

**Statement by Chris Erchull, Attorney, GLBTQ Legal Advocates and Defenders,
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Harvard Law School LGBTQ+ Advocacy Clinic, representing Seacoast Outright,
before the House Education Committee,
in OPPOSITION to Senate Bill 272,
An Act Establishing a Parents' Bill of Rights in Education**

Honorable Chair Ladd and Members of the Committee:

Thank you for taking the time to consider our statement in **opposition** to Senate Bill 272, An Act Establishing a Parents' Bill of Rights in Education. **Senate Bill 272, like its counterpart House Bill 10, is harmful legislation that must not become law.**

As representatives of GLBTQ Legal Advocates and Defenders (GLAD), New England's leading legal rights organization dedicated to ensuring equality for LGBTQ people and people living with HIV, and Seacoast Outright, a community organization providing youth with a safe space to discuss gender and sexuality, we are deeply opposed to legislation stripping rights from LGBTQ youth. GLAD and Seacoast Outright submit this written testimony to highlight several important points to underscore our opposition.

1. Senate Bill 272 would violate the constitutionally protected rights of transgender and gender nonconforming students.

By singling out transgender and gender nonconforming students for a special parental reporting standard, which is not applicable to other students exploring their identities while in school, Senate Bill 272 violates the principle that all students come before the law as equals. Virtually every adolescent who attends public school is in the process of identity exploration and development. For many of those students, that exploration of identity may include forms of expression that do not have approval from their parents and that their parents might like to know about. That may include a student with vegan parents who eats meat in the cafeteria, a student who changes into forbidden clothes or jewelry, or a Muslim student who chooses not to wear her hijab in the classroom. Schools retain the flexibility to address the needs of those students and their families, balanced with the interests of maintaining the optimal school climate for all students, but Senate Bill 272 would restrict schools from doing the same with respect to transgender and gender nonconforming students who are developing a sense of their identity with respect to gender.

The United States Supreme Court has ruled that government action that limits the protections available to a designated group are unconstitutional. In 1992, Colorado adopted an amendment to its state constitution that stated: "Neither the State of Colorado, . . . nor any of its political subdivisions . . . or school districts, shall enact, adopt or enforce any . . . policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute . . . protected status or claim of discrimination." In other words, cities and other government entities, like schools, were not given the same flexibility to protect gay and lesbian people that were afforded to *every other* class of people. The Supreme Court determined that this amendment to the state constitution violated the Fourteenth Amendment of the United States Constitution. *Romer v. Evans*, 517 U.S. 620 (1996) ("[T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation.."). Senate Bill 272 imposes a similar limitation on the

flexibility of school districts to meet the needs of one and only one group of students. Like the Colorado amendment, Senate Bill 272 deprives transgender and gender nonconforming students of equal protection of the laws.

2. The “truthfully and completely informed” standard articulated in Senate Bill 272 is bizarre and unworkable.

Senate Bill 272 posits that parents have the right to be “truthfully and completely informed” by school personnel about their children’s expression of gender at school. A straightforward bill could simply prohibit lying to parents, but instead SB 272 goes much further. It is unclear how this “truthfully and completely” standard would be applied. The responsibility to provide truthful and complete information must be imputed to a single individual (the person at a school contacted by a parent) when any number of people working in the school may come into contact with information about a student’s expression of gender at school. It would be impossible for any one individual to be charged with having every piece of information to meet the “truthfully and completely” standard.

In New Hampshire law, this standard is typically applied to determinations of whether a witness may invoke the Fifth Amendment. “The court must necessarily make the final determination of whether a truthful and complete response might be incriminating . . . in order to protect against abuse of the privilege . . .” *State v. Bell*, 112 N.H. 444, 447 (1972). Applying this standard (most often applied in cases involving criminal liability to *limit* disclosure if it would be incriminating) to school personnel, in the school setting, is an invitation to excessive litigation. The mode of enforcement in Senate Bill 272 includes a private right of action available to all parents to litigate about whether, in any particular case, the information provided meets the “truthfully and completely” standard. While lawyers would eagerly embrace the opportunity to argue that individual disclosures fail to meet the standard for varying reasons, the standard is not helpful to parents and is untenable for our schools.

While it has been said that only administrators such as building principals will be subject to the “truthfully and completely” standard, the plain text of the bill imputes the standard to “the school or school personnel,” and broadly defines “school personnel” to include anyone who works at a school, “includ[ing] any teacher, administrator, employer, or other individual acting in furtherance of or on behalf of any school.” The standard, according to the bill’s plain text, would apply even to a parent acting as a volunteer at a school event. This totally unworkable standard goes very far beyond a prohibition on lying to parents.

Importantly, any attempt to meet the “truthfully and completely” standard would require monitoring student activity and storing that information in a centralized database to which all school personnel have access. An Orwellian surveillance repository is the only way that an educator or other staff member at school can accomplish the task of reporting “truthfully and completely” to parents whenever parents ask questions about how students identify at school.

3. The sweeping provisions targeting transgender and gender nonconforming students go far beyond a teacher’s proactive affirmation of a student’s gender identity.

The notification requirements in Senate Bill 272 include a provision that applies where a student “is being identified by any name other than the name under which the child was enrolled,” with a narrow exception

for some “nicknames” if those nicknames reasonably understood “to be commonly derived from” the student’s given name. This provision is incredibly broad because it is drafted in the passive voice, meaning that any person who uses an alternate name, *even peers or even without the student’s instigation*, could trigger its notification requirements. Every teacher would have an obligation to report to a central database every instance in which anyone uses an alternate name, even just one time, to refer to someone else. (How else would all school personnel be able to comply with the “truthfully and completely” standard?) The only way to comply fully with this requirement is to impose rigid rules on everyone in the school building at all times to be formal in the names that they use when referring to each other. Aside from the free speech implications of a mandate like this, any educator would tell you that it is virtually impossible to achieve such formality in the school setting.

Another provision of Senate Bill 272 applies to any instance in which a student is “being identified or being referred to . . . as being of a gender other than that of which the child was identified or referred when enrolled.” This provision, in addition to its breadth and use of passive voice, is inscrutable and incapable of precise application. Of course there are examples in which the application would be clear—for example, if a transgender girl is clearly expressing her identity as a girl at school even though she was enrolled by her parents as male—but there are unlimited forms of expression that deviate from gender norms and it would be impossible for educators and other school staff to know when a form of student expression has triggered application of the law. Teachers would be tasked with monitoring and, again, reporting all suspected gender nonconformity to a centralized database.

Yet another vague provision of Senate Bill 272 is triggered when school personnel are “proceeding with any intervention to affirm or to provide an accommodation of a child’s asserted gender identity . . .” The bill fails to define the scope of the interventions or accommodations captured by this provision. Does a teacher “accommodate” a student’s expression of gender by tolerating gender-nonconforming self-expression in the classroom? What are the limitations to the conduct captured by this provision? Teachers have no guidance.

The “gray areas” in the bill text are not mere hypothetical thought exercises. When a transgender or gender nonconforming student is in the process of developing their identity, like all adolescents, there is rarely a fixed point at which an observer can identify a change in gender identity or expression, or any other assertion of identity. Nor is there a fixed point at which parents become aware of an adolescent’s expression of their identity. Indeed, these changes, and related intimate conversations among family members about these changes, are often incremental and often occur piecemeal over time.

Proponents of this legislation may argue that it would not be necessary or possible to detail every contour of the application of Senate Bill 272 to communicate clearly the rights at issue. This argument fails, however, when considering that the bill *could have been drafted* in a way that prohibits intentional misrepresentations to parents (eschewing the “truthfully and completely” standard) while making a more general statement about all aspects of student conduct at school (eschewing the singular focus on the gender expression of transgender and gender nonconforming students). But proposals in this vein have been rejected consistently by proponents of this legislation. The reason for the rejection of clear legislation articulating a sensible parental right against deception is self-evident:

The objective of this bill is not to provide a clear right to parents, but rather to target transgender and gender nonconforming students for a different level of surveillance and reporting to which other students will not be subjected.

The result of broad and vague statutory language that targets transgender and gender nonconforming students is two-fold: (a) a culture of surveillance and reporting to avoid any possibility of violating the law; and (b) a chilling effect on students' freedom to express their gender identity at school coupled with a chilling effect on trust students have in adults at school. The targeting of transgender and gender nonconforming students will inevitably result in these outcomes, which, again, is the objective of Senate Bill 272.

4. The "safeguards" in Senate Bill 272 are insufficient to protect students from potential harm that could be caused by excessive disclosure to parents.

Instead of a presumption that school personnel should *avoid* interfering in intimate family affairs, Senate Bill 272 provides a narrow exception from its notification mandates only where the school can demonstrate a "compelling state interest" in refraining from such interference. That "compelling" interest must be supported by "clear and convincing" evidence. "Clear and convincing" is an elevated evidentiary standard that typically applies to certain rare determinations, including claims of fraud (see *Snow v. American Morgan Horse Assoc.*, 141 N.H. 467, 468 (1996)) and preventative detention (see RSA 597:2, III(a)). In cases involving allegations of abuse and neglect of children, the New Hampshire Supreme Court has said that such determinations must be based on the much lower "preponderance of the evidence" standard, to "balance the rights of the parents and the rights of the child." *In re Tracy M.*, 137 N.H. 119, 124 (1993). The Legislature must not pass a law indicating that the state only has an interest in taking steps to protect children in cases where there is a high volume of documented evidence.

Instead, a public employee's decision to *avoid* getting involved in intimate family affairs, where a child may experience harm, should be based on the employee's judgment with whatever information is available to the employee. Furthermore, evidence of past abuse and neglect is insufficient, taken alone, to predict potential harm that might come to a transgender or gender nonconforming student. One in four parents (28%) self-report that they would not be understanding if their child came out to them as transgender or nonbinary. Morning Consult, U.S. Adults' Personal Knowledge and Comfort with LGBTQ Identities Polling Analysis, at 13 (Mar. 2022). By these parents' admission, they would not be prepared to provide a safe and supportive environment for their children. Of course, with proper community supports (including from faith-based institutions, healthcare providers, community, and more), many parents who are uncomfortable at first will quickly adapt to be supportive to their children. And public schools can and do play an important role in helping families connect with those resources, including other parents who have shared experiences. But notification requirements undermine the ability of schools to play a supportive role for the families of transgender and gender nonconforming students.

The narrow exception also overlooks many harms that could come to students beyond direct abuse at the hands of their parents. In some cases, the mere fear or perception of rejection or abuse can be sufficient to cause serious harm to a young person.

In 1997, a Pennsylvania police officer happened upon a young man named Marcus Wayman with his boyfriend in a parked car. The police officer knew Marcus and told him that he was going to tell his family about his homosexuality. Because of that threat, Marcus told his boyfriend that he was going to take his own life, which is exactly what he did after he was released from police custody. Marcus's family sued the police department on the theory that the officer should have known that the threat of disclosure of such deeply private personal information could result in serious harm to Marcus. And the federal Court of Appeals for the Third Circuit ruled that "the law is clearly established that matters of personal intimacy are protected from threats of disclosure by the right to privacy." *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000).

This case is very important for several reasons. A government employee came into contact with personal information about a young person, just as school staff do every day. And the officer did not even have the chance to disclose any information—he merely threatened to do so. But that threat was enough to cause serious, even tragic, harm to that young man and his family. There is no suggestion that the family would have been anything but supportive of Marcus—what mattered in this case was the impact that the threat had on Marcus.

School staff *must* be able to evaluate individual circumstances to make a determination about what is best in a given situation. Senate Bill 272 would deprive schools of the flexibility to make a determination about what is best for a specific student under specific circumstances.

5. Requiring parental notification about participation in school clubs is a violation of the federal Equal Access Act, which applies to all secondary schools.

Senate Bill 272 would conflict with the federal Equal Access Act, which requires schools to allow clubs to carry out their essential functions. 20 U.S.C. § 4071. In *Hsu v. Roslyn Union Free School District No. 3*, a school district argued that its nondiscrimination policy prohibited the students of the Bible Club from permitting only Christians to be club officers. 85 F.3d 839 (2d Cir. 1996). The Second Circuit disagreed, holding that, because Christian leadership was an essential part of the Bible Club, the school could not prohibit it, even through a neutrally-applied nondiscrimination policy. *Id.* As the Court put it, "[A] rule requiring students to wear appropriate footwear at all times, perfectly and consistently enforced, might effectively ban after-school meetings of the Yoga Club. . . . [E]xemptions from neutrally applicable rules that impede one or another club from expressing the beliefs that it was formed to express, may be required if a school is to provide 'equal access.'" *Id.*

Similarly, SB 272's requirement that clubs track and report attendees would impermissibly impede the essential functions of school Gender-Sexuality Alliances, or GSAs. These student-led clubs provide a safe place for students to come together after school and consider their identities. They provide crucial support to LGBTQ students of all backgrounds, including those who have not discussed their LGBTQ identities at home. GSAs can even help prepare LGBTQ students to have those conversations with parents once the student is ready. Subjecting GSA attendees to surveillance and reporting would prevent GSAs from carrying out these essential functions and, accordingly, would conflict with the federal Equal Access Act.

6. School policy is a matter of local control and SB 272 undermines the ability of democratically-elected school boards to institute policies to protect transgender and gender nonconforming students.

Senate Bill 272’s interference in school policies undermines local control of education. Local control is a core feature of American governance because it allows the people closest to an issue to have a greater say in its resolution. For example, school boards with regular public meetings are intimately familiar with the issues facing their school communities and are accordingly best positioned to make policies responding to those issues. The benefits of local control of New Hampshire schools have been evident as school districts have developed policies like the New Hampshire School Board Association’s model policy JBAB, regarding the treatment of transgender and gender nonconforming students. The specifics of these policies vary by district, as each district strives to develop a policy that meets the unique needs of its residents. Some districts even build in flexibility to address unique situations – Nashua’s policy notes that it cannot “anticipate every possible situation that may occur, since the needs of particular students and families differ depending on the student’s age and other factors,” so it instructs schools to “consider the needs of students on a case-by-case basis.” Nashua Board of Education Policy JBAB, Transgender and Gender Nonconforming Students (adopted Nov. 20, 2019). This thoughtful, nuanced policy, generated by a local school board in response to its community’s needs, exemplifies local control at its best. If SB 272 became law, it would supersede this local control with a clumsy, one-size-fits-all approach that does not meet the needs of New Hampshire’s communities.

For these reasons and many more, we urge the Committee to reject this attack on transgender and gender nonconforming students. Please vote ITL on SB 272.

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