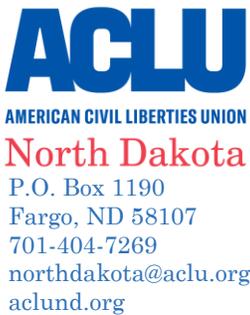


Chair Klemin, Vice Chair Karls, and members of the Committee:

On behalf of the ACLU of North Dakota, I submit testimony in opposition to SB2231.

Discrimination against transgender students violates the Equal Protection Clause of the Constitution and Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. § 1681(a).³ Title IX prohibits sex discrimination in any education program, such as a public school, that receives federal financial assistance. Courts have recognized that deliberately refusing to address transgender individuals by the name and pronouns consistent with their gender identity can be a form of sex-based harassment under state and federal antidiscrimination law.¹



The U.S. Supreme Court has held that statutory prohibition on sex discrimination in federal civil rights law encompasses discrimination against people because they are transgender.² Accordingly, the U.S. Department of Education has instructed schools and universities that discrimination against LGBTQ individuals violates Title IX’s rules against discrimination based on sex or sex stereotypes.³

While an honest mistake would not amount to a violation of Title IX, authorizing teachers or other school staff repeatedly to use names or pronouns for a student that are inconsistent with that student’s gender identity—while all other students are called by the appropriate name and pronoun—subjects transgender students to differential treatment and discrimination on the basis of sex.⁴ Again, SB2231 also violates the constitutional guarantees of Equal Protection.⁵

In addition, if teachers or other school employees disclose a student’s transgender status by insisting on using the pronouns associated with that student’s sex assigned at birth, schools could be subject to liability for violating students’ constitutional right to privacy. Indeed, several courts have recognized that

¹ See, e.g., *Doe v. City of New York*, 976 N.Y.S.2d 360 (N.Y. Sup. Ct. 2013) (holding that a transgender woman had sufficiently alleged discrimination under state sex discrimination law when the state HIV/AIDS Service Administration continued to address her by her former male name and male pronouns); *Burns v. Johnson*, 829 F.3d 1 (1st Cir. 2016) (plaintiff’s allegations, including employer’s purposeful and condescending use of the pronoun “she” to a male transgender employee, supported a reasonable inference of discrimination on the basis of sex); See also OCR Instructions to the Field re Complaints Involving Transgender Students, Dep’t. of Educ. Office for Civil Rights (June 5, 2017), <https://assets.documentcloud.org/documents/3866816/OCR-Instructionsto-the-Field-Re-Transgender.pdf> (“refusing to use a transgender student’s preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus” is an example of gender-based harassment).

² See *Bostock v. Clayton Cty. Ga.*, 140 S. Ct. 1731 (2020).

³ U.S. Dept. of Educ., *Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, (2021), <https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf>.

⁴ See, e.g., *Grimm*, 972 F.3d 586 (singling out transgender students and requiring them to use a different restroom than their peers violates Title IX); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1048–50 (7th Cir. 2017) (same). As the Seventh Circuit observed in *Whitaker*, where a school policy subjects transgender students “to different rules, sanctions, and treatment than non-transgender students,” this violates Title IX. *Id.* at 1049-50.

⁵ See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (holding that “suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools”).

government disclosure of private information such as an individual's sexual orientation violates constitutional privacy rights.⁶

In addition to violating federal antidiscrimination law, requiring permission from a parent or guardian in authorized use of a preferred name or pronoun can violate federal privacy laws by revealing the student's transgender status. Students have the right to share or withhold information about their sexual orientation and gender identity under the federal Constitution⁵ and the Family Educational Rights and Privacy Act ("FERPA").⁷ As NASSP advises, "transgender status, legal name or sex assigned at birth is confidential medical information and considered 'personally identifiable information' under the Family Educational Rights Privacy Act (FERPA). Disclosure of that information to other school staff or parents could violate the school's obligations under FERPA or constitutional privacy protections."⁸

School employees have no constitutional right to refuse to use the appropriate pronouns for transgender students in school. As discussed above, allowing teachers to use the wrong pronouns for transgender students (or any students) in their classrooms could violate statutory and constitutional law. There is, moreover, absolutely no legal basis for allowing public school employees to do so. When teachers address students in the classroom as part of their job duties, they are engaging in curricular speech, and have both the right and the responsibility to supervise the messages being sent to students with the school's imprimatur.⁹ "When a teacher teaches, the school system does not regulate [that] speech as much as it *hires* that speech."¹⁰ Indeed, because children must attend school, the Sixth Circuit has noted that they are a "captive audience," which further counsels against granting their teachers a free speech right to control the curriculum.¹¹ As the Fourth Circuit has explained, "public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and...a school board's ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums."¹²

Applying these principles, every court to consider the question has held that the First Amendment does *not* give K-12 school teachers a free speech right to refuse to address transgender students by pronouns consistent with their gender identity.¹³ Although the Sixth Circuit in *Meriwether v. Hartop*¹⁴ upheld a university professor's free speech objection to using a student's name and pronouns, the court was clear that its holding does not apply to teachers outside the university setting, and

⁶ See *Sterling v. Borough of Minersville*, 232 F.3d 190, 192 (3d Cir. 2000); *Nguon v. Wolf*, 517 F. Supp. 2d 1177, (C.D. Cal. 2007).

⁷ See Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. §§ 99.00 et seq. 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).

⁸ NASSP, Position Statement on Transgender Students (2016).

⁹ See *Evans-Marshall v. Bd. of Educ. of Tipp City*, 624 F.3d 332, 334 (6th Cir. 2010).

¹⁰ *Id.* at 340 (internal quotation marks omitted).

¹¹ *Id.*

¹² *Lee v. York Cty. Sch. Div.*, 484 F.3d 687, 695 (4th Cir. 2007).

¹³ See *Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F. Supp. 3d 823, 839 (S.D. Ind. 2020); *Vlaming v. W. Point Sch. Bd.*, No. CL19-454 (Cir. Ct. King William Cty. Aug. 13, 2021).

¹⁴ 992 F.3d 492 (6th Cir. 2021)



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reaffirmed its prior holding that “the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools.”¹⁵

Similarly, while people may hold a variety of religious beliefs about transgender individuals, that does not authorize any public school teacher or staff to refuse to use the appropriate pronouns for a student in their care. So long as a policy requires all teachers and staff to follow the same requirements, it is neutral and generally applicable, and thus would be subject only to rational basis review under the Free Exercise Clause of the U.S. Constitution.¹⁶

This bill clearly seeks to enshrine discrimination against transgender citizens and we urge the House Judiciary Committee to give SB2231 a “Do Not Pass” recommendation.



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¹⁵ *Id.* at 505 n.1 (quoting *Evans-Marshall v. Bd. of Educ. of Tipp City*, 624 F.3d 332, 334 (6th Cir. 2010))

¹⁶ *See Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990).