.nv.gov/SafeRespectfulLearning/Supporting_Sex_Gender_Diverse_Students/) (last visited Dec. 26, 2022); MD. STATE DEP’T OF EDUC., PROVIDING SAFE SPACES FOR TRANSGENDER AND GENDER NON-CONFORMING YOUTH: GUIDELINES FOR GENDER IDENTITY NON-DISCRIMINATION (2015), <https://marylandpublicschools.org/about/Documents/DSFSS/SSSP/ProvidingSafeSpacesTransgendergenderNonConformingYouth012016.pdf>.

372. ORR & BAUM, *supra* note 216, at 51–59 (discussing how schools can handle a situation in which parents are unsupportive of their transgender child); see *Children’s Health*, MAYO CLINIC (Feb. 23, 2022), <https://www.mayoclinic.org/healthy-lifestyle/childrens-health/in-depth/children-and-gender-identity/art-20266811> (recommending that parents work with their child’s school and teachers to “[c]ome up with a plan for how [their] child will be addressed in school,” including bathroom use and participation in extracurricular activities).

373. See ORR & BAUM, *supra* note 216, at 20–24, 28.



gender identity with their parents;<sup>374</sup> (2) a “disclosure meeting” during which the parents are informed of, and consulted about, their child’s gender identity;<sup>375</sup> and (3) a “gender identity support plan” in which the educational institution will establish specifically how the student’s gender identity will be addressed in the future.<sup>376</sup>

This process will generally uphold the parental “Upbringing Right” by ensuring information regarding their student’s gender identity is not withheld from parents.<sup>377</sup> However, it will also uphold the Personal Decision Right of students by ensuring students have ultimate control over how the educational institution addresses their gender identity.<sup>378</sup> Finally, it incorporates the social science related to gender identity by ensuring educational institutions develop a “support plan” that will protect students throughout their gender identity journey.<sup>379</sup> Thus, instead of focusing on keeping gender identity questions private, educational institutions will be required to focus on creating a safe environment for all students to explore their gender identity.<sup>380</sup>

The details of how the Parental Consultation/Student Control Process plays out will depend on the specifics of each situation, including the unique needs of the student, the parents’ beliefs about gender identity, and the resources available to the school. In some situations, students may want to discuss their gender identity with their parents but are afraid of their potential response. In these situations, schools can help the student discuss their gender identity journey in a safe environment and help with the parents’ response. In other circumstances,

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374. See *supra* notes 358–59 and accompanying text.

375. See *supra* notes 360–71 and accompanying text.

376. See *supra* notes 372–73 and accompanying text.

377. See *supra* Section I.C.2.b.

378. See *supra* Section I.C.2.a.

379. See *supra* Section II.B.1.

380. See *supra* notes 360–73 and accompanying text; ORR & BAUM, *supra* note 216, at 10–12 (stating the need for “[c]reating a [s]afe and [s]upportive [e]nvironment [for] [a]ll [s]tudents” and how “[g]ender-based bullying affects all children”).

students may want their parents to be involved with and help guide them through their gender identity journey. In these situations, schools can use the process to help involve the parents in their child's gender identity journey while ensuring the student ultimately controls their journey. Still, other students may be convinced their parents will not be supportive and therefore, the school can help the student establish that their parents cannot dictate or control their child's gender identity journey.

The resources available to school districts will also dictate how the Parental Consultation/Student Control Process plays out. Depending on the school's location, outside resources may be readily available to assist in the process, such as community support groups or psychologists who can work directly with the students and parents to help with the specific concerns and questions that may arise during the process.<sup>381</sup> Further, some schools may have internal student counselors who are specifically trained to address gender identity questions while other schools may need more outside involvement if their counselors are unprepared to address gender identity questions.<sup>382</sup>

Thus, the details of the Parental Consultation/Student Control Process can and should be elastic to adjust to the specifics of each situation. However, the general principles of each component of the Parental Consultation/Student Control Process will remain consistent. Specifically, the Parental Consultation/Student Control Process dictates that schools must honor students' rights by granting students ultimate

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381. See, e.g., *Supporting LGBTQ+ Students*, *supra* note 371 (providing a resource webpage including links that can help school districts with gender identity concerns based on their region); *Supporting Sex/Gender Diverse Students*, *supra* note 371 (providing references to school districts to assist them in supporting students); MD. STATE DEP'T OF EDUC., *supra* note 371 (providing technical guidance and assistance to the Maryland school system to support the rights of all students, in developing a transgender policy).

382. See Clark D. Ausloos, Madeline Clark, Hansori Jang, Tahani Dari & Stacey Diane Arañez, *A Call for Action: School Counselor Competence in Working with Trans Students*, 12 PROF. COUNS. 65, 66–67 (2022), <https://files.eric.ed.gov/fulltext/EJ1334299.pdf>.

control over their gender identity journey.<sup>383</sup> However, schools must honor parental rights by keeping them informed of their student's gender identity process.<sup>384</sup> With these general guidelines, school districts can decide how best to meet the needs and rights of students and parents based on each specific situation. The Parental Consultation/Student Control Process provides the basic guidelines for school districts to follow, leaving the details up to individual schools based on the unique situations they face so schools have both the guidance and freedom necessary to reach the ultimate goal: promoting the health and safety of each individual student.

This Parental Consultation/Student Control Process will replace the piecemeal procedures enacted by states and local educational institutions that attempt to address the transgender student parental notification debate based on the privacy rights of either students or parents.<sup>385</sup> As demonstrated above, these policies are short-sighted and violate various Constitutional rights.<sup>386</sup> Policies that force educational institutions to withhold gender identity information from parents actively threaten the Fourteenth Amendment's Upbringing Right.<sup>387</sup> Further, this privacy policy can contribute to the harm of the student by creating a false sense that gender identity can be kept private from the parent.<sup>388</sup> Similarly, policies that allow parents to dictate how educational institutions address their child's gender identity ignore the Personal Decision Rights of students.<sup>389</sup> They also ignore social science, which demonstrates that children can and should freely explore and define their gender identity.<sup>390</sup>

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383. See *supra* Section I.C.2.a; *supra* notes 363–64 and accompanying text.

384. See *supra* Section I.C.2.b; *supra* notes 360–63 and accompanying text.

385. See, e.g., *supra* Section I.B; NJDOE *Issues New Guidance on Rights of Transgender Students*, *supra* note 69; *Frequently Asked Questions*, *supra* note 70.

386. See *supra* Section I.C.

387. See *supra* Section I.C.2.b.

388. See *supra* Sections, I.C.2.a, I.C.2.b, II.B.

389. See *supra* Section I.C.2.a.

390. See Rafferty, *Gender Identity Development in Children*, *supra* note 39.

Ultimately, situations in which a student has gender identity questions and unsupportive parents can be potentially dangerous and may not be resolved entirely through the law or educational institution's action.<sup>391</sup> Thus, the law must develop a policy that provides the best realistic solution.<sup>392</sup> By focusing on creating a safe environment instead of privacy, the Parental Consultation/Student Control Process addresses the problems of unsupportive parents head-on instead of avoiding and encouraging students to avoid the issue.<sup>393</sup>

Of course, the Parental Consultation/Student Control Process requires educational institutions to take on a significant role in navigating children's gender identity, including managing and assessing parental objections.<sup>394</sup> However, the Parental Consultation/Student Control Process does not create this burden but instead enables educational institutions to address an issue they are already facing.<sup>395</sup> Schools are often the only resource available to students to discuss their gender identity concerns, specifically when parents are unsupportive.<sup>396</sup> The Parental Consultation/Student Control Process provides a process that helps educational institutions navigate this complex situation. If the law requires educational institutions to provide student privacy, educational institutions will not be able to provide initial support to the student to address their parents' response and instead will spend resources trying to keep information away from parents.<sup>397</sup> If the law required educational institutions to give control to parents, educational

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391. See St. George, *supra* note 10.

392. See *id.*

393. See *supra* Section II.B.1 (discussing the harm of privacy that is avoided by the Parental Consultation/Student Control Process).

394. See *supra* notes 357–73.

395. See *supra* Sections I.B–C.

396. ORR & BAUM, *supra* note 216, at 31–32; *A New Resource for Educators on Supporting LGBTQ Students During Distance Learning*, HUM. RTS. CAMPAIGN (May 13, 2020), <https://www.hrc.org/news/a-new-resource-for-educators-on-supporting-lgbtq-students-during-distance-l>; Zenobia V. Harris, *Breaking the Dress Code: Protecting Transgender Students, Their Identities, and Their Rights*, 13 SCHOLAR 149, 155–56 (2010).

397. See *supra* Section II.B.2 (discussing the harm and logistical difficulty of privacy).

2023]

TOXIC PRIVACY

395

institutions would similarly be unable to utilize professionals to guide the process instead of ceding total control to parents. Thus, the Parental Consultation/Student Control Process represents an option available to address the transgender student parental notification issue in a way that upholds the rights and interests of all involved.

### CONCLUSION

Educational institutions throughout the United States are currently struggling with the many legal issues related to gender identity.<sup>398</sup> While the law provides some guidance, federal law has yet to definitively address the transgender student parental notification debate.<sup>399</sup> As a result, this debate is often presented as an uncompromising clash between the rights of parents and students, in which the safety and health of students hang in the balance.<sup>400</sup> Transgender Rights Advocates claim that the Fourteenth Amendment's privacy right grants students the right to require educational institutions to withhold information from their parents.<sup>401</sup> They also suggest this privacy right is a critical component of protecting the health and safety of transgender students.<sup>402</sup> Conversely, Parental Rights Advocates suggest that the Fourteenth Amendment's privacy right grants parents the right to control their child's gender identity development.<sup>403</sup> They also claim parental control is vital to protect the health and safety of their child's overall development.<sup>404</sup>

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398. St. George, *supra* note 10; Erin E. Buzuvis, "As Who They Really Are": Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports, 34 LAW & INEQ. 341, 383 (2016) (discussing transgender students in the context of sports and bathroom use).

399. *See supra* Section I.A (discussing the federal law that does not provide definitive guidance regarding the transgender student parental notification debate).

400. *See supra* notes 15–20 and accompanying text.

401. *See supra* Section I.C (discussing the Fourteenth Amendment and its application to the transgender student parental notification debate).

402. *See supra* notes 189–192.

403. *See supra* Section I.C (discussing the Fourteenth Amendment and its application to the transgender student parental notification debate).

404. *See supra* Section II.C.

When the actual rights and social science at issue are brought to light, the law can develop a pathway to respect the rights and concerns of all parties. Instead of a generalized privacy right, the transgender student parental notification debate involves complementary student and parental rights.<sup>405</sup> The Fourteenth Amendment creates a Personal Decision Right that allows students to ultimately decide how educational institutions address their gender identity.<sup>406</sup> Educational institutions can implement this Personal Decision Right to enable students to fully explore, discover, and express their gender identity in a way that helps eliminate gender dysphoria.<sup>407</sup> The Fourteenth Amendment also creates an Upbringing Right that allows parents to be involved in the educational experience provided to their child by educational institutions.<sup>408</sup> This Upbringing Right can be implemented in a way that will enable parents, along with health care professionals, to assist students along their gender identity journey and address gender dysphoria that may result.<sup>409</sup>

The Parental Consultation/Student Control Process combines parents' rights, students' rights, and social science insight in a way that will enable educational institutions to uphold the rights, needs, and concerns of all parties.<sup>410</sup> This process removes the privacy arguments that are involved in the transgender student parental notification debate.<sup>411</sup> Instead, it focuses on creating a supportive, all-inclusive environment where parents are involved in, but do not control, their child's

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405. *See supra* Section I.C.2.

406. *See supra* Section I.C.2.a (discussing the Fourteenth Amendment's Personal Decision Right).

407. *See supra* Section I.C.2.a (discussing students' need to fully explore, discover, and express their gender identity).

408. *See supra* Section I.C.2.b (discussing the Fourteenth Amendment's Upbringing Right).

409. *See supra* Section I.C.2.b; *see also supra* Section II.A (discussing the causes and potential solutions to gender dysphoria).

410. *See supra* Part III (summarizing the relevant legal rights).

411. *See supra* Part III (discussing the proposed Parental Consultation/Student Control Process).

2023]

## TOXIC PRIVACY

397

gender identity journey.<sup>412</sup> Specifically, educational institutions will work with both parents and students to set up a series of meetings, guided by gender identity experts, in which the concerns and needs of all parties are expressed in a safe, supportive, and respectful environment.<sup>413</sup> Within these meetings, the parental concerns about their child's gender identity are considered and addressed in the overall context of developing an environment where students can fully explore their gender identity and address gender dysphoria.<sup>414</sup>

This Parental Consultation/Student Control Process can be implemented through the Title IX implementing regulations to provide uniform guidance to all educational institutions.<sup>415</sup> Instead of fueling the debate surrounding gender identity, the Parental Consultation/Student Control process offers a way to respect and uphold the rights and concerns of all parties<sup>416</sup> while pursuing the ultimate goal of protecting and promoting the safety and well-being of all students.<sup>417</sup>

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412. See *supra* Part III.

413. See *supra* notes 357–76.

414. See *supra* notes 357–76.

415. See *supra* Section I.A (summarizing Title IX Implementing Regulations); *supra* notes 347–54.

416. See *supra* Section I.C (summarizing the legal rights involved in the transgender student parental notification debate); *supra* Part III.

417. See *supra* Parts II–III.