Lavigne v. Great Salt Bay Community School

Executive Summary

Parents have a fundamental right to control and direct the education, upbringing, and healthcare decisions of their children. But they cannot fully exercise that right if government officials *hide* important information from them about their children. Unfortunately, schools across the country are doing just that. Now the Goldwater Institute is stepping up to defend Amber Lavigne, a Maine mother whose 13-year-old daughter was given a chest binder—a device to compress breasts so the wearer appears male—by a public-school social worker without informing Amber or getting her consent—and, in fact, while encouraging Amber's daughter not to inform her. Amber discovered the fact when she found the chest binder in her daughter's room in early December 2022. Upon further investigation, Amber learned that school officials were also using a different name and pronouns to refer to Amber's daughter, effectively "socially transitioning" her daughter—again, while concealing the fact from Amber.

Hiding vital information from parents about a child's psychological and physical development isn't just wrong, its unconstitutional. The Supreme Court has consistently held that parents have a fundamental right to control and direct the education and care of their children. These parental rights are broad, and government may only intrude on them when necessary to protect a child's health and safety—for example, if there is evidence of abuse, which there is not in Amber's case.

Unfortunately, officials at the Great Salt Bay Community School insist their actions were not just lawful, but even required by state law. The situation is just the latest example in a recent trend of public school leaders insisting they know better than parents about how children should be raised. Yet the U.S. Supreme Court has made absolutely clear 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."[1]

Parental Rights Under Attack

Parents have a fundamental right to control and direct the education, upbringing, and healthcare decisions of their children. This principle has been recognized as far back as Aristotle.[2] And the U.S. Supreme Court has repeatedly held that this right comes within the "liberty" protected by the Fourteenth Amendment.

But that right is now under systematic attack across the country, and particularly by school districts that seek to conceal or withhold information from parents about what goes on in schools that their tax dollars pay for. In Fairfax County, Virginia, for example, when two mothers submitted requests for information about how their local school district was spending money, the school complied with their requests—and then sued them for telling other people about what they had learned.[3] When another parent sought information from her school district in Rhode Island, the National Education Association sued her, too.[4] Education bureaucrats have opposed even modest efforts to require school districts to comply with basic transparency requirements that apply to other government agencies—such as a requirement that the school post on its website a list of the books being used in the classroom.

Goldwater has long been at the forefront of one aspect of this attack with our work for school transparency. Parents have a right to know what goes on in public school classrooms—a right that's vital to their capacity to do their duty as parents. For one thing, if schools conceal important information about children from their parents, the parents cannot know when to step in and find better educational alternatives.

Now, Goldwater is stepping up to defend another attack on parental rights. Schools across the country are keeping parents in the dark about using different names and pronouns for children at school. Cases in California, Wisconsin, Massachusetts, and Florida are currently winding their way through the legal process all alleging that schools were "socially transitioning" their children without their knowledge or consent. This phenomenon has even caught the attention of the New York Times, which recently observed that "how schools should address gender identity cuts through the liberal and conservative divide. Parents of all political persuasions have found themselves unsettled by what schools know and don't reveal."[5]

The Great Salt Bay Community School went further than most of these other cases. While the school engaged in the social transitioning of Amber Lavigne's daughter without her knowledge, consent, or involvement, it went further—providing her daughter with a medical device and explaining to her that he wasn't going to tell her mother, and she didn't have to either. When Amber discovered the chest binder and confronted school officials about the concealment, they defended the counselor's actions.

On Amber's behalf, Goldwater sent a letter to the school requesting that the school investigate the matter and adopt a policy that mandates that school officials notify parents whenever they make a decision that so significantly affects a child's mental health or physical well-being. The school, however, ignored these requests.

Meanwhile, Amber withdrew her daughter from the Great Salt Bay Community School, because she can no longer trust that the school will inform her about such vital

matters regarding her children's psychological and sexual development. Nor can she entrust the district with the education of her two other children.

Now the Goldwater Institute is representing Amber in a federal lawsuit to protect her constitutional rights as a parent. Amber is alleging that the actions of the school violated the Fourteenth Amendment to the U.S. Constitution. She believes that she has a right to know when the school makes decisions that directly affect the mental health or physical well-being of her daughter.

The Constitution and Parental Rights

The Supreme Court has consistently recognized that the right of parents to control and direct the education, upbringing, and healthcare decisions of their children is one of the "liberty interests" protected by the Fourteenth Amendment's Due Process Clause. In fact, the Court has called it "the oldest of the fundamental liberty interests" recognized in constitutional law.[6] It is this fundamental right, that Amber is asserting.

The Supreme Court first recognized parental rights as "fundamental" in 1923, characterizing it as the right "to control the education of their [children]."[7] It reaffirmed that right two years later, holding that "the liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control,"[8] and that in 1944, it reiterated that parental rights have a constitutional dimension, noting that "the custody, care and nature of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[9]

The Court has repeatedly upheld parental rights over states' attempts to interfere with their choices. It has gone as far as to say that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[10] It is clear, then, that this right is "objectively, deeply rooted in this Nation's history and tradition … and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[11] That makes it clear that the right Amber assert is not only constitutionally protected, but is protected by the very highest degree of legal scrutiny.

It is true, of course, that this does not entitle each individual parent to dictate school curriculum. Courts have regularly held that public schools are entitled to a degree of autonomy in deciding how to operate. In 2008, for example, the First Circuit Court of Appeals (which includes Maine), ruled against parents who sued a school for operating a curriculum that encouraged students to have a favorable view of same-sex marriage—a position the parents found objectionable for religious reasons. Although the parents relied on their fundamental right to raise their children, the court explained that "while parents can choose between public and private schools, they do not have a constitutional right to direct *how* a public school teaches their child."[12] In other words, the court struck a

balance: school districts can decide how to operate, and parents can exercise their fundamental rights by withdrawing their children and seeking private alternatives instead, if they prefer.

But that only makes sense if parents are *informed* about what goes on in schools. When a public school follows a policy of concealing information about how they operate—information as vital and intimate as in this case—it deprives parents of the ability to exercise their fundamental rights. That is why transparency is such a crucial value.

Case Logistics

The plaintiff in this case is Amber Lavigne, a Maine mom challenging the decision of her daughter's school to hide the school's decision to call her daughter by a different name and pronouns and support the school counselor who secretly gave her daughter a chest binder.

The Case was filed with the United States District Court for the District of Maine.

Ms. Lavigne asks for the court to declare her parental rights require that she should at least be told of any decision made by a school that directly affects the mental health or physical wellbeing of her child. This would include the decision to give her daughter a chest binder and the decision to socially transition her daughter. Both actions violated Amber's constitutionally protected parental rights.

The Legal Team

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Jon Riches is the Vice President for Litigation for the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation and General Counsel for the Institute. He litigates in federal and state trial and appellate courts in the areas of economic liberty, regulatory reform, free speech, taxpayer protections, public labor issues, government transparency, and school choice, among others. Jon has litigated cases in multiple state and federal trial and appellate courts.

[1] *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

[2] Aristotle, *Nichomachean Ethics* Bk. 8 ch. 12.

[3] https://www.goldwaterinstitute.org/case/protecting-parents-right-to-knowfairfax-county-school-board-v-tisler-and-oettinger/.

[4] https://www.goldwaterinstitute.org/nea-sues-mom-for-asking-questions-about-curriculum/

[5] Katie J. M. Baker, "When Students Change Gender Identity, and Parents Don't Know," *New York Times*, Jan. 22, 2023, https://www.nytimes.com/2023/01/22/us/gender-identity-students-parents.html.

[6] *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

[7] *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

[8] *Pierce,* 268 U.S. at 535.

[9] *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

[10] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (emphasis added).

[11] *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

[12] *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008).