March 17, 2023

via email

State Superintendent Ryan Walters
c/o Bryan Cleveland, General Counsel
Office of Legal Services
State Department of Education
Hodge Education Building
2500 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105-4599
rules@sde.ok.gov

Re: OAR Docket #23-93, 40 Okla. Reg. 557, 557–58 (Feb. 15, 2023) (to be codified at Okla. Admin. Code §§ 210:10-2-1 through -4)

Dear Superintendent Walters:

Alliance Defending Freedom (ADF) supports the Oklahoma Department of Education's proposed rules on parental rights. *See* 40 Okla. Reg. 557, 557–58 (Feb. 15, 2023) (to be codified at Okla. Admin. Code §§ 210:10-2-1 through -4). The proposed rules recognize that parents are the primary caregivers for their children, they have the right to make important healthcare and education decisions for their children, and they should not be treated with suspicion by a school.

ADF is an alliance-building legal organization that advocates for the right of all people to freely live out their faith. It pursues its mission through litigation, training, strategy, and funding. Since its launch in 1994, ADF has handled many legal matters at both the state and federal levels involving parental rights, including several cases arising from constitutional violations by school districts.

Schools should transparently communicate with parents about all aspects of their children's school life and should recognize parents' role as the primary decisionmakers for their children's education. Schools should never hide important information about children from their parents.

The proposed rules rightfully foster transparent communication between schools and parents, require schools to honor parents' instructions about certain sensitive topics core to children's identity, and prohibit hiding information from parents. First, they ensure parents are notified in advance of education material that may impact or contradict moral and religious teachings in the home, and they extend the right of parents to inspect such materials. *See* Okla. Admin. Code

§ 210:10-2-3(a)(1) through (2) (proposed by 40 Okla. Reg. 557). Second, they preserve parents' ability to opt their children out of certain lessons pertaining to such sensitive topics. *See id.* § 210:10-2-3(a)(3) through (4).

Third, the proposed rules prohibit school officials from hiding information from parents, requiring that schools keep an open line of communication with parents about important health issues. *See id.* § 210:10-2-3(b). In particular, they require schools to disclose to parents if their children request that others treat them as an identity that differs from their sex, including through the use of different names or pronouns. *See id.* § 210:10-2-3(b)(2); *see also id.* § 210:10-2-2(d).

These proposed rules further parents' rights. Parents have prepolitical, natural rights to raise, care for, and educate their children. *See Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 845 (1977) ("[T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'" (footnote omitted) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion))). "The child is not the mere creature of the state . . . ." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). So "those who nurture [a child] and direct his destiny"—that is, a child's *parents*—"have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*; *see Davis v. Davis*, 708 P.2d 1102, 1109 (Okla. 1985) ("The integrity of the family unit and preservation of the parent–child relationship command the highest protection in our society.").

For that reason, both the Oklahoma Supreme Court "and the United States Supreme Court have repeatedly recognized that the relationship between a parent and child is a fundamental and constitutionally protected right." *Herbst v. Sayre (In re Herbst)*, 971 P.2d 395, 397–98 (Okla. 1998) (collecting cases); *see Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."). And by enacting a Parents' Bill of Rights, the Oklahoma Legislature has also recognized "the fundamental right of parents to direct the upbringing, education, health care and mental health of their children." 25 Okla. St. § 2001(B); *see id.* §§ 2002–05.

Parents' fundamental rights reach their peak on "matters of the greatest importance," like religion, sex, and gender. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005); *see Yoder*, 406 U.S. at 233–34 (discussing intersection of "the rights of parents" with "a free exercise claim"). Medical and health-related decisions fall in this category: "Most children, even in adolescence, simply are not

able to make sound judgments concerning many decisions, including their need for medical care or treatment." *Parham v. J.R.*, 442 U.S. 584, 603 (1979). "Parents can and must make those judgments." *Id.*

Therefore, the State may interfere with parents' fundamental rights "only where a 'compelling' State interest arises and protecting the child from harm is the requisite State interest." *Coleman S. v. Dep't of Inst., Social & Rehab. Servs. (In re Sherol A.S.)*, 581 P.2d 884, 888 (Okla. 1978); *see Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (allowing restrictions on parents' rights "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens").

Affirming parental rights and empowering parents ensures all children's emotional, social, and physical needs are met. For parents know their own children's specific needs best, and parents are best equipped and positioned to meet those needs. As the Oklahoma Supreme Court has acknowledged, "children ordinarily will be best cared for by those bound to them by the ties of nature, 'bone of their bone and flesh of their flesh.'" *Sweet v. Johnson (In re Sweet)*, 317 P.2d 231, 236 (Okla. 1957) (quoting *Risting v. Sparboe*, 162 N.W. 592, 594 (Iowa 1917)). Consequently, schools should never hide information from parents or cut them out of important decisions about their children's health.

Unfortunately, school districts across the nation are doing just that. Many have introduced harmful policies that prevent parents from making decisions about their children's health. Worse than that, these policies often prevent parents from even knowing about their children's struggles, because the school forces teachers to conceal those struggles from parents—the people who know and love their children best.

ADF is challenging several such policies in Vermont, Virginia, and Wisconsin. *See, e.g.*, *Allen v. Millington*, No. 2:22-CV-00197-CR (D. Vt. filed Oct. 27, 2022); *Figliola v. Sch. Bd. of Harrisonburg*, No. CL22-1304 (Va. Cir. Ct. Rockingham Cnty. filed June 1, 2022); *B.F. v. Kettle Moraine Sch. Dist.*, No. 2021CV001650 (Wis. Cir. Ct. Waukesha Cnty. filed Nov. 17, 2021). In *Figliola*, for example, the school district requires teachers to ask for and always use a student's preferred names and pronouns. Teachers also must hide that information from parents unless school officials authorize sharing it. *See* Complaint ¶¶ 103, 125, 147, *Figliola v. Sch. Bd. of Harrisonburg*, No. CL22-1304 (Va. Cir. Ct. Rockingham Cnty. filed June 1, 2022).[1]

[1] A copy of this complaint is attached as Exhibit A.

Many districts also maintain "shadow records" where official student records, accessible by parents, contain different information from the child's "Gender Support Plan" or other "shadow" files hidden from parents—even if they specifically request to access their child's records. A district court in Kansas recently found that such policies likely violate the U.S. Constitution. *Ricard v. USD 475 Geary Cnty. Sch. Bd.*, No. 5:22-CV-04015, 2022 WL 1471372, at *9 (D. Kan. May 9, 2022).

Policies like these intentionally exclude parents from important information and conversations about their minor child by falsely presuming school officials—who may only interact with a child for a few hours each week—are better equipped than the child's parents to guide a child through adolescence and beyond.

This is an unconstitutional imposition on parents' fundamental rights. And it hurts kids.

Deferring to parents' decisionmaking is especially critical with respect to gender-identity struggles in children. Leading psychiatrists and psychotherapists widely vary on both causation and the best courses of intervention. *See, e.g.*, Aff. of Stephen B. Levine, M.D., ¶¶ 37–75, *B.F. v. Kettle Moraine Sch. Dist.*, No. 2021CV001650 (Wis. Cir. Ct. Waukesha Cnty. filed Feb. 3, 2023) ("Levine Aff.").[2] If even mental health professionals cannot agree on such matters, then schools certainly should not mandate a one-size-fits-all approach to students' gender-identity questions. Even more concerning is evidence that a majority of children (in several studies, a very large majority) diagnosed with gender dysphoria "desist"—their gender dysphoria did not persist—beyond puberty. *See id.* ¶¶ 83, 87–91.

Indeed, immediately putting a child with gender-related distress on puberty blockers pushes that child down a dangerous and potentially irreversible path. The child risks a range of long-term harms, including sterilization (chemical or surgical); physical health risks associated with exposure to elevated levels of cross-sex hormones; surgical complications and lifelong after-care; family alienation; inability to form healthy romantic relationships; and elevated mental health risks. *See id.* ¶¶ 102–12. Some countries, like Sweden, France, and the United Kingdom, have stopped encouraging children to transition, employing instead a "watch and wait" approach. *See, e.g.*, Hilary Cass, *Independent review of gender identity services for children and young people: Interim report* 15–24 (Feb. 2022);[3] Levine Aff., *supra*, ¶¶ 64–68.

Adopting a reflexive "affirmative" response to students experiencing distress with their biological sex ignores evidence that a student's so-called "social

[2] A copy of this affidavit is attached as Exhibit B.
[3] A copy of this report is attached as Exhibit C.

transition" as part of an "affirmative" response (*e.g.*, using different names, pronouns, or clothes) has real, significant implications for the child's long-term health. *See* Levine Aff., *supra*, ¶¶ 105–09 & n.9 (explaining that social transition "severely reduces the likelihood that the child will revert to identifying with the child's natal sex, at least in the case of boys").

The proposed rules rightly recognize that medical and psychiatric interventions like these should be administered by doctors and psychiatrists with the appropriate informed consent. The school's role is not to diagnose a child and have teachers administer psychotherapeutic interventions without parents' knowledge or consent, but to bring parents into the conversation in a timely manner.

Schools must not be gatekeepers controlling when and whether parents have access to their children's lives. The proposed rules correctly reflect this and honor parents' primary role in directing their children's upbringing. ADF encourages the State Board to adopt them.

Respectfully submitted,

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