

Legal Notes Seven: Students' Rights to Informational Privacy (Version 2.0)

Legal Notes Seven was originally distributed on June 3, 2021, prior to the enactment of the Parents' Bill of Rights, Chapter 1014, Fla. Stat. (2021).

The first iteration of this document was created to provide the constitutional framework supporting students' fundamental rights to informational privacy, and to provide guidance to school districts and staff on how to navigate situations where parents' and students' interests conflict.

This iteration (Legal Notes Seven, Version 2.0) is intended to ensure that school districts and staff understand that the enactment of the Parents' Bill of Rights did not alter the fundamental rights of parents or students, nor did it change the legal analysis required when the disclosure of sensitive, personal information about students is at issue.

In navigating the rights and interests of students and parents, it is critical to remember that schools are ultimately responsible for the educational environment, and schools have a compelling interest in ensuring the learning environment is safe and supportive for all students, as well as a compelling interest in protecting student privacy.

The Parents' Bill of Rights has given rise to many questions and concerns regarding the obligations of school staff when it comes to protecting the rights of LGBTQ+ students. We hope that this Legal Note will (1) provide reassurance that the constitutional framework and analysis required before the new law took effect remains unchanged, and (2) provide guidance and assistance to school officials who are navigating these situations.

Why Schools Should Strive to Provide a Safe Space for LGBTQ+ Youth

For some LGBTQ youth, school is the only safe space they have to be themselves. Disclosure of a student's sexual orientation or gender identity to others without their consent not only interferes with their constitutional rights to privacy and autonomy, but can also potentially threaten that student's safety and well-being.

Studies have demonstrated that the primary reason for homelessness among LGBTQ youth is family rejection (55.3% of LGBTQ youth; 67.1% of trans youth), making parental reactions the leading cause of homelessness among LGBTQ youth.(i) Approximately 40% of the nation's homeless youth identify as LGBTQ, among which 68% have experienced family rejection and 54% have experienced abuse in their families.(ii)

Students with highly rejecting parents are 8x as likely to attempt suicide, and 6x as likely to report high levels of depression.(iii)

A study by the Human Rights Campaign illustrated that the top three problems reported by LGBTQ youth are: (A) non-accepting families, (B) school/bullying problems, and (C) fear of being "out;" while the top three problems reported by non-LGBTQ youth are: (A) classes/exams/grades, (B) college / career, and (C) financial pressures related to college or job.(iv) This study further showed that less than half (49%) of LGBTQ youth say they have an adult in their family they could turn to for support, meanwhile 46% list their family among the places where they most often hear negative messages about being LGBTQ.(v)

Finally, there are proven benefits to creating a safe and affirming environment for LGBTQ youth at school: statistics have demonstrated that LGBTQ students who are out to other students or school staff have higher levels of school belonging, higher levels of self-esteem, and lower levels of depression.(vi)

Common Questions and Answers

As we explored in Legal Notes Five in the context of freedom of expression, minors do not shed their constitutional rights at the schoolhouse gate.(vii) Students, like adults, have a fundamental right to privacy under both the Florida and United States Constitutions, which encompasses "the right to determine whether or not sensitive information about oneself will be disclosed to others."(viii) For many LGBTQ+ youth, their sexual orientation and/or gender identity constitute highly sensitive and personal information, the disclosure of which could have tragic consequences. For instance, when police officers threatened to disclose to a young man's family that he was gay, he took his own life rather than facing what he feared would be family rejection.(ix)

Question: How should schools balance parents' and students' constitutional rights?

Answer: The United States and Florida Constitutions have long protected the rights of parents in determining the care, custody, upbringing, and education of their children. While these rights are fundamental and deeply rooted, they are not absolute, (x) and must be balanced alongside the child's own constitutional rights to privacy, (xi) autonomy,(xii) and personal security. Under the Florida K-12 Education Code, **Parents** are entitled to information related to their minor child, including school records, curriculum, educational materials, clubs and activities, standardized test results, graduation requirements, and more.(xiii) **Students**, however, have their own constitutional right to privacy,(xiv) which includes "the right to determine whether or not sensitive information about oneself will be disclosed to others."(xv) **Balancing:** when disclosure of sensitive, private information about a student may put the safety and well being of that student at risk, school officials must carefully weigh the competing fundamental rights and interests at stake. **Examples include:** (A) a student who uses only affirmed name/pronouns at school, but the parent asks school to use only legal name/sex assigned at birth, the use of which would "out" the student as transgender to their classmates, violating their privacy rights and subjecting the student to potential bullying and harassment from peers; (B) a student who discloses domestic violence to a school official, the disclosure of which to the parent could exacerbate the harm to the student or others at home; (C) a parent who asks a school official "is my child gay?" when the school official knows the student does not feel safe or comfortable disclosing this information at home.

Question: Can school officials “out” LGBTQ+ students to their parents without the students’ consent?

Answer: If the information about a student’s sexual orientation or gender identity is *contained in the student’s education record*, parents are entitled to the information.(xvi) However, if the information is *not contained in a student’s education record*, an LGBTQ+ student who wishes to keep their sexual orientation or gender identity private has a reasonable expectation of privacy in that information.(xvii) Further, just because a student discloses their sexual orientation or gender identity in confidence to a school official *does not* mean they’ve relinquished the privacy right to that information in all contexts.(xviii) Under Florida constitutional law, the fundamental right to privacy can only be intruded upon if: **(a)** the school district has a *compelling* interest in disclosing the information, and **(b)** the disclosure of the students’ LGBTQ status is the least intrusive means of accomplishing that compelling state interest.(xix) This means a school official must have a *genuine, legitimate* interest (xx) in disclosing a student’s sexual orientation and/or gender identity, such as protecting the student’s well-being, health, or safety, or an express statutory mandate requiring the disclosure.

Example: In analyzing whether a Principal had a legitimate interest in telling a suspended student’s parent that she was a lesbian, a federal court in California determined that the state Education Code mandated parental notification of the conduct giving rise to a student’s suspension.(xxi) The court held that under federal constitutional law the Principal could not have “gratuitously” informed the parent that the student was gay, however, because the student repeatedly defied warnings about inappropriate PDA with her girlfriend on the school campus, the student subjected herself to the disciplinary process and “injected the nature of [her same-sex relationship] into the home.” (xxii)

Much like the rights discussed by the United States and Florida Supreme Courts in the foundational cases involving the fundamental right to privacy, the decision to disclose private, personal information about one’s sexual orientation or gender identity is similarly “fraught with specific physical, psychological, and economic implications of a uniquely personal nature.” (xxiii) As outlined above, LGBTQ+ youth are disproportionately likely to experience rejection by their family upon disclosure of their sexual orientation or gender identity, resulting in *physical* consequences (abuse, being kicked out), *psychological* consequences (depression, suicidal ideation), and *economic* consequences (homelessness, lack of financial support).

In addition to the U.S. and Florida Supreme Court’s articulations that the right to privacy includes the right of autonomy in decision-making and confidentiality of information, additional lower court decisions demonstrate an emerging recognition of constitutional privacy rights against unwanted disclosure of highly personal information, such as sexuality and identity.(xxiv)

Question: How do school officials follow mandatory parental notification requirements while also protecting the privacy rights and safety of LGBTQ+ students?

Answer: The Florida K-12 Education Code requires that school districts notify parents about certain aspects of their child’s education, including, among others: placement of the student in a dropout prevention or academic intervention program (Fla. Stat. §1002.20(2)(e)), verified reports of a substance abuse violation by their child (Fla. Stat. §1002.20(3)(g)), removal from school for involuntary examination (Fla. Stat. §1002.20(3)(l)), suspension or expulsion (Fla. Stat. §1002.20(4)(a)-(b)), and instances where their child is a victim of bullying (Fla. Stat. §1006.147(4)(i)). When notification of parents as required by Florida law involves a student’s LGBTQ status (for instance, when a student is bullied because of their sexual orientation or gender identity) districts must try to navigate the situation in a way that protects the privacy and safety of the student. Guidance from the Massachusetts Department of Education regarding the notification of parents in this situation (xxv) discusses the reality that LGBTQ+ students are less likely to report bullying to school officials if they fear being “outed” to their parents. The Mass. DOE recommended that districts should **(a)** designate a staff person who is proficient in these topics, and **(b)** design a parental notification process that includes consultation with the student, guidance staff, and that designated staff person, which is informed by an assessment of the student’s safety and privacy interests in disclosing their sexual orientation or gender identity to their parent(s).

Conclusion: In navigating these highly complex and sensitive situations, school districts must balance the competing and sometimes conflicting interests of parents and students, recognizing the fundamental rights of parents to direct the upbringing and education of their children *and* the fundamental rights of students to privacy and autonomy. When considering disclosure of a students’ sexual orientation or gender identity, which intrudes on the student’s fundamental right to privacy, school officials must carefully consider:

(1) whether there is a compelling reason for doing so (i.e. does the Florida Education Code mandate disclosure, is the disclosure necessary to protect the safety or health of the student, or is the disclosure gratuitous in response to mere parental curiosity); and
(2) how to accomplish through the least intrusive means (i.e. does notifying the parents of a victim of bullying require disclosing the details that the bullying was because the student is LGBTQ). Finally, in weighing the competing interests, the individual circumstances of the student should always be considered (xxvi) (i.e. the age and maturity of the student, the circumstances necessitating the disclosure, whether or not the student is “out” to their parents/family, whether disclosure of the student’s sexual orientation or gender identity could create an unsafe home environment for the student, or if disclosure of a student’s LGBTQ identity is mandated are there resources that could be provided to support the family in affirming the student).

Questions? Reach out to us at:

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- i Shelton, J., & Gates, G. (2015), *Serving Our Youth 2015: The Needs and Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness*, The Williams Inst. with True Colors Fund.
- ii Durso, L., & Gates, G. (2012), *Serving Our Youth: Findings From A National Survey Of Services Providers Working With Lesbian, Gay, Bisexual, And Transgender Youth Who Are Homeless Or At Risk Of Becoming Homeless*, The Williams Inst. with True Colors Fund & Palette Fund.
- iii Ryan, C., et al., *Family acceptance in adolescence and the health of LGBT young adults*, 29 J. Child & Adolescent Psychiatric Nursing, 205-13; Ryan, C., et al., *Family rejection as a predictor of negative health outcomes in white and Latino lesbian, gay and bisexual young adults*, 123 Pediatrics, 346-52.
- iv Human Rights Campaign, *Growing Up LGBT In America: Key Findings*, available at [http://www.hrc.org/files/assets/resources/Growing-Up-LGBT-in-America_Report .pdf](http://www.hrc.org/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf), at 14.
- v *Id.* at 21.
- vi Joseph G. Kosciw et al. & GLSEN, *The National School Climate Survey: The Experiences Of Lesbian, Gay, Bisexual And Transgender Youth In Our Nation's Schools* (Sept. 5, 2012).
- vii *Tinker v. Des Moines Indep. Cnty Sch. Dist.*, 393 U.S. 503, 506 (1969).
- viii *Rasmussen v. S. Fla. Blood Serv., Inc.*, 500 So. 2d 533, 536 (Fla. 1987); see also *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)(federal constitutional right to privacy not only protects individual's right to bodily autonomy but also the right to control the nature and extent of highly personal information released about that individual); *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (fundamental liberties include "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs" such as a person's sexual orientation).
- ix *Sterling v. Borough of Minersville*, 232 F.3d 190, 193, 196 (3d Cir. 2000).
- x The constitutional rights of parents to direct the upbringing and education of their children without undue government influence is not absolute, and yields where the state shows compelling reasons to promote the best interests of the child. See *Padgett v. Dep't of Health & Rehab. Serv.*, 577 So. 2d 565, 570 (Fla.1991), quoting *In re Camm*, 294 So.2d 318, 320 (Fla.), cert. denied, 419 U.S. 866 (1974) ("While Florida courts have recognized the "God-given right" of parents to the care, custody and companionship of their children, it has been held repeatedly that the right is not absolute but is subject to the overriding principle that it is the ultimate welfare or best interest of the child which must prevail.").
- xi **Federal:** *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) ("A child, merely on account of his minority, is not beyond the protection of the Constitution"); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights"); **Florida:** Art. I, § 23, Fla. Const. (state constitutional right guaranteeing the "right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."); *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) ("The right of privacy extends to [e]very natural person... Minors are natural persons in the eyes of the law and [c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").
- xii "In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).
- xiii Fla. Stat. Chpt. 1000-1013, including Fla. Stat. § 1002.20 (K-12 Student and Parental Rights).
- xiv *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977) (the federal constitutional right to "privacy" protects two 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."); *B.B. v. State*, 659 So. 2d 256, 258-59 (Fla. 1995) (based upon the unambiguous language of article I, section 23 of the Florida Constitution, the right to privacy extends to every natural person and minors are natural persons in the eyes of the law).

xv *Rasmussen*, 500 So. 2d at 536.

xvi Fla. Stat. § 1002.20(13).

xvii *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1193 (C.D. Cal. 2007) (student's "right to privacy with regards to her sexual orientation falls under the broader right to informational privacy" under federal law); *C.N. v. Wolf*, 2007 WL 9702949, at *5 (C.D. Cal. Dec. 14, 2007) ("this Court's decision will likely lead subsequent courts to conclude that the right to privacy in one's sexual identity is now clearly established").

xviii *Nguon*, 517 F. Supp. 2d at 1193-95 (the conduct giving rise to the suspension of being "kissed by another girl").

xix *Winfield v. Div. of Pari Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985).

xx *B.B.*, 659 So. 2d at 259 ("once it is determined that a citizens' privacy interest is implicated, this test shifts the burden to the State to justify the intrusion of privacy").

xxi *Nguon*, 517 F. Supp. 2d at 1193-95 (the conduct giving rise to the suspension being "kissing another girl").

xxii *Id.* at 1195 (in the context of a statutory requirement that parents are notified of the conduct giving rise to the student's suspension, the Principal did not violate the student's privacy rights by disclosing to the parents the "objective facts" underlying the disciplinary action.).

xxiii *In re T.W.*, 551 So. 2d at 1193 (quoting *Roe v. Wade*, 410 U.S. 113, 153 (1973)).

xxiv **2d Cir.:** *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir.1999) ("The excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate"); **3d Cir.:** *Sterling*, 232 F.3d at 196 ("it is difficult to imagine a more private matter than one's sexuality"); **5th Cir.:** *Wyatt v. Kilgore Indep. Sch. Dist.*, 2011 WL 6016467 (E.D. Tex. Nov. 30, 2011) *rev'd in part, vacated in part sub nom. Wyatt v. Fletcher*, 718 F.3d 496 (5th Cir. 2013) (coach's disclosure of student's sexual orientation was in interest of student's well-being and was narrowly tailored to mothers' "need to know"); **6th Cir.:** *Bloch v. Ribar*, 156 F.3d 673, 685-86 (6th Cir.1998) ("Our sexuality and choices about sex, in turn, are interests of an intimate nature which define significant portions of our personhood."); **7th Cir.:** *Wolfe v. Shaefers*, 619 F.3d 782, 785 (7th Cir. 2010) ("The courts of appeals, including this court, have interpreted *Whalen* to recognize a constitutional right to the privacy of medical, sexual, and perhaps other categories of highly personal information"); **9th Cir.:** *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir.1983) ("The interests Thorne raises in the privacy of her sexual activities are within the zone protected by the constitution"); *Nguon*, 517 F. Supp. 2d 1177; *C.N.*, 2007 WL 9702949.

xxv *Guidance on Notifying Parents When a Student Has Been Bullied Based on Sexual Orientation or Gender Identity/Expression*: Implementation of 603 CMR 49.05, Mass. Dep't of Elem. & Secondary Educ.

xxvi In the case example from question 2, in weighing the competing interests the Court "considered the environment of [the student's] home," including the parents' cultural background and infrequent presence at the student's school, and the student's decision not to disclose her same-sex relationship to her parents or bring her girlfriend to her home. *Nguon*, 517 F. Supp. 2d at 1191.

Final Note: Schools have the duty to act *in loco parentis* and to protect the safety and well-being of students in their care, which for LGBTQ+ students requires providing a safe and affirming learning environment. While parents have the right to make decisions regarding the "custody, care, and control of their children," this right is not unlimited. The Parents' Bill of Rights does not give parents the right to dictate the operations of public schools, nor does it erode the deeply-rooted constitutional rights of students to privacy, autonomy, and self-determination.

As you navigate these complex conversations, do not hesitate to consult with your district's school board attorney.

This series of Legal Notes is created in tandem with attorney Simone Chriss, Director of the Transgender Rights Initiative at Southern Legal Counsel (simone.chriss@southernlegal.org), as well as members of our EQFL Florida School Board Attorney Advisory Group. We hope that you keep these resources handy as you continue to ensure the safety and wellbeing of LGBTQ+ students.