

August 26, 2020

Dear Principal or Superintendent,

You're being given this letter because your school or a school in your district may be violating the constitutional privacy rights of its students. You are legally obligated to prevent and stop such violations. Specifically, without full and voluntary consent by the student, it is against the law to disclose a student's sexual orientation or gender identity, even to a student's parents or other school administrators.



The Supreme Court has long recognized that the federal constitutional right to privacy not only protects an individual's right to bodily autonomy, but also the right to control the nature and extent of highly personal information released about that individual. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). This right to informational privacy restricts the government's ability to disclose information about an individual's personal matters, especially those matters that are protected by the Constitution from unwarranted government intrusion, such as contraception, abortion, marriage, family life, and sexual associations. *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) ("It is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity."); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) ("Publicly revealing information [about sexuality] exposes an aspect of our lives that we regard as highly personal and private."); *Eastwood v. Dep't of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) (right to privacy "is implicated when an individual is forced to disclose information regarding sexual matters."). Disclosure of private information related to sex or gender can also violate sex discrimination laws. See *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016) (disclosure of private information about employee's transgender status in an email established a prima facie case for harassment/hostile environment under Title VII's sex discrimination prohibition).

This right to informational privacy extends to students in a school setting. Students have the constitutional right to share or withhold information about their sexual orientation or gender identity from their parents, teachers, and other parties, and it is against the law for school officials to disclose, or compel students to disclose, that information. Even when students appears to be open about their sexual orientation or gender identity at school, it remains the student's right to limit the extent to which, and with whom, the information is shared. *C.N. v. Wolf*, 410 F. Supp. 2d 894, 903 (C.D. Cal. 2005) ("[T]he fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of that information to others."). The Family Educational Rights and Privacy Act ("FERPA"), also protects students against the disclosure of personally identifiable information.¹ The National Association of Secondary School Principals ("NASSP") has recognized that students' "transgender status, legal name or sex assigned at birth is confidential medical information and considered 'personally identifiable information' under" FERPA and cautions that "[d]isclosure of that

¹ See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. §§ 99.00, *et seq.*

information to other school staff or parents could violate the school's obligations under FERPA or constitutional privacy protections."²

School officials often think they are doing the right thing by revealing students' sexual orientation or gender identity to their parents. But doing so can have dramatic and unforeseen consequences. In one particularly tragic case, a teenager died by suicide after a police officer threatened to disclose his sexual orientation to his family. *Sterling*, 232 F.3d at 196. Depending on the circumstances, disclosing a student's sexual orientation or gender identity to their parents could also lead the student to be physically abused or thrown out of their home. See Mass. Dep't of Educ., *Guidance on Notifying Parents When a Student Has Been Bullied Based on Sexual Orientation or Gender Identity/Expression* (Jan. 2011), <http://www.doe.mass.edu/sfs/bullying/PNguidance.html>.



As a school administrator, you have a legal obligation to maintain the privacy and safety of your students, including those who are lesbian, gay, bisexual, transgender, queer, or questioning. Please do not hesitate to contact the ACLU if you have any questions about this letter or wish to discuss it further. We can be reached at 212-549-2673.

Sincerely,

A handwritten signature in black ink that reads "James D. Esseks". The signature is written in a cursive style with a large, stylized initial "J".

James D. Esseks
Director
ACLU Lesbian Gay Bisexual Transgender & HIV Project

Students and parents: Feel free to use this letter as an advocacy tool in your school.

² NASSP, *Position Statement on Transgender Students* (2016), <https://www.nassp.org/policy-advocacy-center/nassp-position-statements/transgender-students/>.