Oregon Department of Education's Transgender Guidance Document:

A Violation of Parental Rights

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INTRODUCTION

Recently, the mother of a first-grader in Oregon received routine paperwork in the mail from her daughter's elementary school. The letter was addressed to the correct home and parents, but referenced a child's name the mother did not recognize. The mother called the school to bring attention to the error. The school secretary told the mother that the unrecognized name was correct in their school's system, and she could make an appointment with the guidance counselor if she had any additional concerns. The mother immediately called the school's counselor to make an appointment.

Both parents attended the meeting with the guidance counselor. The counselor informed the parents that their daughter told her teacher she wanted to change her name and be a boy. The teacher was not surprised because she noticed the girl preferred to play with boys, had short hair, and displayed more masculine than feminine mannerisms. Additionally, the teacher never saw the child wearing a dress or other traditional "girl" clothes. The school counselor explained to the parents that the school district's policy is to honor a student's declaration of their gender identity, and there is no requirement to inform the parents - or engage them in a discussion - before recommending that the Oregon Department of Education change the student's gender and legal name in the Secure Student Identification System:

> ODE will change a student's gender within the Secure Student Identification System (SSID) upon request from a district. ODE will allow the request from the district to serve as the 'documentation to support the change' that is generally required by ODE for changes to the SSID. There is no need for the student to prove their new gender. The student's declaration of their gender is acceptable. [1]

[1] Oregon Department of Education, *Guidance to School Districts: Creating a Safe and Supportive School Environment for Transgender Students*, p. 7, May 5, 2016. *Retrieved from*: https://www.oregon.gov/ode/students-and-family/equity/civilrights/Documents/TransgenderStudentGuidance.pdf).

Additionally, there is no requirement for a medical professional's diagnosis or recommendations surrounding treatment of gender dysphoria before taking such action. The school follows this policy because they are concerned about high rates of neglect and abuse to transgender children when they reveal their identity to their parents.

The parents, who had never been suspected of abusing or neglecting any of their children, were astonished to learn this information and adamantly disagreed with the school unilaterally determining that a "full social transition" (adopting the gender, name, hairstyle, clothing, and pronoun associated with their desired, rather than birth, gender) was in their child's best interest. If the school staff had communicated with these parents they would have learned that the parents, along with the child's psychologist, determined the best therapeutic approach for this young child was a "watchful waiting" approach. The school's actions damaged the course of therapy that child was receiving; and therefore, was not in the best interest of the child.

The school district's authority arises from a guidance document issued to Oregon School Districts by ODE on May 5, 2016.[2] The department's goal is to create safe and supportive school environments for transgender students.[3] The document, however, fails to provide individualized guidance for approaching the issue with children in different grade levels, various stages of development, and who are already receiving mental health intervention outside of the school. The recommendations that apply to twelfth graders also apply to kindergarteners. Furthermore, the policy gives the school authority to wholly remove parents from the process. There is no requirement, nor provision, providing parents with notice or an opportunity to be heard on the issue.

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2 *Id.*

3 *Id.* at 1.

Parents have a constitutional right "to direct the upbringing and education of [their] children."[4] The Supreme Court, in *Troxel v. Granville*, affirmed that "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."[5] Simultaneously, the state also has an important interest and responsibility to provide equal educational opportunities to all children. *Brown v. Board of Education* emphasized that "education is perhaps the most important function of state and local governments" … and "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[6]

Balancing parents' rights over their *individual* children with the State's responsibility to implement and oversee proper education for *all* children is bound to create a constitutional conundrum. Furthermore, children's constitutional rights must be considered. More often than not, the values and beliefs of young children and parents will align; but how should schools react when parents' rights collide with their child's rights? The Supreme Court in *Bellotti v. Baird* "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[7]

This paper will examine the scope of parents' rights and children's rights within public schools; the scope of the state's right to develop curriculum and implement education; and the school's interest as a state actor in the care and control of children under the *parens patriae* doctrine. The scope of these rights will determine how schools should respond when a child in

4 *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925).
5 *Troxel v. Granville*, 530 U.S. 57, 65 (2000).
6 *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).
7 *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

elementary school expresses signs of gender dysphoria. In conclusion, this paper will provide recommendations for an updated transgender policy that (1) differentiates between elementary and secondary school children, and (2) provides notice and deference to fit parents; thus mitigating the risk of litigation.

I. THE SCOPE OF PARENTAL RIGHTS IN PUBLIC SCHOOLS

A parent's right to direct the education and upbringing of their children was constitutionalized in the landmark cases of *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925).

Meyer v. Nebraska

In *Meyer*, a Nebraska statute criminalized teaching "any subject to any person in any language other than English" until the completion of eighth grade.[8] This law also implicitly denied parents the right to encourage their child to learn a foreign language before eighth grade. Meyer, a private school teacher, was convicted of violating the statute. The Supreme Court invalidated the law, reversed Meyer's conviction, and held that the Fourteenth Amendment's right to "liberty" includes the "right of parents to engage [a teacher] to instruct their children."[9] The Court recognized this liberty interest as an extension of the "natural duty of the parent to give his children education suitable to their station in life," supporting the common law belief that parental rights stem from parental duties.[10]

The Court did not limit its findings to the rights of parents, but also emphasized that "[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools … is not questioned."[11] There was no challenge to the "state's power to proscribe a

8 *Meyer v. Nebraska*, 262 U.S. 390, 397 (1923).
9 *Meyer*, 262 U.S. at 400.
10 *Id.*
11 *Id.* at 402.

curriculum," so the Court refrained from that discussion.[12] There is no suggestion by the Court that individual parents have the right to control public school curriculum generally. "Parents, simply, have the right to contract for educational services in a school setting without unreasonable interference from the state, even if the state does not support what is being taught. Clearly, *Meyer* does not diminish the power of the state to control its curriculum."[13]

Pierce v. Society of Sisters

Two years after its *Meyer* decision, the Supreme Court applied the parental rights doctrine in *Pierce v. Society of Sisters* (1925). In *Pierce*, the Court expanded parents' liberty interests found in *Meyer* by striking down an Oregon statute requiring all children between the ages of eight and sixteen to attend *public* school ("…we think it entirely plain that the Act … unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children…").[14] *Pierce* recognized that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[15] Again, as in *Meyer*, the Court noted no question was raised concerning the state's ability to regulate schools, require attendance, and establish curriculum.[16] The Supreme Court identified two competing interests: (1) a parent's right and duty to direct the upbringing and education of their children, and (2) the state's power to establish and direct public schools; including curriculum development.[17] Parents and schools share rights in education; but schools do not conversely share in a parent's fundamental right to the "upbringing" of their children.

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12 *Id.*

13 *A Parent's Child and the State's Future Citizen: Judicial and Legislative Responses to the Tension over the Right to Direct an Education*, 22 S. Cal. Interdisc. L.J. at 604 (*quoting Meyer*, 262 U.S. at 604).

14 *Pierce*, 268 U.S. at 510

15 *Id.* at 535

16 *Id.* at 534

17 *Id*. at 606.

Prince v. Massachusetts

Two decades after *Meyer* and *Pierce*, in *Prince v. Massachusetts,* the Supreme Court expounded on the principle that parental authority is not absolute. The state has broad authority to create child welfare laws and to intervene in the parent/child relationship when a parent violates such a law. *Prince* concerned a Jehovah Witness parent who violated a child labor law by allowing her children to join her in publicly distributing religious material in exchange for donations. The Court upheld her conviction, holding that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."[18] Mainly, the state's interest in protecting a child may exceed the parent's right to the care and custody of the child if the court determines the parent is violating a child welfare law.

The Supreme Court established that parents have a fundamental right to the education and upbringing of their children; but that right is not absolute. The state has the right to develop and implement curriculum, require attendance, and maintain order in public schools. Public schools, however, do not share in parental rights to make decisions regarding the upbringing of children. The state does not possess a general authority to infringe on parental rights, unless: (1) acting under its police power "to promote the public health, safety and welfare" of children generally, or (2) acting as *parens patriae* "to protect or promote a particular child's welfare" (commonly applied in cases of "abuse, neglect, foster care, adoption, medical decision-making, support, status offenses, and delinquency").[19] "It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights. The

[18] *Prince v. Massachusetts*, 321 U.S. 158 (1944). .

[19] Douglas E. Abrams, Sarah H. Ramsey, Susan V. Mangold, *Children and the Law: Doctrine, Policy and Practice*, pp. 20-21, 5th ed., 2014.

state's requirement to defer to parental control over children is underscored by the Court's admonitions that '[t]he child is not the mere creature of the State,'"[20] When an Oregon elementary school student expresses signs of gender dysphoria and the school determines a full social transition is the proper therapeutic approach (solely based on the child's assertions, without parental notice or medical diagnosis) the school is no longer acting under their "education" and "curriculum" interests; and therefore, must be acting pursuant to the state's *parens patriae* power. *Pierce*, *Meyer*, and *Prince* provide the framework for analyzing whether the government has abused its *parens patirae* power in its treatment of parents.

II. *PARENS PATRIAE*

Parens patriae ("parent of his or her country") refers to "the state in its capacity as provider of protection to those unable to care for themselves."[21] As discussed above, *Prince v. Massachusetts* was the first Supreme Court case to discuss this doctrine in relation to child welfare. The Court expressed that the state may act as *parens patriae* to restrict by law "the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways."[22] "In many other ways" referenced an 1894 New York case where a mother was arrested and charged with violating a code preventing her seven-year-old daughter from dancing in theater productions.[23] The New York court held that the legislature may deprive parents of their right to the care and custody of their children when acting under their police power to "promote the health or moral well-being of the members of society." As in *Prince*, the legislature acted pursuant to its *parens patriae* power to protect minors by regulating child labor. However, the court stated that such a law would be invalid if it *alleged* to promote the "well-being of children," but "in reality it

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20 *Gruenke v. Seip*, 225 F.3d 290, 307 (3rd Cir.2000) (*quoting Pierce*, 268 U.S. at 535).
21 Black's Law Dictionary (5th ed. 2016).
22 *Prince v. Massachusetts*, 321 U.S. at 166 (emphasis added).
23 *People v. Ewer*, 141 N.Y. 129, 36 N.E. 4 (1894).

strikes at an inalienable right or at the personal liberty of the citizen, and … remotely concern[s] the interests of the community…."[24]

Clearly, "the state maintains a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and … this includes, to some extent, matters of conscience and religious conviction."[25] But, "when state action impinges upon a claimed [] freedom, it must fall unless shown to be necessary for or conducive to the child's protection against some clear and present danger."[26]

Wisconsin v. Yoder

In 1972, the Supreme Court again addressed the state's *parens patriae* power in *Wisconsin v. Yoder*, holding that the First and Fourteenth Amendments prevent a state from compelling Amish parents to send their children to formal high school.[27] There, Amish parents were found guilty of violating a Wisconsin compulsory education law. Wisconsin believed that its "interest in its system of compulsory education [was] so compelling that even the established religious practices of the Amish must give way."[28] The state argued that allowing parents to circumvent state law and prevent their child from attending high school "fails to recognize the substantive right of the Amish child to a secondary education, and fails to give due regard to the power of the State as *parens patriae* to extend the benefit of secondary education to children regardless of the wishes of their parents."[29]

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[24] *People v. Ewer*, 141 N.Y. at 134.
[25] *Prince*, 321 at 167.
[26] *Id.*
[27] *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972) ("The Supreme Court, Mr. Chief Justice Burger, held that the First and Fourteenth Amendments prevent a state from compelling Amish parents to cause their children, who have graduated from the eighth grade, to attend formal high school to age 16.").
[28] *Wisconsin v. Yoder*, 406 U.S. at 221.
[29] *Id.* at 229.

The Court determined that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests."[30] The "State's interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights…," and enforcement "would gravely endanger if not destroy [those fundamental rights]."[31] Furthermore, The Court would not accept either of the State's asserted *parens patriae* or police power rationales for the law because there was no particularized showing of "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare."[32] "The Court's holding in *Yoder* thus seems to imply that 'when the state contravenes parental decisions in child rearing with the claimed purpose of benefiting the child, the state must present a convincing case that its intervention, in fact, will serve its professed goal.'"[33]

Oregon Department of Education as *Parens Patriae*

The Oregon Department of Education has broad authority to regulate the education and curriculum of public schools. Additionally, public schools are state actors and possess *parens patriae* power. To act as *parens patriae*, a state entity must have reason to believe the child needs protection from someone or something. Traditionally this has been accomplished through child welfare statutes and juvenile courts. ODE's transgender policy is a unique application of *parens*

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30 *Id.* at 205 (*Citing E.g., Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); *McGowan v. Maryland*, 366 U.S. 420, 459, 81 S.Ct. 1101, 1122, 6 L.Ed.2d 393 (1961) (*separate opinion of Frankfurter*, J.); *Prince v. Marssachusetts*, 321 U.S. 158, 165, 64 S.Ct. 438, 441, 88 L.Ed. 645 (1944).).

31 *Wisconsin v. Yoder*, 406 U.S. at 205.

32 *Id.*.at 230 (*citing Cf. e.g., Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905); *Wright v. DeWitt School District*, 238 Ark. 906, 385 S.W.2d 644 (1965); *Application of President and Directors of Georgetown College, Inc*., 118 U.S.App.D.C. 80, 87—90, 331 F.2d 1000, 1007—1010 (1964) (in-chambers opinion), cert. denied, 377 U.S. 978, 84 S.Ct. 1883, 12 L.Ed.2d 746 (1964).)

33 *State Interests in the Family*, 93 Harv. L. Rev. 1198, 1237 (1980) (citing Burt, *supra* note 232, at 127. Broad statutory schemes that do not allow parents to rebut the presumption that the state's intervention will in fact benefit the child are thus susceptible to constitutional attack. *See* Disanto & Podolski, *supra* note 232, at 209-10. On the other hand, state interference with parental rights should be upheld when based on a particular finding that the child's best interests demand such intrusion. *See, e.g., Jehovah's Witnesses v. King County Hosp. Unit No. 1*, 278 F.Supp. 488 (W.D. Wash. 1967)(upholding lifesaving blood transfusion against parent's religious wishes), *aff'd mem.*, 390 U.S. 598 (1968).

patriae. The policy presumes that parents of gender-questioning children, who want to transition without telling their parents, will harm their children. This general presumption does not supply a particularized showing of "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare." More importantly, this policy patently violates the Supreme Court presumption that parents act in the best interests of their children.[34] Furthermore, ODE's general policy cannot be shown to benefit all transgender children now or in the future; and to the contrary, may harm some students.

Oregon has a system in place for investigating threats of "clear and present danger" to children, and it is *not* the public school system. The Oregon Department of Human Services ("DHS") Child Welfare division is the proper state agency to investigate allegations of child abuse and/or neglect. When a public school employee is concerned that a transgender child will be abused, they must report those concerns to DHS. Public school employees are mandatory reporters, not equipped to internally investigate abuse allegations. It is never permissible for a state agent to preemptively deny constitutional rights because they presume a parent will abuse their transgender child.

III. SUPREME COURT PRESUMPTION IN FAVOR OF PARENTS

Parham v. J.R.

In *Parham*, minors claimed that Georgia mental health laws permitting voluntary admission of minors to mental hospitals by parents or guardians violated their Fourteenth

[34] *Troxel v. Granville*, 530 U.S. 57 (2000) ("There is presumption that fit parents act in best interests of their children. (Per Justice O'Connor, with the Chief Justice and two Justices concurring, and with two Justices concurring in result."); *Parham v. J. R.*, 442 U.S. 584, 602 (There is a presumption that fit parents act in their children's best interests); *Reno v. Flores*, 507 U.S. 292, 304 (there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children).

Amendment Due Process rights.[35] The Supreme Court balanced the interests of the children, the parents, and the state, with the risk of error inherent in the parental decision. The Court concluded that their "precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply."[36]

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." … Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.[37]

The Court was not ignorant to the reality that some parents do act contrary to their children's best interests; recognizing "that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."[38] However, just because a decision "is not agreeable to a child" does not "automatically transfer the power to make that decision from the parents to some agency or officer of the state."[39] "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."[40] But that is exactly what

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35 *Parham v. J. R.*, 442 U.S. 584 (1979).

36 *Parham*, 442 U.S. at 604 (emphasis added).

37 *Id.* at 602 (*citing Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925). *See also Wisconsin v. Yoder*, 406 U.S. 205, 213, 92 S.Ct. 1526, 1532, 32 L.Ed.2d 15 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923); 1 W. Blackstone, Commentaries * 447; 2 J. Kent, Commentaries on American Law * 190.).

38 *Id.* at 584.

39 *Id.* at 603.

40 *Id.* at 603.

ODE's policy does – allows the government to supersede parental authority in all cases because some parents abuse their transgender children.

Troxel v. Granville

Most recently, in 2000, The Supreme Court had another opportunity to decide whether states may interfere in a fit parent's fundamental right to "make decisions concerning the care, custody, and control of their children."[41] *Troxel v. Granville* struck down a Washington Superior Court decision and held that allowing third-party visitation of a child without deference to the fit parent's judgment violates the parent's Fourteenth Amendment Substantive Due Process right. The decision was narrow and did not determine third-party visitation statutes are unconstitutional *per se* but did emphasize that courts must defer to a fit parent's judgment in such matters. Third-party visitation statutes require weighing three, possibly four, conflicting interests: (1) a parent's interest in the "care, custody, and control" of their child, (2) the state's interest in the welfare of the child, (3) the child's interest in maintaining healthy relationships with nonparental adults, and (4) the third-party petitioner's interest in a relationship with the child. The Court's determination that states must defer to a fit parent's decisions, even when the child and state have an interest in the outcome, rests on the presumption that "parents act in the best interests of their children," and [state agents] are not in a better position than parents to make such decisions.

ODE cannot simply determine that parents do not deserve notice or deference on private family issues unrelated to education or curriculum. State agencies must presume parents will act in the best interests of their children – agencies act unconstitutionally when preemptively removing parental rights under the inverse presumption.

ODE's Policy Directly Contravenes the Presumption that Parents Act in Their Child's Best Interests

41 *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

The decisional framework employed by the Oregon Department of Education directly contravenes the traditional presumption that a fit parent will act in the best interests of their child. ODE's policy of changing a child's gender and name, solely upon request by the child and state agents, violates parents' Fourteenth Amendment Substantive Due Process rights. Furthermore, the policy violates the parents' Due Process rights by presuming parents will *not* act in the best interest of their child, without providing parents with notice or an opportunity to rebut the state's unconstitutional presumption.

Parents have the utmost duty and interest in the well-being and health of their children. If a child is suffering from gender dysphoria, the school is not in a better position than the parents to determine the best course of treatment. Even if an elementary-aged student expresses a desire for a full social transition, that does not give schools a legal right to make the decision sans notice and deference to fit parents. There are long-term and yet to be discovered psychological impacts to allowing a young child to engage in a full social transition. A full social transition should not be presumed to be in the in the best interest of *every* pre-pubescent child who may suffer from gender dysphoria. ODE's willingness to make that potentially harmful presumption without parental or medical consent shows that the state agency is not qualified to engage in such sensitive psychological matters.

IV. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS – GENDER DYSPHORIA

The most recent *Diagnostic and Statistical Manual of Mental Disorders (*DSM–5*)* is "the product of more than 10 years of effort by hundreds of international experts in all aspects of mental health."[42] It is recognized as "an authoritative volume that defines and classifies mental disorders

[42] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5), Retrieved from* https://www.psychiatry.org/psychiatrists/practice/dsm.

in order to improve diagnoses, treatment, and research."[43] The DSM-5 provides "one overarching diagnosis of gender dysphoria, with separate developmentally appropriate criteria sets for children and for adolescents and adults."[44] This paper is focused on the DSM's developmentally appropriate criteria sets for children.

Gender dysphoria "refers to an individual's affective/cognitive discontent" with their biological gender.[45] More specifically, the term "refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender [*natal gender*]."[46] Contrary to when the DSM-4 was published, the dysphoria itself is now the focus of "the clinical problem, not identity per se."[47]

The DSM-5 recognizes "separate criteria sets for children verses adolescents and adults" … "[b]ecause expression of gender dysphoria varies with age." [48] Likewise, the Oregon Department of Education should recognize separate policies for children verses adolescents.

Rates of Persistence of Gender Dysphoria from Childhood into Adolescence

"Rates of persistence of gender dysphoria from childhood into adolescence" vary between natal [at birth] males and natal [at birth] females.[49] For natal males, persistence ranges from 2.2% to 30%.[50] For natal females, persistence ranges from 12% to 50%.[51] (Stated differently, 70% to 97.8% of boys, and 50% to 88% of girls outgrow their gender dysphoria.) [52] Studies show that

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43 *Id.*

44 American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders: Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition. Arlington, VA: American Psychiatric Association, p. 451, 2013.

45 *Id.* at 451.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.* at 455.

50 *Id.*

51 *Id.*

52 *Id.*

both male and female children who showed signs of gender dysphoria in childhood alternatively identify as homosexual in adolescence and adulthood ("For natal male children whose gender dysphoria does not persist, the majority are *androphilic* (sexually attracted to males) and often self-identify as gay or homosexual (ranging from 63% to 100%)") while the rates for natal females who later self-identify as lesbian ranges "from 32% to 50%."[53] The American Psychological Association ("APA") confirms that transgender identity fluctuates, and the vast majority of gender dysphoric minors will eventually accept their chromosomal sex.[54]

Therapeutic Interventions and Outcomes

When a child presents signs of gender dysphoria, a mental health professional will first eliminate other possible disorders before making a diagnosis. Some children who show signs of gender dysphoria may actually suffer from disorders such as "body dysmorphic disorder," "body integrity identity disorder," or more rarely, "schizophrenia."[55] Mental health professionals, not public schools, are qualified to determine and diagnose what is causing the child's distress and how to best treat it. When schools and young students act in concert to make such conclusions without parental knowledge or consent, they may be impeding the best course of treatment for that particular child.

Parents and mental health care providers have a variety of therapeutic interventions to choose from.[56] These interventions range from "active efforts to reduce gender dysphoria" to "a more neutral, 'watchful waiting' approach."[57] There are short-term and long-term reasons parents may choose a watchful waiting approach for their young child. The *APA Handbook* warns that

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53 *Id.* (emphasis in original).
54 Deborah L. Tolman and Lisa M. Diamond, *APA Handbook of Sexuality and Psychology*, 744 (2014).
55 *Id*. at 458.
56 *Id.*
57 *Id.*

ODE's full acceptance approach "runs the risk of neglecting individual problems the child might be experiencing and may involve an early gender role transition that might be challenging to reverse if cross-gender feelings do not persist."[58] Additionally, "children may experience stigma associated with gender role nonconformity."[59] "Stigma can take the form of teasing, ridicule, and bullying, particularly from peers."[60]

Mental health experts do not know whether "particular therapeutic approaches to gender dysphoria in children are related to rates of long-term persistence."[61] Accordingly, it is unknown whether children encouraged "to live socially in the desired gender will show higher rates of persistence, since such children have not yet been followed longitudinally in a systematic manner."[62] Parents have good reason to be concerned about the probability of long-term persistence and schools should tread cautiously when allowing young children to socially transition without collaborating with parents. Statistics support the probability that most children will outgrow the dysphoria, and it is unknown whether children encouraged "to live socially in the desired gender will show higher rates of persistence."[63] Adults, not children, can foresee that persistence of gender dysphoria

> is associated with high levels of stigmatization, discrimination, and victimization, leading to negative self-concept, increased rates of mental disorder comorbidity, school dropout, and economic marginalization, including unemployment, with attendant social and mental health risks, especially in individuals from resource-poor family backgrounds.[64]

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58 Deborah L. Tolman and Lisa M. Diamond, *APA Handbook of Sexuality and Psychology*, 750 (2014).
59 *Id.* at 744.
60 *Id.*
61 *Id.* at 750.
62 *Id.*
63 American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders: Diagnostic and Statistical Manual of Mental Disorders*, at 455.
64 *Id.* at 458.

Schools should not encourage children to socially transition (without parental consent) when it is unclear whether this method of intervention increases rates of persistence, and the outcomes for transgenders are grave. The APA affirms that "[p]remature labeling of gender identity should be avoided. Early social transition (i.e., change of gender role, such as registering a birth-assigned boy in school as a girl) should be approached with caution to avoid foreclosing this stage of (trans)gender identity development."[65] While "early social transition may be necessary for some," "the stress associated with possible reversal of this decision has been shown to be substantial…."[66] With so many unknowns, and so much at stake for their child's future, fit parents should never be dismissed from this decision by the state acting in the public school system.

Clearly, a one-size-fits-all policy does not work here. Children need individualized mental health care and treatment. Accommodating a child who desires a full social transition at school is not the best practice for all children with signs of gender dysphoria – it is a mental health care decision that should be entered into cautiously by parents and mental health professionals. Public school employees are not qualified to presume a child has gender dysphoria, then determine a social transition is in their best interest. Even if a child expresses the desire to socially transition, children cannot fully understand the ramifications of such a decision and need parental guidance. "Consensus about the best clinical practice is currently under debate," and schools should not be entering this zone of medical practice, especially considering the unknown long-term outcomes.[67]

V. CHILDREN'S RIGHTS

If there was any doubt after *Meyer*, *Pierce*, and *Prince* that children possess liberty interests aside from their parents, the Supreme Court in *Tinker* unequivocally stated that "First Amendment

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65 Deborah L. Tolman and Lisa M. Diamond, *APA Handbook of Sexuality and Psychology*, 750.

66 Id. at 744.

67 Ristori J. Steensma TD, US National Library of Medicine: National Institute of Health, *Gender dysphoria in childhood*, 2016 (*retrieved from* https://www.ncbi.nlm.nih.gov/pubmed/26754056?report=abstract).

rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[68] In *Tinker*, teenaged students were suspended from school for engaging in political speech by wearing armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them."[69] The Court recognized that "[s]tudents in school as well as out of school are 'persons' under our Constitution … [t]hey are possessed of fundamental rights which the State must respect …."[70] The Court ultimately sided with the students because their expression of speech did not substantially disrupt or materially interfere with school activities or the rights of others. Later decisions by the Court affirmed the constitutional rights of students in public schools but also recognized they are "not automatically coextensive with the rights of adults in other settings."[71]

The Mature Minor Doctrine

In addition to children's constitutional rights in school, the Court also acknowledges the rights of children who appear "capable of articulating a reasoned preference on matters important to the child's welfare"; this consideration is known as the "mature minor" doctrine.[72] The age of maturity is an arbitrary number and the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach."[73] At common-law, the mature minor exception "was not created to advance the autonomy of minors" but "to protect the interests of physicians,

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68 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 736 (1969).
69 *Tinker*, 393 U.S. at 514, 89 S. Ct. at 740.
70 *Id*. at 511, 89 S. Ct. at 739.
71 *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (*quoting New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).
72 Douglas E. Abrams et al., *Children and the Law* 82 (5th ed. 2014).
73 *Roper v. Simmons*, 543 U.S. 551 (2005).

permitting them to avoid battery and malpractice charges when treating minors without their parents' permission."[74] In practice, however, the doctrine creates a path for mature minors to obtain medical care without parental consent.

Early recognition of children's liberty rights involved cases where the interests of parents and children did not conflict (*Meyer*, *Pierce*, *Prince*). Courts soon faced decisions regarding conflicting rights of minors and their parents. *Bellotti v. Baird* considered the rights of minors to obtain abortions without parental consent. The constitutional right to an abortion under *Roe* had to be reconciled with the State's interest in encouraging minors to communicate with their parents about sensitive topics, and a parent's right to the "care, custody, and control" of their child.[75] *Bellotti* "recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[76] The Court quoted *Prince* to promote the principle that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.*"*[77]

However, despite the Court's deference to a fit parent's liberty interest, they determined that requiring parental consent to a minor's abortion puts an undue burden on the child's constitutional right. "[Y]oung pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court," therefore,

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74 Michael Hayes, *The Mature Minor Doctrine: Can Minors Unilaterally Refuse Medical Treatment?*, 66 U. Kan. L. Rev. 685, 695 (2018).

75 *Bellotti v. Baird*, 443 U.S. 622, 623 (1979) ("The abortion decision differs in important ways from other decisions facing minors, and the State is required to act with particular sensitivity when it legislates to foster parental involvement in this matter.")

76 *Bellotti*, 443 U.S. at 622 (1979).

77 *Id*. at 638.

"every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents."[78] Then, "[i]f … the court is not persuaded by the minor that she is mature or that the abortion would be in her best interests, it may decline to sanction the operation." Effectively, the state, through the legal system, replaces the parent's judgment with its own. Either way, the mature minor must submit to the decision of an authority figure.

Parental Consent Requirements in Oregon

Presumptively, ODE created their policy (of allowing students of any age to determine whether a full social transition is in their best interest) in part to respect the rights of children to their autonomy and medical care. In Oregon, a minor who is 14 years or older may access outpatient mental health and drug/alcohol treatment (excluding methadone) without parental consent.[79] These services include help from a psychiatrist or psychologist; mental health therapy from a doctor or social worker; and help for drug or alcohol use. Additionally, a minor who is 15 years or older may obtain medical care, including surgeries and abortions, without parental consent (however, receiving contact lenses for the first time requires parental consent for every minor).[80] Oregon is very liberal with children's rights, yet still requires minors under the age of 14 to receive parental consent for mental and physical health care. Likewise, ODE should require parental notice and consent before affirming a child's social transition in the school system if the child is under the age of 14.

CONCLUSION

It is laudable for the Oregon Department of Education to aim to protect children from abuse and discrimination; especially when bullying and suicide rates remain a concern for students.

78 *Id.* at 647, 99 S. Ct. at 3050.
79 ORS 109.675
80 ORS 109.640

Unfortunately, this policy does not protect gender-questioning children – and may actually harm them. Furthermore, the policy violates parental rights in the upbringing of their children and violates the Supreme Court presumption that parents act in the best interest of their children. Even if the school disagrees with the course of treatment a parent chooses, that decision belongs to the parents, not the school or the child under the age of 14. ODE should update its guidance document to require parental notice and consent be given before changing a child's name and gender in the Secure Student Identification System, when the child is under the age of 14.