MATTHEW J. PLATKIN, ATTORNEY GENERAL, NEW JERSY AND SUNDEEP IYER, DIRECTOR, NEW JERSEY DIVISION OF CIVIL RIGHTS, Appellee-Petitioners, v. MIDDLETOWN TOWNSHIP BOARD OF EDUCATION AND MIDDLETOWN TOWNSHIP PUBLIC SCHOOL DISTRICT, Appellant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000037-23 *Civil Action* ON APPEAL FROM: On Appeal From: Superior Court of New Jersey Chancery Division, Monmouth County Sat Below: Honorable David F. Bauman, J.S.C. Docket Number in Court Below: Docket No.: MON-C-80-23

BRIEF OF APPELLANT-RESPONDENTS, MIDDLETOWN TOWNSHIP BOARD OF EDUCATION AND MIDDLETOWN TOWNSHIP PUBLIC SCHOOL DISTRICT

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PRELIMINARY STATEMENT

This office represents Manalapan-Englishtown Regional Board of Education and Middletown Township Board of Education (the "Board Defendants"). Although separate orders were entered below, the issues here arise from the same decision and involve the same law and facts. As such, one brief is being submitted on behalf of the Board Defendants.

This case was brought pursuant to the Law Against Discrimination's ("LAD") prohibition on discrimination in places of public accommodation. The specific issue on appeal is the propriety of the Court's Order restraining implementation of Amended Policy 5756, "Transgender Students," adopted June 20, 2023.

Generally, the Districts' Amended Policy 5756 provides for parental notification when: (i) a student formally changes a mandatory student record, including gender, as defined by N.J.A.C. 6A:32-7.3(b)(1); (ii) a student participates in a sport for a gender other than that assigned at birth; (iii) referring a student for outside health services, and the student's sexual identify and expression is germane to the referral; and (iv) a student uses a gendered bathroom, other than that assigned at birth, except a gender-neutral bathroom.

The State alleges that the Amended policy violates LAD. It does not. The policy is narrowly-tailored and triggered by specific unilateral action taken by a

transgender student. The policy allows a student to take several steps of their public social transition without parental notification. Moreover, no steps require parental consent. For example, parental notification does not occur when a student uses a different name on a school ID, in class or on school work, nor based on a student's attire, or use of a gender-neutral bathroom.

The Chancery Division abused its discretion by misapplying the "well-settled legal claim" prong of Crowe. Rather than rely on the substantive application of LAD to the issue of parental notification, the Court ruled that it is well-settled that the Attorney General can enforce the LAD. This is a clear departure from established precedent and an impermissible basis for granting a preliminary injunction.

Additionally, the Court's decision totally ignores New Jersey Student Records Laws, which provide that gender is a mandatory student record and that parents, not students, have unfettered access to those records.

Among other reasons, the Court also erred by considering inadmissible and anecdotal hearsay evidence and ignoring evidence Board Defendants submitted. As such, the Court's August 18, 2023 Order must be reversed.

PROCEDURAL HISTORY

On June 20, 2023, Board Defendants adopted amended versions of Policy 5756. See Da152 and Da169.

On June 21, 2023, Respondents filed Verified Complaints with the Division on Civil Rights ("the DCR matter") alleging that the Policy violated the Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et seq. See Da36 and Da74.

Simultaneously, on June 21, 2023, Respondents filed Verified Complaints and Orders to Show Cause before the Chancery Division in Essex County, Docket Numbers ESX-C-98-23 and ESX-C-99-23, seeking a preliminary injunction restraining implementation of the Policy until the DCR matter is adjudicated. See Da9 and Da48.

On June 23, 2023, Board Defendants filed motions to change venue from Essex to Monmouth County. On June 27, 2023, the Court entered Orders transferring these matters to the Chancery Division in Monmouth County. See Da147 and Da148.

On June 28, 2023, the Court entered an Order to Show Cause, returnable August 15, 2023. See Da1-2 and Da3-4. On August 15, 2023[1], the Superior

[1] 1T refers to the Transcript of the August 15, 2023, Oral Argument on the Respondent-Plaintiff's Orders to Show Cause.

Court, Chancery Division, Monmouth County, heard oral argument on the Order to Show Cause.

On August 18, 2023, the Court entered an Order preliminary enjoining the Policies pending resolution of the DCR matter and restraining Board Defendants from otherwise altering, amending, rescinding, or revising Policy 5756. See Da115-116, Da117-118, and Da119-138.

On September 6, 2023, Board Defendants filed Notices of Appeal, which were amended on September 8, 2023. See Da139-142 and Da143-146.

On October 13, 2023, Board Defendants filed Motions to Supplement the Record, which the Court decided on October 27, 2023. See Da272-279.

After issuing initial scheduling orders, and pursuant to Respondents' request, the Court issued scheduling orders on November 27, 2023, aligning the briefing schedule of these matters, along with a companion case involving Marlboro Township Board of Education (Docket Number A-118-23).

STANDARD OF REVIEW

An appellate court applies an abuse of discretion standard in reviewing a trial court's decision to grant or deny a preliminary injunction. Rinaldo v. RLR Inv., LLC, 387 N.J.Super. 387, 395 (App.Div. 2006). A court abuses its discretion when a decision "is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012) (quoting Iliadis v. Wal–Mart Stores, Inc., 191 N.J. 88, 123 (2007); see also, Terranova v. Gen. Elec. Pension Tr., 457 N.J.Super. 404, 410–11 (App.Div. 2019).

STATEMENT OF FACTS

The Board Defendants operate public school districts in Monmouth County. See Da156, Para.3 and Da234, Para.3. The Districts contract with an outside vendor known as Strauss Esmay Associations, LLP ("Strauss") to draft and advise on policies and regulations. See Da57, Para. 4 and Da234, Para.4.

Strauss has been providing policy and regulation consulting services to over 570 New Jersey school district since 1972. According to their website their "clients include more than 570 school districts..." Id.

Nearly a decade ago, Strauss began recommending that boards of education adopt transgender student policies. See Da234, Para.5 and Da238-244. In September 2014 and again in July 2015, Strauss recommended adoption of transgender student policies. Id. Both of these versions provided for parental notification in the process and consent for certain younger students. Id. Manalapan-Englishtown adopted these recommended Policies. See Da234-235, Para.6-7. Neither the Attorney General nor Director of the DCR initiated against Manalapan-Englishtown for adopting these policies. Middletown chose not to adopt those policies.

In January 2019, Strauss significantly revised its transgender student policy following the enactment of N.J.S.A. 18A:36-41 and issuance of the New Jersey Department of Education "Transgender Student Guidance for School

Districts" (hereinafter referred to as the "Guidelines"). See Da246-254. For all intents and purposes, that version of the Strauss policy was substantially identical to the Guidelines. Cf. See Da246-254 and 255-261. Significantly, Strauss advised its clients that adoption of that policy was mandatory. See Da265, Para.8-9 and Da246.

In accordance with that advice, during Winter/Spring 2019, each Board Defendant adopted Policy 5756 in the form Strauss recommended. See Da158, Para.8 and Da265, Para.9. The principles embodied in that version confronted District staff with issues that seemingly required them to make material misrepresentations or omissions to parents concerning a student's gender identity or expression.

In Manalapan-Englishtown, school administrators and staff were confronted with at least one issue where compliance with the Guidelines conflicted with the general obligation for transparency with parents. Specifically, while preparing for parent-teacher conferences, teachers of one particular student were concerned about the response to parents if asked about that student using a name about which the parents were unaware. After reviewing then-existing policy and consultation with counsel, teachers were advised to respond with: "I'm sorry, but the scope of this conference is limited to the academic progress of your child this year. Both our legal counsel and the

Department of Education advise that school districts cannot discuss specific gender identity issues with parents." While the issue did not arise, it was the subject of much concern for District staff. See Da235-263, Para.11.

In Middletown, school administrators and staff were confronted with several issues presented by compliance with the Guidelines:

- Counselors are placed in a compromised position to misrepresent or omit material facts when referring transgender students to counseling, despite gender identity and expression being germane to the referral. For example, counselors will cite a generic reason, such as anxiety and depression, rather than specifically referencing gender identity and expression. See Da158-160, Para.8-14.
- Schools are required to provide a snapshot of their student information system ("SIS") to the NJDOE each October. This snapshot is linked to standardized testing reports that are mailed home to parents. Recently, a transgender elementary student changed their name in the SIS without parental consent. When the standardized test scores, including the student's preferred name, were ready to be sent to the parents, the District was required to send a student report to a parent with a name which the State advises should be kept confidential from the parents.

In order to comply with the Guidelines, District staff was placed in the untenable position of obfuscating the test scores. Id.

- Similarly, the SIS contains a parent portal component. Parents are asked to set up an electronic account to view their child's demographic information such as emergency contacts, addresses, and other such information, in addition to report cards and grades. If a student requests a name change in the district's formal database, there is a high likelihood that a parent would be able to access that information as it would be reflected in the parent portal. The district has no way of preventing parents/guardians access to the parent portal. Id.

Additionally, in both districts, compliance with the Guidelines has conflicted with their legal obligations under the Anti-Bullying Bill of Rights Act ("ABL"), N.J.S.A. 18A:37-13 et seq. See Da158-159, Para.10. According to the ABL, districts shall inform parents/guardians of the "nature of the investigation," including if the nature of the investigation arises from a student's gender identity or expression. N.J.S.A. 18A:37-15(b)(6)(d).

When the nature of the bullying is the student's gender identity or expression, the Guidelines suggest maintaining student confidentiality, which conflicts with the statutory requirement to inform parents of the "nature of the

investigation." Thus, following the Guidelines could result in violations of the Anti-Bullying Bill of Rights Act.

Subsequent to these experiences, on June 20, 2023, the Board Defendants amended Policy 5756 to adopt the versions which are the subject of this appeal. See Da156, Para.7 and 14 and Da235, Para.10. Some minor differences exist between the Manalapan-Englishtown and Middletown Policies; however, those differences are minor and are not relevant to the issues on appeal.

In accordance with regular practice and procedure, the Superintendents prepared regulations implementing the Policy. The regulations define several aspects of the Policy and outline the procedure for student support and parental notification. See Da158, Para.14; Da235, Para.10; Da162-165; and Da262-265.

Of particular importance, the regulations define the evidence warranting an exception from the notification provisions of the Policy. See Da162 and Da262. The Court questioned the prerequisites for the exception to apply; however, as is evident from its written decision, the Court neglected to review those regulations, nor consider the manner in which the Policy would be implemented. See Da133.

Further, notwithstanding the narrowly-tailored policy, and carefully prepared regulations, Respondents sought and obtained preliminary injunctions preventing implementation of the policy and restraining Board Defendants,

without any basis in law or fact, from revising, repealing, or otherwise altering its amended Policy.

The Court's order dated August 18, 2023, constitutes an abuse of discretion and must be vacated.

LEGAL ARGUMENT

POINT I
(SEE DA125)

THE COURT ERRED BY ERRONEOUSLY APPLYING THE "WELL-SETTLED LEGAL RIGHT" PRONG OF CROWE, THE COURT ERRED BECAUSE IT FAILED TO DETERMINE THAT THE UNDERLYING APPLICATION OF THE LAW AGAINST DISCRIMINATION IN THE MANNER PLAINTIFF'S ASSERTED WAS A WELL-SETTLED LEGAL RIGHT.

The Court made plain error by misapplying Crowe's "well-settled legal right" prong. See Da125. It then compounded that error by: (i) overlooking evidence of the Attorney General's inconsistent application of the LAD in this context; and (ii) disregarding the plethora of litigation around the nation on this very issue. See Da126.

Injunctive relief represents a significant intrusion into the affairs of the parties. Waste Mgmt. of New Jersey, Inc. v. Union County Utilities Auth., 399 N.J.Super. 508, 538 (App.Div. 2008), and must only be used sparingly, in the clearest of factual circumstances and for the most compelling of equities. Mays v. Penza, 179 N.J.Super. 175, 180 (Law Div. 1980). A party seeking such relief must satisfy a "particularly heavy burden." Guaman v. Velez, 421 N.J.Super. 239, 247-248 (App.Div. 2011). Injunctive relief should not be entered simply to maintain the status quo.

Courts have consistently held that restraining one's conduct without a full hearing is extraordinary relief. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982). **In order to grant the extraordinary remedy of injunctive relief, it is imperative that the law concerning the underlying conduct must be well-settled by clear and convincing evidence.**

In other words, the "well-settled legal right" must concern the substantive application of the law, not, as the Court found here, a procedural aspect of the litigation. To the contrary here, the Court found that it is well-settled that the Attorney General can litigate to enforce the LAD. See Da125.

Indeed, the Court disregarded and overlooked evidence which demonstrates that the substantive issues concerning Policy 5756 are not well-settled, including (1) the Attorney General's lack of prosecution to prevent similar policies in place as early as 2014; and (2) the plethora of litigation around the country on this precise issue. See Da224-232; Da234-235, Para.6-7; and see infra.

Indeed, Districts, including those party to these lawsuits, had begun adopting policies in 2014 which provided for parental involvement and notification and none were sued by the Attorney General. See Da234-235, Para.6-7. Pursuant to Strauss Esmay Policy Alert 204 and 205, Districts,

including Manalapan-Englishtown, adopted transgender student policies which provided for parental notification Id. The Attorney General did not litigate against Manalapan-Englishtown over those policies. This lack of prosecution is significant because the LAD was amended in 2006 to include gender identity and expression as a protected class, significantly before those initial policies were adopted. See P.L. 2006, c. 100, § 1.

Moreover, The LAD has never been substantively applied in the manner Respondents assert. There is no caselaw, decision, opinion or other determination that parental notification violates LAD. Indeed, it cannot be disputed that this is a matter of first impression, which must reconcile the rights of transgender students with a public school district's legal obligations to parents. See Da216-222 and Da224-232.

Furthermore, establishing that this is an evolving and far-from-well-settled area of law, several lawsuits are pending or have been brought around the nation concerning this particular issue. One case challenging a similar policy is Willey v. Sweetwater Cnty. Sch. Dist., ---F.Supp.3d.---, 2023 WL 4297186 (D. Wyo. June 30, 2023), wherein the plaintiffs challenged the district's "Student Privacy Policy," barring school officials from informing parents of a child's requested name or pronoun.

Therein the District Court held:

> However, a parent's established fundamental right to direct the upbringing and education of their children would appear to be burdened if a parent was misinformed or the District or a teacher refused to respond to a parent's inquiry regarding their minor child's request to be a called a different name, absent a showing of some danger to the health or well-being of the student.
>
> **To the extent the Student Privacy Policy would preclude a teacher or school district personnel, absent a minor student's consent, from answering or responding to a parent's or guardian's inquiry as to whether their child is being called by other than their legally given name or required to lie to a parent or guardian as to the name of the minor student is being called by, likely creates a constitutional problem**.

Id. See also Da224-232. (emphasis added).

The Willey court granted the ***parents' motion*** for a Preliminary Injunction with respect to the Student Privacy Policy, on the same constitutional grounds raised herein.

Additionally evidencing this evolving area of the law are cases currently pending in Maryland, Wisconsin, Florida, and Massachusetts. See e.g., John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F.Supp. 3d 118 (D. Md. 2022)(holding that parents do not have a fundamental right under the due process clause to be promptly informed of their child's gender identity currently on appeal to the United States Court of Appeals 4th Cir.); T.F., et al., v. Kettle

Moraine School District, Case No. 21-CV-1650 (Waukesha Cty. Wisconsin Cir. Ct. 2023) (ongoing litigation involving parental challenges to a Kettle Morraine, Wisconsin School District policy concerning change of students' names and gender pronouns at school without parental consent). Thus, it is impossible to establish by clear and convincing evidence that the State's claim is a well-settled legal right.

Notwithstanding the several pending lawsuits concerning this issue, there is ongoing social discourse in the media and academia on the interplay of transgender student rights and the rights and obligations of school districts and parents. See, e.g., Da216-222 and Da224-232.

It cannot go unnoticed that a school is not a traditional public accommodation. While the District acknowledges that transgender students are protected by the LAD, the District also has other legal obligation to parents of this students. Amended Policy 5756 and its regulation carefully consider each of those rights and obligations and applies only in the narrowest of circumstances. The Court's decision is devoid of any analysis whatsoever of the specific provisions of the policies and their implementing regulations. This is an abuse of discretion and must be reversed because, as the devil is always in the details, the manner in which the policies are applied – as outlined in the regulations – pass legal muster. See Da162-165 and Da262-265.

Here, the Court latched onto any well-settled legal right in an attempt to satisfy this Crowe element because there is no well-settled jurisprudence concerning parental notification when a transgender student changes their formal legally-defined mandated student record. As such, the Court abused its discretion and the injunction must be reversed and vacated.

POINT II
(SEE DA119-138)

THE COURT ERRED BY FAILING TO CONSIDER THE APPLICATION OF N.J.A.C. 6A:32-7.1 TO -7.8 "STUDENT RECORDS."

The Court's Decision is devoid of any consideration of New Jersey and Federal Student Records law. This issue was extensively, briefed and argued below. See, e.g., T55:22-56:11. This is significant for several reasons. Primarily, a student's gender is a mandatory pupil record pursuant to New Jersey law. N.J.A.C. 6A:32-7.3(a)(1). Additionally, New Jersey Statutes and Regulations and the United States Code entitle parents the right to access their child's full and accurate student record.

As such, parents of all students are aware of the gender identified on the district's mandated student records. Accordingly, transgender students are treated the same as their cisgender counterparts as it pertains to parental knowledge of the contents of mandated student records. This point is significantly reinforced when considering the many steps a transgender student may take along their public social transition journey without parental involvement, such as selection of attire and name used in classrooms and on school identification cards, for example. See Da162-163 and Da262

N.J.S.A. 18A:36-19 provides, in pertinent part:

> The State Board of Education shall provide by regulation for the creation, maintenance and retention of pupil records and for the security thereof and access thereto, to provide general protection for the right of the pupil to be supplied with necessary information about herself or himself, **the right of the parent or guardian and the adult pupil to be supplied with full information about the pupil**, except as may be inconsistent with reasonable protection of the persons involved, the right of both pupil and parent or guardian to reasonable privacy as against other persons and the opportunity for the public schools to have the data necessary to provide a thorough and efficient educational system for all pupils.

In other words, parents have the unequivocal right to full, complete and accurate information contained in a student record. Thus, it follows that parents have the right to be notified when a student determines to change their mandated student record.

New Jersey adopted an extensive regulatory scheme governing student records. See, generally, N.J.A.C. 6A:32-7.1 to -7.8. In relevant part, those regulations provide:

- A parent shall have access to the student's records. N.J.A.C. 6A:32-7.1(f); N.J.S.A. 18A:36-19.
- The parent of a student under the age of 18 is authorized to access their child's student record, regardless of whether the child resides with the parent. N.J.A.C. 6A:32-7.5(e)(1).
- Nonadult students may assert rights of access to their records **only through their parent(s)**. N.J.A.C. 6A:32-7.1(e).

- A student is only authorized to access his/her student record if they have obtained written permission of a parent. N.J.A.C. 6A:32-7.5(e)(1).

- A record may be withheld from a parent or from an adult student **only when the district board of education obtains a court order** or is provided with evidence that there is a court order revoking the right to access. N.J.A.C. 6A:32-7.6(a)(5).

- A student's name and gender, *inter alia*, are mandated student records. N.J.A.C. 6A:32-7.3(b)(1).

- Parents of ***adult*** students may access student records **without the adult student's consent** if the adult student is financially dependent on the parent and enrolled in the public school system. N.J.A.C. 6A:32-7.5(e)(3).

- To request a change in the student record, **a parent or *adult* student** shall notify, in writing, the chief school administrator of the specific issues relating to the student record. N.J.A.C. 6A:32-7.7(b). There is no authority in student record regulations for minor children to change their student records.

Thus, it is clear that the regulatory scheme established by the State Board of Education prioritizes parental access and control of student records. Indeed, the regulations provide nearly no rights to minor students in relation to their records and, furthermore, affirmatively infringe on the rights of adult students when they are enrolled in public school and financially dependent on their parents.

Lastly, these regulations also require each district board of education to compile and maintain student records and regulate access in accordance with the

Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, and 34 CFR §99. N.J.A.C. 6A:32-7.1(b).

20 U.S.C. § 1232g(a)(1)(A) specifically reads:

> No funds shall be made available under any applicable program to any educational agency[2] or institution which has **a policy of denying**, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, **the right to inspect and review the education records of their children**.

FERPA's implementing regulations similarly embody the principle of parental right to access all of their student's educational records. See, generally, 34 CFR §99.1 to -99.67.

FERPA regulations provide that "a parent or eligible student must be given the opportunity to inspect and review the student's education records." 34 CFR §99.10(a). Education records means "those records that are: (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a

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[2] Indeed, the State's policy, which it asserts here, also threatens its receipt of Federal funds. See, 20 U.S.C. § 1232g(a)(1)(B)("No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) **that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children** who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section."(emphasis added))

party acting for the agency or institution." 34 CFR §99.3. "Eligible student" is defined as "a student who has reached 18 years of age or is attending an institution of postsecondary education." Id. **Only parents and eligible students [those over 18] may amend a student's records**. 34 CFR §99.20(a).

Respondent's position is that transgender students are legally entitled to unilaterally alter their formal student records without parental notification and that the District conceal this information from parents. This is antithetical to FERPA and New Jersey student records law and regulations, which both prioritize parental access to student records.

Failure to acknowledge these principles is a significant oversight by the Chancery Division. Student record laws demonstrate a legislative determination that parents of ***all students*** are entitled to full, complete, and unfettered access to their child's student records. To apply the LAD in the manner the State asserts is not providing transgender students with equal rights. To the contrary, such an application treats cisgender students less favorably and establishes transgender student rights not available to the non-transgender community.

Simply, the parents of all students are aware of the gender identified and maintained in the mandatory student records. Thus, it cannot be disparate treatment to advise parents any change of gender in the mandated student record. Indeed, a change to any other mandated student record, such as address,

telephone number, or name, would trigger parental notification. Thus, parental notification of a formal mandated student record is not discriminatory.

POINT III
(SEE DA131-133)

THE COURT ERRED BY NOT RECOGNIZING THAT THE INJUNCTION COMPELS THE BOARDS TO VIOLATE PARENTS' FUNDAMENTAL RIGHTS UNDER THE FOURTEENTH AMENDMENT AND FAILS TO CONSIDER THE DISTRICTS' IMPLEMENTING REGULATIONS.

In its decision, the Court gives passing reference, but not due deference, to the Constitutional rights of parents. See Da131-133. More importantly, however, the Court's decision is devoid of any consideration that its injunction compels the District to violate those Fundamental Constitutional Rights and the concomitant liability of the District for these violations. Id. Lastly, the Court completely ignores the Districts regulations, which balance transgender students' rights with the Constitution restraints on schools as government actors. See Da133, Da162-165, and Da262-265.

In its written Decision, the Court erroneously determined that a Constitutional violation is subordinate to the State's interest to:

> ensure that a protected class under a state law against discrimination does not suffer either disparate treatment of disparate impact because of polices requiring parental notification where a student requesting a transgender accommodation or expressing

> transgender identification specifically requires that their parents or guardian not be notified.

See Da132.

The Court erred because (i) there clearly are Constitutional implications; and (ii) the Court fails to consider the Districts' process for notification, which properly balances the State's compelling interest under the LAD and parents' Fundamental Constitutional Rights. See Da163-164 and Da263-264. Indeed, to sustain this decision will result in this being the only aspect of public education where public school staff must defer 100% to the desire of the student, instead of using the staff's own education, experience and training to communicate and be transparent with parents.

The Constitutional Violation

The entire premise of the State's argument is that every other legal right – including Fundamental Rights to which parents are entitled – are trumped by the protections for gender identity and expression afforded by the LAD. This cannot be the law. The trial Court's obligation- at which it failed- was to reconcile those rights.

It is a well-settled legal presumption that fit parents act in the best interests of their children. Troxel v. Granville, 530 U.S. 57, 68 (2000). The Supreme Court of the Unites States has recognized that "[i]t is cardinal with us 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." Stanley v. Illinois, 405 U.S. 645, 651 (1972).

Indeed, "so long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Troxel, 530 U.S. 57, 68–69 (2000).

In that regard, courts nationwide, including the Supreme Courts of the United States and New Jersey, uniformly recognize parents' Fundamental Constitutional right to direct their children's upbringing – *against* which state interference with family matters are not condoned. See Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that this Court's decisions "have respected the private realm of family life which the state cannot enter"). **"[P]arents have a substantial constitutional right … to direct and control the upbringing and development of their minor children.**" Halderman, by Halderman v. Pennhurst State Sch. & Hosp., 707 F.2d 702, 709 (3d Cir. 1983)(emphasis added).

The Third Circuit also recognizes that "[t]he right of parents to raise their children without undue state interference is well established" and "[c]hoices about marriage, family life, and the upbringing of children are among associational rights th[e] [Supreme] Court has ranked as of basic importance in

our society, rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." Gruenke v. Seip, 225 F.3d 290, 303 (3d Cir. 2000) *citing* M.L.B. v. S.L.J., 519 U.S. 102 (1996).

Similarly, the New Jersey Supreme Court recognizes parental autonomy deriving from the "**fundamental right** of parents to raise their children as they see fit." Moriarty v. Bradt, 177 N.J. 84, 103, 115 (2003)(emphasis added). Our State's highest court held that "the entitlement to autonomous family privacy includes the fundamental right of parents to make decisions regarding custody, parenting time, health, education, and other child-welfare issues between themselves, without state interference." Fawzy v. Fawzy, 199 N.J. 456, 476 (2009).

Moreover, our Appellate Division elaborated on that right:

> We begin with a review of the principles applicable to the right of a parent to make decisions, both philosophical and mundane, regarding his or her child. "Our law recognizes the family as a bastion of autonomous privacy in which parents, presumed to act in the best interests of their children, are afforded self-determination over how those children are raised." In re D.C., 203 *N.J.* 545, 551, 4 *A.*3d 1004 (2010). A parent's right to parental autonomy is recognized as "a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution" that is "rooted in the right to privacy." Moriarty, *supra,* 177 *N.J.* at 101, 827 *A.*2d 203; *see also* N.J. Div. of Youth & Family Servs. v. P.W.R., 205 N.J. 17, 38, 11 *A.*3d 844 (2011); Watkins

> v. Nelson, 163 N.J. 235, 245, 748 *A*.2d 558 (2000); V.C., *supra,* 163 N.J. at 218, 748 *A*.2d 539.

Tortorice v. Vanartsdalen, 422 N.J. Super. 242, 248 (App. Div. 2011).

The Fourteenth Amendment's Due Process Clause has a substantive component which "provides heightened protection against government interference with certain fundamental rights and liberty interests" including the right "to direct the education and upbringing of one's children…" Washington v. Glucksberg, 521 U.S. 702, 720 (1997). This right encompasses parents' "fundamental right to make decisions concerning the rearing of" their children including "decisions concerning the care, custody and control of" their children. Troxel, 530 U.S. at 68, 72 (upholding mother's right to decide the frequency of her child's visits with grandparents despite claims that such visits were in her child's best interests).

In Troxel, the Supreme Court explained the entrenched Constitutional parental right as follows:

> **The liberty interest at issue in this case – 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**. More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U.S. 510, 534–535, 45 S.Ct. 571, 69 L.Ed. 1070

(1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce 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." Id., at 535, 45 S.Ct. 571. We returned to the subject in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children...

In subsequent cases also, **we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children**. See, *e.g.,* Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (citation omitted)); Wisconsin v. Yoder, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilloin v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("**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**");

> Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); Glucksberg, *supra,* at 720, 117 S.Ct. 2258 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] ... to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Troxel, 530 U.S. at 65-66 (emphasis added).

Thus, our jurisprudence mandates "state deference to parental control over children" because "it is the parents' responsibility to inculcate 'moral standards, religious beliefs, and elements of good citizenship.'" Gruenke, 225 F.3d at 307 *citing* Yoder, 406 U.S. at 233.

The Court's decision below is contrary to this required Constitutional deference as it deprives parents, and more specifically parents of LGBTQ+ students, of information critical to the parents' ability to actively guide and foster their children's moral and psycho-social development. **Indeed, not only does the Court's decision deprive parents of their Constitutional Rights, it compels the Board Defendants to be the State actor depriving parents of those rights.**

Disregard for the District's Policy and Regulation Concerning Notification

The specific language of the Districts' policies and implementing regulations – totally ignored by the Court – find the appropriate balance between recognizing the State's compelling interest to eradicate discrimination and recognizing parent's Fundamental Constitutional Rights. See Da152-154, Da162-165, Da169-171, and Da262-265.

Significantly, the Policy is not triggered by one's status alone. Rather, it is implemented only when a student unilaterally undertakes certain steps along their public social transition accommodation spectrum. See Da152, Da162, Da169-170, and Da262. Indeed, there are many steps in the transition which can occur without parental notification. Moreover, all occur without parental consent.[3] For example, a student can change a school ID card, use a different name in class and on school work, choose whatever attire the student wants, or utilize a gender-neutral bathroom – all without parental notification. See Da163 and Da263.

Indeed, the implementing regulations are also designed in a way that recognizes several of the principles in the Guidelines and, again, balances the

[3] The Manalapan-Englishtown Policy requires parental consent for students, in grades Pre-K through 5. See Da169.

transgender students' rights with those of their parents. See Da162-165, Da262-265. The Court failed to acknowledge these regulations.

More importantly, and contrary to the State's characterization of an affirmative duty to notify parents, the Policy and the Regulation both provide for exceptions to notification when that is in the best interest of the student. See Da133, Da152, Da162, Da170, and Da262.

In fact, demonstrating that the Court failed to review all the evidence submitted, it writes, "And what is meant by 'Documented evidence' under the Middletown Policy" or "credible evidence" under the Manalapan-Englishtown Policy. See Da133. The District Regulations – submitted to the Chancery Division – include a specific definition of what this means. See Da152, Da162, Da170, Da262. Failing to review evidence submitted, particularly when that evidence addressed questions the Court included in its written decision constitutes an abuse of discretion and warrants vacating the preliminary injunction.

For example, these regulations represent a final safeguard protecting both the rights of transgender students and the rights of their parents. Indeed, while the Policy and regulations contemplate parental notification, they contain an exception when documented evidence exists that physical or emotional harm will result from parental notification. **Such evidence includes, but is not**

limited to previous reports to DCPP, student reporting of fear of physical and/or emotional harm upon disclosure, or student reporting of fear of non-acceptance upon disclosure.

Again, rather than recognize this balancing of competing interests, the Court abused its discretion and found that there exceptions supported the State's position. See Da132-133. Such a conclusion is short-sighted and totally ignores a school district's legal obligations to parents and to abide by Constitutional restraints.

Board Defendants acknowledge that transgender students are protected by the LAD. Their Policies and Regulations acknowledge those rights and afford transgender students the unilateral right without parental consent to engage in all steps along the public social transition. However, when the student chooses to take certain specific steps along their social transition journey, the school is required to recognize parents' Constitutional rights and, unless an exception applies, notify parents. The Court erred by finding that these Constitutional Rights are subordinate to the State's compelling interest to eradicate discrimination. The law can do both and Board Defendants' policies do just that.

POINT IV
(See DA129-130)

THE COURT ERRED BY RELYING UPON INADMISSIBLE HEARSAY, AND EVIDENCE WHICH IS IRRELEVANT, UNDULY PREJUDICIAL, AND LACKS ANY PROBATIVE VALUE PURSUANT TO N.J.R.E. 801, 802, 401 AND 403(A).

Under its disparate impact analysis, and notwithstanding Board Defendants' objection, the Court specifically relied upon a number of studies and surveys the State submitted and erroneously concluded that "none of the School Board defendants refute the State's data or presents alternate evidence to negate or call into that data or the methodology by which it was compiled." See Da130. This is not true as the School Board Defendants specifically provided contrary evidence and, at oral argument, specifically referenced the State's studies to support parental notification. See Da173 and Da200-207. See also T55:8-15; T57:1-13; and T56:16-19.

R. 1:6-6 provides that only facts which are admissible in evidence may be considered by the Court when hearing a motion. The studies upon which The State relied constitute inadmissible hearsay, are irrelevant and unduly prejudicial and should not be considered by this Court pursuant to N.J.R.E. 801, 802, 401 and 403(a).

N.J.R.E. 801 and 802 provide that hearsay, defined as an out of court statement offered to prove the truth of the matter asserted, is not admissible. The various studies cited are the exact definition of hearsay and, if considered by the Court, deprive Defendants of the opportunity for cross-examination. See Da86-114. See also T55:1-7 and T57:1-13. As such, these studies cannot be considered.

N.J.R.E. 401 provides that relevant evidence is generally admissible. The studies upon which Plaintiffs rely are irrelevant to the Court's disposition of the issue before it: whether Policy 5756 treats transgender students differently. See Da86-114. While those studies may provide rationale behind Plaintiffs' positions – a rationale upon which reasonable minds may differ – the reason for Plaintiffs' position does not have a tendency to prove or disprove any material fact at issue. Rather, such studies are inflammatory, unduly prejudicial, and lack any probative value as they attempt to paint a picture of a downtrodden, depressed and suicidal transgender community.

In that regard, N.J.R.E. 403(a) provides, "Except as otherwise provided by these rules or other law, the court may exclude relevant evidence if its probative value is substantially outweighed by the risk of: (a) Undue prejudice, confusing the issues, or misleading the jury…"

Indeed, there are myriad other studies which demonstrate that parental involvement with transitioning students is imperative for the health and well-being of transgender students. Most compelling, and completely ignored by the Court is the affidavit and expert opinion of Erica E. Anderson, Ph.D., dated February 3, 2023, submitted in T.F., et al., v. Kettle Moraine School District, Case No. 21-CV-1650 (Waukesha Cty. Wisconsin Cir. Ct. 2023), opining that "Parental Involvement is Essential at Every Stage of the [transition] Process," See 200-207 at Para. 58-78, concluding that "a school policy that involves school adult personnel in socially transitioning a child or adolescent without the consent of parent or over their objection violates widely accepted mental health principles and practice," See Da207 at Para. 78.

As the studies Plaintiffs provide constitute hearsay, are biased and unduly prejudicial, the Court erred by relying upon this information.

Additionally, at oral argument, and contrary to the Court's written decision, Board Defendants specifically referred to the opinion of Dr. Anderson and the study the State submitted, which specifically counseled family health care providers that parental notification was in the best interest of the child. (See T55:8-15; T56:18-19; and T57:1-13).

Thus, the Court abused its discretion, considered inadmissible evidence and ignored Board Defendants' evidence. As such, the preliminary injunction must be vacated.

POINT V
(See Da116, Para.2 and Da118, Para.2)

THE COURT ABUSED ITS DISCRETION BY ENJOINING APPELLANTS FROM AMENDING, MODIFYING, OR SUPERSEDING ANY PORTION OF POLICY 5756, UNTIL DISPOSITION OF THE ADMINISTRATIVE COMPLAINT BEFORE THE DIVISION ON CIVIL RIGHTS

The Court's August 18, 2023 decision imposed two restrictions on Board Defendants: (1) restraining implementation of Policy 5756 adopted on June 20, 2023; and (2) restraining Board Defendants from "amending, modifying, or superseding any portion of [pre-existing] Policy 5756." There is no legal or factual basis for this relief. None was offered and none was cited by the Court. This self-serving action allows the State to prosecute claims, which may otherwise be moot if the policies were repealed.

N.J.S.A. 18A:11-1(c) specifically provides that a Board may "[m]ake, amend and repeal rules . . . for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees. . ." Indeed, a board's direct responsibilities are to make policies, develop plans, and evaluate outcomes.

Incredibly, the State **admitted that Policy 5756 is not mandatory and parental notification is legal.** On September 6, 2023, in a separate matter

concerning the same issue, Platkin and Iyer v. Hanover Twp. Board of Education and Hanover Twp. Public Schools, Docket Number MRS-C-042-23, Deputy Attorney General James R. Michael admitted to the Court:

> THE COURT: True, but as I think you argued the first time, there are many districts around the State that don't have any policy whatsoever with regard to the issue to maybe the statewide guidance, but there is not necessarily specific policy on the issue; is that correct?
>
> MR. MICHAEL: I am not sure about many. **I know it is not necessarily a mandatory policy.** It's mandatory guidance that the DOE was required to put – the Legislature directed DOE to put out the guidance, and in this particular area, basically directed in large part what the guidance should say. So it is sort of an insight into –
>
> THE COURT: Guidance, yes, but –
>
> MR. MICHAEL: -- how the Legislature views the issue.
>
> THE COURT: Right, but guidance yes; policy no.
>
> MR. MICHAEL: Right. **But it is correct this is not a policy that every district is mandated to have.**

See Da269 (Lines 2-22) (emphasis added). See N.J.R.E. 803(b)(3)(admissibility of statement by person authorized to speak on behalf of party-opponent).

In a similar stunning admission from a party opponent, Attorney General Matthew J. Platkin admitted that parental notification is legal. See Da281. On August 29, 2023, Respondent General Platkin appeared on The Brian Lehrer Show on WNYC radio, and stated, "**of course, you can tell parents about**

issues going on with their student, including changes in gender identity and expression." See Da281. Such statements of a party-opponent are admissible evidence. See N.J.R.E. 803(b)(1).

Nonetheless, the State continues to prosecute this case. Moreover, unlike every other school district in this State, as a result of the Court's August 18, 2023 Order, the Board Defendants are compelled to maintain a policy subjecting them to this baseless litigation. As such, the Court must vacate that portion of the Chancery Division's decision. See Da116, para.2 and Da118, para.2.

CONCLUSION

For the foregoing reasons, the Chancery Division abused its discretion when it entered a preliminary injunction. As such, the Court's Order dated August 18, 2023 must be reversed.

Respectfully submitted,

/s/ Bruce W. Padula
Bruce W. Padula

Dated: December 20, 2023

NEW JERSEY SUPERIOR COURT
APPELLATE DIVISION

MATTHEW J. PLATKIN, AG, NJ AND SUNDEEP IYER, DIRECTOR, NJ DIVISION OF CIVIL RIGHTS, Plaintiffs-Appellees, v. **MIDDLETOWN TOWNSHIP BOARD OF EDUCATION AND MIDDLETOWN TOWNSHIP PUBLIC SCHOOL DISTRICT,** Defendants-Appellants.	**Docket No. A-000037-23** **Civil Action** **On appeal from the Superior Court of New Jersey, Monmouth County, Chancery Division – General Equity** **Sat below: Hon. David F. Bauman, J.S.C.**

AMENDED BRIEF OF PROPOSED AMICUS CURIAE THE CENTER FOR AMERICAN LIBERTY IN SUPPORT OF APPELLANTS

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PRELIMINARY STATEMENT

Parents have a fundamental right under the United States Constitution to direct the upbringing of their children. Pursuant to that right, public schools are required to notify parents and obtain their consent before socially transitioning their children at school. "Social transitioning" refers, primarily, to calling a transgender-identifying person by a new name and pronouns associated with their transgender identity. *See* ACa14, Certification of Dr. Erica E. Anderson ("Anderson Cert.") ¶ 9, attached to ACa1, Certification of Josiah Contarino, as Exhibit 1. Social transitioning is a form of psychological treatment, with dramatic and potentially life-long consequences, and the State may not perform this treatment on children without informing their parents. Minor children are not capable of determining by themselves whether social transitioning is appropriate for them, and the healthcare consensus is that schools should not socially transition students without involving their parents in the process.

Here, the Middletown Township Board of Education / Middletown Township Public School District (the "District") adopted a policy that at least partially acknowledges parental rights by requiring schools to notify parents when the schools socially transition their children (the "Parental Notification Policy"). Under the Parental Notification Policy, schools must accept a student's asserted gender identity as decisive and socially transition the student if the student asks for it. Upon socially

transitioning the student, the school must notify the child's parents, unless there is reason to believe that doing so would create a risk of harm to the child.

The Parental Notification Policy amended a prior policy under which schools were permitted to socially transition children in secret from their parents if the child asked that their parents not be informed (the "Parental Secrecy Policy"). The Parental Secrecy Policy was based on a guidance document issued by the New Jersey Department of Education, called *Transgender Student Guidance for School Districts*, which provided that schools may socially transition children in secret from their parents if the child asks that their parents not be informed.

The court below entered an order preliminarily enjoining the Parental Notification Policy and requiring the District to reinstate the Parental Secrecy Policy. This was erroneous. An injunction may not violate constitutional rights, and the Parental Secrecy Policy violates the rights of parents whose children attend schools in the District. What is more, the Parental Secrecy Policy harms children. It keeps children who may be experiencing psychological distress from seeing a competent mental health practitioner. It results in children receiving a "one size fits all" form of psychological treatment in a situation that demands individualized evaluation. It results in children persisting in a transgender identity when they might otherwise desist. And it cuts parents out of their children's lives, isolating children from their

main source of support and driving a wedge into the heart of the parent-child relationship just when children need it most.

This Court can remedy the violation of parents' constitutional rights and prevent this harm to children. It should reverse.

BACKGROUND ON SOCIAL TRANSITIONING[1]

I. Youth should receive a careful professional assessment before socially transitioning.

Transgender persons experience a "mismatch between [their] natal sex and [their] felt, perceived, or desired gender identity." ACa15 ¶ 10. Having a transgender identity is not, standing alone, a psychological condition. ACa15 ¶ 10. Nevertheless, transgender-identifying persons can experience gender dysphoria, which refers to "clinically significant distress . . . related to gender incongruence." ACa15 ¶ 10. Not everyone who has a transgender identity suffers from gender dysphoria, but a young person's desire to undergo a social transition is a sign that may indicate the presence of gender dysphoria or related mental-health conditions. ACa11-ACa12 ¶ 8.b.

[1] This background discussion is based on the certification of Dr. Erica Anderson. ACa7-ACa57. Dr. Anderson, a transgender woman, is an expert in the field of the treatment of youth dealing with gender-identity related issues. ACa10-ACa11, Anderson Cert. ¶¶ 3–6. Dr. Anderson's certification starts on page ACa6 of the attached appendix.

Minors who want to undergo a social transition should thus receive a "careful evaluation by an appropriately trained mental health professional" to determine whether gender dysphoria or other related conditions exist. ACa37-ACa38 ¶ 57.

II. Social transition is a significant psychotherapeutic intervention.

The primary purpose of social transitioning is to relieve the psychological distress associated with having a mismatch between one's natal sex and gender identity. ACa14 ¶ 9. Social transitioning is an "impactful psychotherapeutic intervention" in the life of a child. ACa12 ¶ 8.e. Indeed, "a social transition represents one of the most difficult psychological changes a person can experience." ACa31 ¶ 42. Like other forms of healthcare treatment, however, social transitioning is not without risks.

First, social transitioning may cause a minor's transgender identity to persist. Absent social transitioning, for the vast majority of children, "gender incongruence does not persist" into adulthood. ACa20 ¶ 20. But once a child is socially transitioned and lives as their aspired-to gender, the likelihood that the child's transgender identity will persist into adulthood "dramatic[ally]" increases. ACa25 ¶ 30. In this way, social transitioning itself can change "gender identity outcomes" in the lives of children. ACa25-ACa30 at IV.a.

Second, in most cases, social transitioning is the first step down the road to graduated "affirmative" care for the child in the form of puberty blockers and cross-

sex hormones, which can "have permanent, long-term effects," including but not limited to sterility. ACa35 ¶ 53; *see also* United Kingdom National Health Service Website (noting that "long term cross-sex hormone treatment may cause . . . permanent infertility"), ACa86- ACa90. The risks associated with this graduated care must be considered when deciding whether to socially transition a minor. ACa22-ACa23 ¶¶ 24–25.

Third, the recent surge of youth reporting a transgender identity suggests that "cultural and/or social factors may contribute—even substantially—to a young person's experience of gender variance." ACa19 ¶ 19. Caution is thus warranted to ensure that a social transition is appropriate. ACa19 ¶ 19.

Based on these concerns, social transitioning youth must be carefully undertaken with the assistance of a mental health practitioner and the minor's parents. ACa25-ACa31 ¶¶ 29–43. And in some cases, based on a weighing of the relevant considerations, "it can be appropriate for parents to say 'no' to a social transition" of their children. ACa39 ¶ 60.

III. Parental involvement is essential at every stage in the social transition process.

As a practical matter, parents must be involved for their children to even see a mental health professional. ACa40-ACa41 ¶¶ 61–64. Parental involvement is also critical in "the diagnostic process to [allow the mental health professional to] evaluate how long the [minor] has been experiencing gender incongruence, whether

there might be any external cause of those feelings, and a prediction of how likely those feelings are to persist." ACa35 ¶ 66. And given the "complicated risk-benefit calculus . . . and the limited knowledge about long-term effects and outcomes," parents "should . . . be involved to make important decisions about next steps." ACa44 ¶ 72. Moreover, excluding parents from decisions about a social transition "drive[s] a wedge between the parent and child" and "undermines [minors'] main support structure"—their families. ACa45, ACa46 ¶¶ 77, 80.

Parental involvement is also necessary to obtain informed consent. Minors generally may not be seen "without informed consent from the parent(s)/legal guardian(s), both as a matter of state laws and as a matter of medical ethics." ACa40 ¶ 61. And because minors "lack the skills for future thinking, planning, . . . and self-reflection," parents are "integral to the informed consent process." ACa40 ¶ 62.

IV. Schools should not socially transition students in secret from their parents.

Based on these considerations, schools should not socially transition minors "without consultation with parents and appropriate professionals." ACa31 ¶ 42. Indeed, no professional body "has endorsed school-facilitated social transition of minors without parental [involvement]." ACa46-ACa47 ¶ 81. School policies "excluding parental involvement [in the decision whether to socially transition their child are] contrary to widely accepted mental health principles and practice" and are "likely to lead to student harm." ACa47, ACa49 ¶¶ 82, 86.

ARGUMENT

The State has not satisfied its burden of demonstrating the preliminary injunction factors by "clear and convincing[]" evidence. *Waste Mgmt. of New Jersey, Inc. v. Union Cnty. Util. Auth.*, 399 N.J. Super. 508, 519–20 (App. Div. 2008) (setting forth preliminary injunction factors).

I. THE STATE IS NOT LIKELY TO SUCCEED ON THE MERITS

Below, the court concluded that the Parental Notification Policy violated New Jersey law, and it enjoined that Policy and required the District to reinstate the Parental Secrecy Policy. This was error. Under the Supremacy Clause of the United States Constitution, parents' federal constitutional rights trump any other state-law rights that might be at issue. *Montgomery v. Louisiana*, 577 U.S. 190, 205 (2016), *as revised* (Jan. 27, 2016). Moreover, it is black-letter law that a state-court injunction may not violate federal constitutional rights. *Horizon Health Center v. Felicissimo*, 135 N.J. 126, 148–49 (1994) (modifying injunction that "impermissibly exceeds [federal constitutional] standards"); *see also N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 n.51 (1982) (noting that in a "civil lawsuit between private parties," the "application of state rules of law by . . . state courts in a manner alleged to restrict [constitutional] freedoms constitutes 'state action' under the Fourteenth Amendment" (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964))).

Here, for the reasons set forth below, the lower court's injunction, which requires the District to reinstate the Parental Secrecy Policy, violates the federal constitutional rights of parents in the District. Thus, this Court should reverse.

A. Parents have a fundamental right to direct the upbringing of their children.

Parents have a fundamental right under the United States Constitution to direct the "care, custody, and control" of their minor children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.); *see also Gruenke v. Seip*, 225 F.3d 290, 304 (3d Cir. 2000) (same). This right rests on the constitutionally mandated common-law presumptions of parental fitness and affection—*i.e.*, that (1) "parents possess what a child lacks in maturity, experience, and capacity for judgment" and (2) the "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

The Parental Secrecy Policy—which the lower court ordered the District to reinstate—infringes the rights of parents in the District in four ways.

1. Right to Consent to Psychological Treatment

First, the Parental Secrecy Policy violates parents' right to consent when the State performs psychological treatment on their children. *Parham*, 442 U.S. at 602; *see also Parents United For Better Sch., Inc. v. Sch. Dist. of Phila. Bd. of Educ.,* 148 F.3d 260, 275 (3d Cir. 1998) (recognizing that "parental consent must be secured before medical treatment is obtained" by children); *Kanuszewski v. Michigan Dep't*

of Health & Hum. Servs., 927 F.3d 396, 418 (6th Cir. 2019) (noting parents have the "right to direct their children's medical care"); *Mann v. Cnty. of San Diego*, 907 F.3d 1154, 1160–61 (9th Cir. 2018) (holding state violates parental right by performing healthcare treatment on children "without notifying the parents . . . and without obtaining either the parent's consent or judicial authorization"). As Dr. Anderson explains, social transitioning is a form of psychological treatment. ACa12, ACa25-ACa31 ¶¶ 8.e, 29–43. Indeed, the very purpose of social transitioning is to alleviate the mental suffering that persons with a transgender identity can experience. ACa7 ¶ 9. Because social transitioning constitutes psychological treatment, parents have the right to consent when the State is performing that treatment on their children. *See T.F. v. Kettle Moraine School Dist.*, No. 2021CV1650, 2023 WL 6544917, at *5 (Wis. Cir. Oct. 03, 2023) (holding that socially transitioning child against parents' wishes "directly implicates an infringement against the parental . . . right to direct the care for their child").

The characterization of social transitioning as a form of psychological treatment is not controversial. Courts across the country have recognized this fact. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 770 (9th Cir. 2019) (noting that "[t]reatment options for individuals with gender dysphoria" include "changes in gender expression and role (which may involve living . . . in another gender role, consistent with one's gender identity)"); *Lamb v. Norwood*, 899 F.3d 1159, 1161 (10th Cir.

2018) (noting that "[t]reatment forms [for gender dysphoria] currently include . . . [c]hanges in gender expression and role (which may involve living . . . in another gender role, consistent with one's gender identity)"); *Koe v. Noggle*, No. 1:23-CV-2904-SEG, 2023 WL 5339281, at *6 (N.D. Ga. Aug. 20, 2023) (noting that "gender dysphoria treatment plans include therapy, support, and assistance with elements of a social transition"); *Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831, at *3 (D. Ariz. July 20, 2023) ("Undergoing treatment to alleviate gender dysphoria is commonly referred to as 'transition' and includes . . . social transition . . . ."); *Monroe v. Meeks*, 584 F. Supp. 3d 643, 678 (S.D. Ill. 2022) (holding that "[s]ocial transition . . . is a medically necessary component of treatment for some . . . with gender dysphoria"); *Pinson v. Hadaway*, No. 18-CV-3420-NEB-KMM, 2020 WL 6121357, at *1 (D. Minn. July 13, 2020) (noting that "[g]ender dysphoria treatment can involve . . . social transition"); *Porter v. Allbaugh*, No. 18-CV-0472-JED-FHM, 2019 WL 2167415, at *2 n.3 (N.D. Okla. May 17, 2019) (noting that "[c]urrent treatments for gender dysphoria include . . . social transition").

Leading medical associations also consider social transitioning to be psychological treatment. For example, the American Academy of Pediatrics, the American Association of Child & Adolescent Psychiatry, the American College of Physicians, and the American Medical Association, among others, hold the views that "[t]he recommended treatment for transgender people with gender dysphoria

includes . . . social transition" and that "[s]ocial transition . . . is often a critically important part of treatment" for gender dysphoria. Brief of Amici Curiae Medical, Nursing, Mental Health, and other Health Care Organizations in support of Plaintiff in *Adams v. The School Board of St. Johns County*, Case No. 18-13592 (11th Cir. 2019) at 12–13, ACa91–132. In addition, in its recently released *Standards of Care* Version 8, the World Professional Association of Transgender Health ("WPATH")—an advocacy organization committed to the health of transgender-identifying individuals—considers social transitioning to be psychological treatment. E. Coleman, et al., *Standards of Care for the Health of Transgender and Gender Diverse People*, Version 8, Int'l J. of Transgender Health (Sept. 15, 2022) ("WPATH SOC8") at S77 (noting that the "potential benefits" of social transitioning include "reducing gender dysphoria and enhancing psychosocial adjustment and well-being"), ACa134-ACa137.

And other leading experts in the field—like Dr. Anderson—consider social transitioning to be psychological treatment. Ken Zucker, the former head of the Centre for Addiction and Mental Health in Toronto, has opined that social transition is a form of "psychosocial treatment that will increase the odds of long-term persistence." Zucker, K.J., *The myth of persistence: Response to "A Critical Commentary on Follow-Up Studies and Desistance Theories about Transgender and Gender Non-Conforming Children" by Temple Newhook et al.*, International Journal

of Transgenderism, 19, 231–245 (2018), ACa138–54. Hillary Cass, the former President of the Royal College of Paediatrics and Child Health in the United Kingdom, has similarly opined in her recent *Interim Report* that childhood social transition is an "active intervention [that] may have significant effects on the child." Cass, H., *Independent review of gender identity services for children and young people: Interim Report* (February 2022) at 62, ACa156-157.

The State undoubtedly has the authority to render medical treatment to children without parental consent in certain situations, *see, e.g.*, *D.C.M.M. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, No. 87207, 2023 WL 5837974, at *2 (Nev. Sept. 8, 2023) (authorizing treatment without parental consent where child needed immediate medical attention for serious medical condition and parents could not be located), but this is not one of them. Socially transitioning every child who asks for it is not recommended by any healthcare association. ACa46 ¶ 81; *see also* WPATH SOC8 at S77–78 (recommending that "health care professionals discuss the potential benefits and risks of a social transition with families who are *considering* it"), ACa136–37. Instead, a child's request to be socially transitioned should merely *begin* a "careful evaluative process" of the child. ACa21 ¶ 22; *see also* WPATH SOC8 at S77–78, ACa136–137. Socially transitioning every child who asks for it ignores the facts that (1) most children who experience a transgender identity will desist, (2) social transitioning reduces the likelihood of desistance, (3) most children

who are socially transitioned will go on to receive puberty blockers and cross-sex hormones, which can have irreversible consequences, (4) the surge in transgender identifying youth may be impacted by peer pressure, and (5) there is a growing awareness of adult "detransitioners"—*i.e.*, persons who transitioned to a transgender identity as youth who decide as adults to revert to the gender associated with their natal sex. ACa20, ACa18-ACa29, ACa34, ACa36 ¶¶ 20, 29–38, 50, 54–55; *see also* James M. Cantor, *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, J. Sex & Marital Therapy 307, 313 (2019) (noting that "[o]ver puberty, the majority of [gender dysphoric] children cease to want to transition"), ACa158–66; *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 48 (D.D.C. 2020) (citing scholarship establishing that "childhood social transitions [are] important predictors of persistence"); Kristina R. Olson, *Gender Identity 5 Years After Social Transition*, Pediatrics 150(2):e2021056082 (Aug. 2022) (study in which majority of children who socially transitioned were receiving puberty blockers and / or cross-sex hormones within 5 years), ACa167–74; Carmichael, P., Butler, G., Masic, U., Cole, T. J., De Stavola, B. L., Davidson, S., Skageberg, E. M., Khadr, S., & Viner, R. M., *Short-term outcomes of pubertal suppression in a selected cohort of 12- to 15-year-old young people with persistent gender dysphoria in the UK*, PLOS ONE 16(2) (2021) (study in which 98% of children who received puberty blockers went on to receive cross-

sex hormones), ACa175–201; WPATH SOC8 at S58 (noting that the uptick in transgender-identifying adolescent girls may be driven in part by "excessive peer and social media influence"), ACa136–37; Irwig, M.S., *Detransition Among Transgender and Gender-Diverse People—An Increasing and Increasingly Complex Phenomenon*, J. Clin. Endocrinology & Metab., e4251–e4262 (June 9, 2022) (noting new scholarship focusing on detransitioners), ACa202–204. It is not permissible for school personnel to make such a critical healthcare decision in the life of the child without involving their parents. ACa47-ACa49 ¶¶ 82–86; *see also* WPATH SOC8 at S77–78 (recommending that "health care professionals discuss the potential benefits and risks of a social transition with *families* who are considering it" and noting that such communications "facilitate the *parents/caregivers'* success in making informed decisions about the advisability and/or parameters of a social transition for their child" (emphases added)), ACa136–37. These facts counsel for caution, not schools rushing headlong to socially transition every student who asks for it without parental involvement.

Moreover, there are no exigent circumstances in the social transitioning context that would justify schools' failure to obtain parents' consent. While it might be permissible to render life-saving emergency treatment to a child whose parents cannot be located, *see D.C.M.M.*, 2023 WL 5837974, at *2, social transitioning is a slow, deliberative process in which parental involvement is always feasible.

It does not matter that it is students—and not the school—who are initiating the request to be socially transitioned. As a matter of law, minors lack the "maturity, experience, and capacity for judgment" needed to "make sound judgments concerning many decisions, *including their [own] need for medical care*." *Parham*, 442 U.S. at 603 (emphasis added); *see also Roper v. Simmons*, 543 U.S. 551, 569 (2005) (noting that children are "vulnerable . . . to negative influences and outside pressures, including peer pressure" and often make "impetuous and ill-considered . . . decisions"). Parents—not the State, and not the child—have the "primary role" in raising their children. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). This rule, which contemplates parental participation in children's healthcare decisions, protects children from their own imprudent decisions. *See Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000). If the rule were otherwise, it would be permissible for a school to employ doctors to distribute Adderall to students before class to help them focus without obtaining parental consent, so long as the students voluntarily sought the medication. That is not the law. *See, e.g.*, *Mario V. v. Armenta*, No. 18-CV-00041-BLF, 2021 WL 1907790 (N.D. Cal. May 12, 2021) (holding parents' rights violated when school secretly conducted blood-sugar tests on willing students).[2]

[2] It is important to note that the United States Constitution protects parents' rights to *consent* to the social transitioning of their children, not just the right to parental *notice* that schools are taking this step in treating their children. While the Parental

2. Right to Make Important Decisions

Second, the Parental Secrecy Policy violates parents' right to make the "important decisions" in their children's lives. *H.L. v. Matheson*, 450 U.S. 398, 410 (1981); *see also C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005) (discussing parents' right to make those decisions in their children's lives that go to the "heart of parental decision-making"). "It is not educators, but parents who have primary rights in the upbringing of children," *Gruenke*, 225 F.3d at 307, and parents cannot play this crucial role if their children's school is actively concealing its actions from them, *Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (noting that, under the common law, parents had the right, "not merely to be notified of their children's actions, but to speak and act on their behalf") (Kennedy, J., concurring in part and dissenting in part).

Regardless of whether social transitioning is considered psychological treatment, the decision of whether a school socially transitions a child is indisputably an "important decision" in the child's life. *See Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 522CV04015HLTGEB, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022) (observing that parents must "have a say in what [their] minor child[ren are] called" by their school); *Mirabelli v. Olson*, No. 323CV00768BENWVG, 2023 WL

Notification Policy appropriately requires parental notice before a school socially transitions students, to comply with the Constitution, it must go further and require parental consent as well.

5976992, at *9 (S.D. Cal. Sept. 14, 2023) (concluding that school district's "policy of elevating a child's gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that kind of choice, is . . . foreign to federal constitutional . . . law"). Social transitioning impacts the very core of the child's self-definition as a boy or girl. And, as discussed, it substantially reduces the odds of desistence, is likely to lead to a life of medicalization, and—when done by schools behind parents' backs—results in the child suffering without parental support.

Moreover, socially transitioning students in secret from their parents does not fall within the scope of schools' implied authority under the doctrine of *in loco parentis*. Schools have "inferred parental consent" that gives them "a degree of authority . . . commensurate with the task that the parents ask the school to perform"—namely, to educate their children. *Mahanoy Area Sch. Dist. v. B.L*, 141 S. Ct. 2038, 2052 (2021) (Alito, J., concurring). Consistent with that authority, schools must have the ability "to control curriculum and the . . . educational environment," *C.N.*, 430 F.3d at 182, including things like "the hours of the school day," "the timing and content of examinations," or "the extracurricular activities offered at the school," *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) ("*Fields I*"), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187 (9th Cir. 2006) ("*Fields II*"). But socially

transitioning students without parental consent is not within the scope of that inferred delegation—parents do not hand children off so schools may render psychological treatment and secretly facilitate changing their gender identity. *See Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2052; *see also Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265–66 (N.Y. App. Div. 1993) (holding in-school condom distribution program violated parental rights because it lacked parental notification and opt-out provision).

In short, as the Third Circuit has held, parents' rights do not stop at "the threshold of the schoolhouse door." *C.N.*, 430 F.3d at 185 n.26. Schools must obtain parents' consent before socially transitioning their children.

3. Right to Family Integrity

Third, the Parental Secrecy Policy violates parents' right to maintain the integrity of their family. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (noting that "freedom of personal choice in matters of . . . family life" is constitutionally protected) (plurality op.); *see also Gruenke*, 225 F.3d at 303 (discussing right to "familial integrity"). This right protects parents' relationships with their children from "undue state interference." *Gruenke*, 225 F.3d at 303, 306 (holding school personnel's secret interference with parents' "management of [their daughter's] teenage pregnancy" violated right to family integrity). *See also Pierce*

v. Society of Sisters, 268 U.S. 510, 535 (1925) (noting that students are not "mere creatures of the State").

The Parental Secrecy Policy constitutes an "undue state interference" in parents' relationship with their children. From the clothing and toys parents give their children, to the friends parents allow their children to have, to the sports parents allow their children to play, the parent-child relationship is deeply shaped by whether the child is a boy or a girl. By requiring schools to socially transition children without informing parents, the Parental Secrecy Policy allows schools to fundamentally alter the nature of parents' "emotional bond[s]" with their children. *Ovando v. City of Los Angeles*, 92 F. Supp. 2d 1011, 1021 (C.D. Cal. 2000); *see also Doe v. Dickenson*, 615 F. Supp. 2d 1002, 1014 (D. Ariz. 2009) (holding state may not fundamentally alter the nature of the parent-child relationship). Moreover, the Parental Secrecy Policy treats parents as the enemy, impermissibly driving a wedge into the parent-child relationship that lies at the heart of the family, thus usurping the parental role. *Patel v. Searles*, 305 F.3d 130, 134, 137 (2d Cir. 2002) (holding the state violated the right to family integrity when it created "mistrust among the members of [plaintiff's] family"). In short, a school that socially transitions children behind parents' backs unduly interferes with the parents' right to family integrity.

4. Presumptions of Fitness and Affection

Fourth, the Parental Secrecy Policy impermissibly reverses the constitutionally mandated presumptions of parental fitness and affection in violation of both substantive and procedural due process. *Parham,* 442 U.S. at 602; *see also Troxel*, 530 U.S. at 68 (reversing visitation decision that failed to presume parental fitness and affection) (plurality op.); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (invalidating statute that presumed unmarried fathers were unfit parents); *Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003) (holding parents' rights violated where state actors "not only failed to presume that . . . parents would act in the best interest of their children, they assumed the exact opposite"); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (noting that the "fundamental requirement of [procedural] due process" is notice and an opportunity to be heard). According to the State, parental secrecy is required in *all* cases because *some* parents might harm their transgender-identifying children. ACa81–82.[3] But the "statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect [their] children is repugnant to American tradition." *Parham*, 442 U.S. at 603 (emphasis in original). Thus, the State's justification for the Parental Secrecy Policy renders it constitutionally impermissible.

[3] All citations to the State's Brief herein are citations to State's brief in the trial court.

To be sure, the State may overcome the presumptions of fitness and affection if an appropriate factfinder makes *specific findings* that *specific parents* are either unfit or will not act in the child's best interests. But the Parental Secrecy Policy does not require such findings. Instead, its secrecy requirement is predicated on the presumption that all parents are unfit and / or will not act in the best interests of the children simply because their children do not want them to know they are being socially transitioned at school. ACa81. This impermissibly reverses the presumptions of fitness and affection in violation of the parental right.

* * *

To be clear, the United States Constitution does not require schools to inform parents if they merely have a suspicion—or even direct knowledge—that their children are asserting a transgender identity (or, for that matter, any identity or orientation). Thus, this case is not, as the State argued below, about "outing" LGBTQ+ children. ACa60. Instead, this case is about whether schools must involve parents before *schools take the affirmative step* of socially transitioning their children. Under the United States Constitution, they must.

B. The Parental Secrecy Policy does not satisfy strict scrutiny.

Because parental rights are "fundamental," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), the Parental Secrecy Policy is subject to strict scrutiny, *Reno v. Flores*, 507 U.S. 292, 302 (1993). To satisfy strict scrutiny, the State must show

that the Parental Secrecy Policy is "narrowly tailored to serve a compelling state interest." *Id.* The State has not made—and cannot make—that showing.

1. Children do not have a privacy right to keep the fact their school is socially transitioning them secret from their parents.

The State argued below that children have a privacy right to keep their school's social transitioning of them secret from their parents. ACa80. The State did not specifically invoke the United States Constitution as the source of students' alleged privacy rights (presumably to avoid creating federal jurisdiction), but even if it had, children have no federal constitutional right to privacy to keep secret from their parents the fact they are being socially transitioned by their school. Thus, student privacy is not a legitimate interest, much less a compelling one.[4]

To find new extra-textual rights in the United States Constitution, the Court must conclude that the right, as "careful[ly] descri[bed]" by the litigant advancing it, is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720–21. The argument that children have a privacy right to keep secret from their parents the fact that their school is socially transitioning them does not come close to satisfying this standard. Indeed, the argument is devoid of any historical support whatsoever. *See* Blackstone,

[4] As for the State's state-law privacy arguments, as discussed, parents' federal parental rights trump any state-law privacy rights their children may have. *Montgomery*, 577 U.S. at 205.

1 *Commentaries on the Laws of England* at 440–41 (recognizing the obligation of children to parental "subjection and obedience"); Kent, 2 *Commentaries* on *American Law* at 207 (providing that children's duties to their parents include "obedience"); *Hodgson*, 497 U.S. at 483 (noting that, under the common law, parents had the right, "not merely to be notified of their children's actions, but to speak and act on their behalf") (Kennedy, J., concurring in part and dissenting in part).

Below, the State cited *Sterling v. Borough of Minersville* in support of its position, ACa75, but *Sterling* did not involve a minor. Instead, *Sterling* involved an *eighteen-year-old*. 232 F.3d 190, 192 (3d Cir. 2000).[5] Even if *adults* had a privacy right to keep the state's social transitioning of them secret (and the United States Supreme Court has never held that they do), that holding would not extend to *minors*. As the United States Supreme Court has held, "the constitutional rights of children cannot be equated with those of adults." *Bellotti v. Baird*, 443 U.S. 622, 634 (1979), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (noting that "unemancipated minors lack some of the most fundamental rights of self-determination"). Adults have the constitutional right to marry, *Loving v.*

[5] In its briefing below, the State attempted to obscure this fact, describing the case as involving a "teenager." ACa75. While that description is not incorrect, it also ignores the categorial distinction between minors and adults in connection with parental rights.

Virginia, 388 U.S. 1 (1967), to engage in consensual sexual relations, *Lawrence v. Texas*, 539 U.S. 558 (2003), and to and to view indecent material, *Pope v. Illinois*, 481 U.S. 497 (1987), for example, yet almost every state in the union, including New Jersey, has laws prohibiting minors from engaging in these activities, *see, e.g.*, N.J.S.A. 37:1–6 (prohibiting minors from marrying); N.J.S.A. 2C:14–3 (restricting sexual activity with minors); N.J.S.A. 2C:34–3 (prohibiting distribution of indecent material to minors).

More importantly, the proposed right at issue is not some abstract privacy right. Rather, it is a proposed privacy right in children *against their parents*. But minor children generally "lack . . . rights vis-à-vis [their] parents." *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944–45 (9th Cir. 1997). Indeed, considering "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," the Court should be highly skeptical of arguments that seek to interpose the United States Constitution between parents and their children. *Bellotti*, 443 U.S. at 634; *see also Parham*, 442 U.S. at 603 ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . . ."). This conclusion is especially true considering the significant long-term "medical, emotional, and psychological consequences" associated with social transitioning, which leave

children particularly vulnerable to their own immature choices. *H.L.*, 450 U.S. at 411.

The alleged privacy right at issue also does not arise from the logic of those cases requiring a judicial bypass of a parental consent requirement in the abortion context. *See, e.g.*, *Bellotti*, 443 U.S. 622. For one thing, those cases were predicated on a federal constitutional right to an abortion, which no longer exists. *Dobbs*, 597 U.S. 215. For another thing, the Supreme Court has only ever required a judicial bypass to a parental consent requirement in the unique context of abortion, where the (former) right must be exercised within the short window of human gestation or lost forever. *Bellotti*, 443 U.S. at 642 ("A pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy."). The same is not true with social transitioning, which—like most life decisions—minor children can choose for themselves when they reach the age of majority. *Id.* (observing that no judicial bypass is required for laws prohibiting minors from marrying because "[a] minor not permitted to marry before the age of majority is required simply to postpone her decision").

Furthermore, a right to privacy exists only where the individual has a "reasonable expectation[] of confidentiality." *Fraternal Ord. of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 112 (3d Cir. 1987). Children have no expectation of confidentiality in the fact that their school is socially transitioning them. Social

transitioning is open and notorious; indeed, the transition is a "social" one. By definition, students have no reasonable expectation of confidentiality in this information. *Mirabelli*, 2023 WL 5976992, at *10 ("A student who announces the desire to be publicly known in school by a new name, gender, or pronoun and is referred to by teachers and students and others by said new name, gender, or pronoun, can hardly be said to have a reasonable expectation of privacy or expect non-disclosure.").

Finally, even if minor children had a federally protected privacy right against their parents to conceal their social transitioning at school (and they do not), it is settled that privacy rights must yield where "the government interest in disclosure outweighs the individual's privacy interest." *Fraternal Ord. of Police*, 812 F.2d at 110. Here, due to the importance of parental involvement in the lives of their children, which the United States Supreme Court has recognized for over a century, parents' constitutional right to direct the upbringing of their children outweigh any putative privacy right their children might have.

In sum, children have no federal constitutional right to privacy to keep secret from their parents the fact they are being socially transitioned by their school. Thus, student privacy cannot be a compelling governmental interest sufficient to support the Parental Secrecy Policy's infringement of parental rights.

2. The Parental Secrecy Policy is not narrowly tailored to prevent harm.

a. The Parental Secrecy Policy is not narrowly tailored to prevent parents from abusing their children.

The State argued below that the Parental Secrecy Policy also prevents parents from harming their transgender-identifying children. ACa81–82. The prevention of harm to children is assuredly a compelling government interest in the abstract. But it violates both the substantive and procedural components of the Due Process Clause to presume that parents will harm their children without making specific factual findings in each individual case.

As discussed, the United States Constitution's protection of parental rights rests on the common-law presumptions of parental fitness and affection. *Parham*, 442 U.S. at 602. The State must adhere to these presumptions unless and until it makes specific findings that rebut them in each individual case. *Id.*; *see also Troxel*, 530 U.S. at 68 (plurality op.); *Stanley*, 405 U.S. at 652. As the Third Circuit Court of Appeals has held, "a state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Croft v. Westmoreland Cnty. Child. & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997). Because the Parental Secrecy Policy presumes that parents will harm their children if told the child is asking to be socially transitioned at school, it is not narrowly

tailored to the prevention of child abuse. *Id.*; *see also Ricard*, 2022 WL 1471372, at *8 (holding parental secrecy overbroad "because it prohibits the disclosure of preferred name and pronoun information to parents without any assessment of whether disclosure would actually post a risk" of harm to the child); *T.F.*, 2023 WL 6544917, at *8 (holding school's actions in socially transitioning child without parental consent was "not narrowly tailored because there [were] not the necessary procedural protections in place that are necessary to override a parent's choice of how to . . . treat their child").

b. The Parental Secrecy Policy is not narrowly tailored to prevent discrimination against transgender-identifying students at school.

The State also argued below that the Parental Secrecy Policy is necessary to prevent discrimination against—and create a "safe space[]" for—transgender-identifying students at school. ACa81. As with the prevention of child abuse, the prevention of discrimination is certainly a compelling governmental interest in the abstract. But the Parental Secrecy Policy is not narrowly tailored to serve that goal.

Under both the Parental Notification Policy and the Parental Secrecy Policy, schools are required to socially transition students upon their request. The only substantive difference is that under the Parental Notification Policy, schools must inform parents of their actions, while under the Parental Secrecy Policy, schools are not required to inform parents. Because social transitioning is required under both

policies, to justify the Parental Secrecy Policy, it is not enough for the State to demonstrate that *socially transitioning* students prevents discrimination. Instead, the State must demonstrate that the Parental Secrecy Policy's *non-disclosure provisions* prevent discrimination. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1881 (2021) (holding that government does not satisfy its burden of satisfying strict scrutiny by proffering government interest at a "high level of generality" but must link the interest to the provision being challenged). Here, the State has utterly failed to demonstrate how the failure to notify parents that their children are being socially transitioned prevents discrimination against transgender-identifying students.

To the extent the State's argument is predicated on the assumption that some parents would not allow their children to be socially transitioned if given the opportunity to consent, it fails. First, this argument assumes that every child who asks to be socially transitioned should be, which is demonstrably untrue. ACa25-ACa31, ACa39 ¶¶ 29–43, 60; *see also* WPATH SOC8 at S77–78, ACa136–37. Rather, as discussed, a child's request to be socially transitioned merely *begins* the evaluation process between a mental health professional and parents regarding whether social transitioning is appropriate for that child, a process that can appropriately lead to the child not being socially transitioned. Second, the argument that bypassing parental consent prevents discrimination assumes that children play the primary role in their own upbringing. But parents have the right to play this role,

and if parents do not consent to their children's social transitioning at school, then—absent a finding of parental unfitness—that decision controls, and the District lacks any anti-discriminatory interest with respect to those children. Accordingly, like the prevention of child abuse, the State's alleged anti-discrimination purpose is not narrowly tailored.

II. THE OTHER PRELIMINARY INJUNCTION FACTORS TIP DECIDEDLY IN FAVOR OF REVERSAL

Far from *preventing* irreparable harm, the Parental Secrecy Policy *causes* harm, both to parents and to their children.

The Parental Secrecy Policy irreparably harms parents. It violates parents' fundamental rights under the United States Constitution, which cannot be remedied by money damages. *See Garden State Equal. v. Dow*, 216 N.J. 314, 328 (2013) (holding that loss of constitutional rights that cannot be remedied by money damages constitutes irreparable injury); *see also Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 949–50 (S.D. Miss. 2014) (holding that deprivation of parental rights gives rise to irreparable harm), *aff'd*, 791 F.3d 625 (5th Cir. 2015); *Jenkins v. Jenkins*, No. 03-08-CV-037, 2008 WL 483312, at *1 (S.D. Ohio Feb. 19, 2008) (same). Moreover, the harm is immediate—the Parental Secrecy Policy is in effect now, and every day it is in place parents face the substantial risk that their children might seek to be socially transitioned in secret at school.

The Parental Secrecy Policy also irreparably harms children.

First, the Parental Secrecy Policy keeps children who are experiencing a transgender identity even from being evaluated by a competent mental health practitioner. Gender dysphoria can be a serious condition, yet the Parental Secrecy Policy leaves children who are struggling with it (or sub-threshold psychological distress) to fend for themselves, without parental support and without the involvement of a mental health professional. "[K]eeping parents uninformed . . . of significant events that beg for medical and psychological experts to evaluate a child . . . is . . . likely to cause . . . harm [to the child]." *Mirabelli*, 2023 WL 5976992, at *14.

Second, the Parental Secrecy Policy's "one size fits all" approach fails to account for the unique facts in each child's situation and results in the unnecessary and ill-advised social transitioning of at least some children. This is significant because once social transitioning is introduced, the odds of desistence plummet. And the persistence of a transgender identity can result in the child experiencing psychological distress and is highly likely to lead to the introduction of puberty blockers and cross-sex hormones, which can cause irreversible changes to children's bodies. Even one child who unnecessarily suffers these life-long impacts is one too many.

Third, the Parental Secrecy Policy creates a paradigm where students are socially transitioned at school but remain the gender associated with their natal sex

at home. This facilitation of a secret "double life" cuts children off from their primary support structure and is psychologically harmful. ACa38-ACa39 ¶¶ 77–80. The State acknowledges that transgender-identifying children are uniquely susceptible to mental-health challenges, ACa80, yet—remarkably—it concludes that this is reason to *exclude* parents from their lives. The State has it exactly backwards—the fact that these children face unique challenges is a reason for parental disclosure, not secrecy.

Finally, the State has not demonstrated that transgender-identifying students will suffer harm due to the Parental Notification Policy. The State argues that notifying parents can result in parents harming their children, ACa80–81, but, again, presuming that parents will harm their children based on nothing more than the child's request to be socially transitioned in secret is constitutionally prohibited. In any event, the Parental Notification Policy has an exception for the situation where parents are likely to harm their children, so the Parental Notification Policy adequately accounts for that concern. The State also argues that the Parental Notification Policy compromises students' "safe spaces" at school, ACa81, but as pointed out, the District is free to continue to socially transition students under the Parental Notification Policy just as it has done in the past. The only difference is that, under the Parental Notification Policy parents will be notified, and the State has not remotely demonstrated that the notification requirement will cause transgender-

identifying students to be discriminated against at school. Unlike the Parental Secrecy Policy's "one size fits all" approach, the Parental Notification Policy's case-by-case evaluation of the risk of parental harm interposes the State between parents and their children only when such interference is truly needed.

For these reasons, the balance of the equities tips dramatically in parents' favor, and lifting the injunction is strongly in the interest of parents, their children, and the public.

CONCLUSION

For the foregoing reasons, the Court should reverse.

January 3, 2024

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BRIEF ON BEHALF OF PLAINTIFFS-RESPONDENTS

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PRELIMINARY STATEMENT

New Jersey's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50, is designed to eradicate discrimination in all forms. Among its protections, the LAD prohibits discrimination on the basis of "gender identity or expression" in "any place of public accommodation," N.J.S.A. 10:5-12(f)(1), including "any kindergarten, primary and secondary school, … [or] high school," N.J.S.A. 10:5-5(l). In other words, a school that adopts a policy discriminating against students based on gender identity has violated the LAD's bedrock protections. And as the New Jersey Supreme Court recognized decades ago, this prohibition extends to both disparate-treatment and disparate-impact claims.

This case arose when Appellants, the Middletown Board of Education and Middletown Public School District, violated the LAD's requirements. For years, Appellants had maintained a policy—consistent with guidance the New Jersey Department of Education issued in 2018—to ensure a nondiscriminatory, safe, and supportive environment for all students, including all transgender students. But on June 20, 2023, they changed course. They adopted, for the first time, a blanket policy that required school personnel to affirmatively inform the parents of transgender, gender non-conforming, or non-binary students about the child's gender identity. Because the policy discriminated on the basis of gender identity or expression, the Attorney General and Director of the Division on Civil Rights

("DCR") (together, "the State"), filed an administrative complaint before DCR the very next day alleging multiple LAD violations. And they sought relief in the Superior Court to preliminarily enjoin enforcement of the policy—and thus maintain the status quo—pending resolution of that administrative action.

Judge Bauman did not abuse his discretion in maintaining the status quo while DCR resolves the administrative proceeding. The trial court rightly held that the State demonstrated a reasonable probability of success on the merits on its claim that this new policy subjected transgender, gender non-conforming, or non-binary students to disparate treatment and to a disparate impact under the LAD. The trial court properly found that failure to enjoin these policies would irreparably harm these students—students who already face distressingly high risks of mental health challenges and suicide. And the court accurately reasoned that Appellants would not be harmed by an order maintaining the prior policy, which had been in place for four years without identified problems, while DCR's administrative proceeding plays out. Appellants do not directly challenge these findings, which are amply sufficient to justify the preliminary injunction.

The arguments Appellants do present on appeal cannot overcome the trial court's meticulous findings on each Crowe factor. Appellants claim the State's right to relief was insufficiently settled; that their new policy is compelled by state and federal recordkeeping laws; and that the court's injunction interferes

with parents' constitutional rights. But the State's right to relief could scarcely be clearer: the court found (and Appellants' opening brief does not dispute) that the policy likely violates the LAD, and N.J.S.A. 10:5-14.1 provides the Attorney General and Director the right to seek an injunction in this situation. Second, the injunction has nothing to do with recordkeeping; this case concerns whether schools may adopt policies requiring affirmative disclosure of students' gender identities on a discriminatory basis, not when schools can withhold records from requesting parents. Third, the injunction does not intrude on parental decision-making; it does not stop parents from counseling their children, and it does not stop children from sharing information with their parents. The injunction simply restores the very policy Appellants kept in place "uneventfully" for four years, without any suggestion that Appellants were somehow violating parents' federal constitutional rights throughout that long period.

Appellants misunderstand what this case is about. The State has always embraced the central role that parents play in decisions regarding their children. And, consistent with the LAD, schools may disclose a student's gender identity in a number of circumstances, including where the school has a compelling and non-discriminatory basis to do so. But they may not enforce a policy requiring personnel to discriminate based on a protected characteristic—let alone while the State's administrative action plays out. This court should affirm.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. Statutory Background.

The New Jersey Legislature enacted the LAD in 1945, making it one of the oldest civil rights laws in the Nation. C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 306 (2023). Its purpose, our Supreme Court has held, "is nothing less than the eradication of the cancer of discrimination." Id. at 306-07; see also L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 189 N.J. 381, 400 (2007) (agreeing that the LAD must be "liberally construed" to effectuate "the Legislature's broad remedial objectives" to eradicate discrimination); Rodriguez v. Raymours Furniture Co., 225 N.J. 343, 354 (2016) ("The LAD occupies a privileged place among statutory enactments in New Jersey."). The LAD has prohibited unlawful discrimination in all places of public accommodation since 1949, Pub. L. 1949, c. 11—a prohibition that covers unlawful discrimination in "any kindergarten, primary and secondary school ... [or] high school," N.J.S.A. 10:5-5(1); see also, e.g., C.V., 255 N.J. at 307. And since 2006, the LAD has expressly barred discrimination on the basis of "gender identity or expression." N.J.S.A. 10:5-12(f); Pub. L. 2006, ch. 100; see also, e.g., Holmes v. Jersey City Police Dep't, 449 N.J. Super. 600, 601 (App. Div. 2017). This prohibition on

[1] Because the procedural history and statement of facts are closely related, they have been combined for efficiency and the Court's convenience.

unlawful discrimination extends to disparate treatment and disparate impact alike. See N.J.S.A. 10:5-12(f) (prohibiting any place of public accommodation from engaging in discrimination "directly or indirectly"); Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 81-82 (1978).

The LAD also adopts a number of remedies to enforce these bedrock protections. Almost eight decades ago, the Legislature established what is now the Division on Civil Rights in the Department of Law and Public Safety, which today enjoys "general jurisdiction and authority" to "prevent and eliminate" all "discrimination" the LAD prohibits. N.J.S.A. 10:5-6. New Jersey law likewise vests in the Attorney General the broad authority to "[e]xercise all powers of the division." N.J.S.A. 10:5-8(a), (g). The statute allows the Attorney General and Director to proceed in an administrative forum or in the Superior Court against any party they believe is violating the LAD. N.J.S.A. 10:5-8.2, -13. And even where the Attorney General and Director proceed administratively, New Jersey law empowers them to proceed "in a summary manner in the Superior Court of New Jersey to obtain an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof" while the administrative action proceeds. N.J.S.A. 10:5-14.1; see also, e.g., Pfaus v. Palermo, 97 N.J. Super. 4, 8 (App. Div. 1967).

B. The Instant Case.

On May 1, 2019, the Middletown Board of Education adopted Policy 5756—Transgender Students ("Original Policy"), to govern the Middletown Public School District. (Ra11).[2] The Original Policy broadly followed the New Jersey Department of Education's Transgender Guidance for School Districts ("State Guidance") (Da255-61; Ra7-11), which DOE had issued in 2018 pursuant to the Legislature's direction to "assist schools in establishing policies and procedures that ensure a supportive and nondiscriminatory environment for transgender students." N.J.S.A. 18A:36-41. The Original Policy thus generally required the district to "keep confidential a current, new, or prospective student's transgender status." (Ra9). The Original Policy also stated that there was "no affirmative duty" on school personnel to notify parents regarding a student's gender identity or expression, (Ra8), and recognized that students might wish to keep this information private. But the Original Policy and State Guidance acknowledge that even when a student requests privacy, there will be times when the "school district may be obligated to disclose a student's status" because it has "a specific and compelling need" to do so, "such as the health and safety of a student or an incident of bias-related crime." (Ra9; Da259).

[2] "Ra" refers to Respondents' appendix to this brief. "Da" refers to Appellants' appendix and "Db" refers to Appellants' brief. "1T" refers to the August 15, 2023 transcript of the Order to Show Cause hearing.

On June 20, 2023, Appellants amended the Policy 5756—Transgender Students ("Amended Policy"). (Da122; 152-55). The Amended Policy imposed a new obligation on the school district to affirmatively notify all parents when a student "requests a public social transition accommodation[]" related to their gender, including any "public name/identity/pronoun change." (Da152). The terms of the Amended Policy provide:

> [I]n the event a student requests a public social transition accommodation, such as public name/identity/pronoun change, bathroom/locker room accommodation, or club/sports accommodations, or the like, the school district shall notify a student's parents or guardian of the student's asserted gender identity and/or name change, or other requested accommodation, provided there is no documented evidence that doing so would subject the student to physical or emotional harm or abuse. It shall be the policy of the Board to support and facilitate healthy communication between a transgender student and their family, rather than foster an unreasonable expectation that a public in school transition will remain confidential or require district staff to affirmatively misrepresent information to parents.
>
> [(Da152) (emphasis added).]

The Amended Policy goes on to state that if any emotional support services are provided to "transgender students, students facing other gender identity issues, or students who may be transitioning," then "[t]he full, complete, and accurate reason for counseling and/or referrals for mental health crisis and/or concerns

shall be provided to parents/guardians in relation to parental notification/consent for such services." (Da152-53).

On June 21, 2023, the State filed an administrative complaint with DCR alleging that the Amended Policy violates the LAD. (Da74-84). The same day, the State filed the instant suit in the Superior Court, Chancery Division, under N.J.S.A. 10:5-14.1, which authorizes the Attorney General or the Director to "proceed against any person in a summary manner in the Superior Court of New Jersey to obtain an injunction" at any time after the filing of an administrative complaint or whenever it appears that a person is engaging in any practice that violates the LAD. Proceeding by Verified Complaint and Order to Show Cause, the State sought temporary restraints and a preliminary injunction to preserve the status quo prior to Appellants' adoption of the Amended Policy only for so long as the administrative complaint is pending. (Da48-67).

The trial court heard argument on August 15, 2023, and granted the State's request on August 18, 2023. (Da117-18). The preliminary injunction directed Appellants "to preserve the status quo ante prior to the adoption of Amended Policy 5756, until such time as the litigation before [DCR] arising from a separate administrative complaint filed on June 21, 2023 is resolved." (Da118). But the trial court went no further than maintaining the status quo: the court emphasized that it was "not rendering any final judgments or determinations as

to the merits of either the State or the School Boards' claims," which would "be left to the sound determination of the Office of Administrative Law after a full development of the factual and legal record in that matter." (Da137).

The court's opinion methodically considered the prongs set forth in Crowe v. DeGioia, 90 N.J. 126, 132-35 (1982), and found that the State had carried its burden on each one. (Da124-38). Initially, the court rejected Appellants' claim that the State had no "well-settled right" to obtain relief. (Da125-126). Just the opposite: the court explained that the LAD's plain text both allows the Attorney General and the Director to "proceed in a summary manner in the Superior Court of New Jersey to obtain an injunction" prohibiting any violation of the LAD and makes clear that schools may not discriminate on the basis of gender identity or expression. Ibid. (citing N.J.S.A. 10:5-14.1). That supplied ample legal basis for the State to seek, and for the court to award, an order maintaining the status quo while the DCR administrative action proceeds. Ibid.

The trial court also found the State had a reasonable probability of success on the merits of its LAD claims. The court found the State was likely to prevail in arguing that the Amended Policy violated the LAD's prohibition on disparate treatment: the new policy, by its terms, adopted a different notification policy for transgender, gender non-conforming, and non-binary students than for their cisgender peers. (Da126-28). Although Appellants had claimed that this policy

would also apply to cisgender students who request the same change, the court noted: "who but transgender, gender non-conforming, and non-binary students would request public and social accommodations or express a change in gender identity and expression?" Ibid. For similar reasons, the court found that the Amended Policy would likely have a disparate impact: transgender, gender non-conforming, and non-binary students would experience "far greater incidence of parental disclosure of their gender identity or expression, and, with it, a far greater risk of harm from this involuntary disclosure." (Da129).

The trial court also identified the flaws in Appellants' argument that any preliminary injunction would interfere with the rights of parents. The trial court explained that its findings were not intended to "minimize or discount the right of parents" to make decisions about their children. (Da131). Although the court did not dispute the crucial role parents play, the court emphasized that the State's suit was "not targeting parental rights per se, but rather policies promulgated by school boards that the State contends unlawfully subjects a protected class to discrimination in violation of the LAD." (Da132). And in that circumstance—in which a public entity has adopted a blanket policy discriminating on the basis of gender identity or expression—Appellants' position "yield[ed]" to the State's "compelling government interest" in eradicating discrimination. Ibid. Indeed, the court explained, the school district itself seemed to recognize that a blanket

notification policy could harm students—its exception for instances in which a disclosure posed a "documented threat" constituted "tacit acknowledgement that the State's concerns regarding mandatory parental notification may be valid," but the exception's vague terms gave "insufficient assurance" that they "would be applied consistently and uniformly" to assuage that risk. (Da132-33).

Finally, the trial court found that remaining equitable factors also weighed in the State's favor. (Da134-37). The court found both that transgender youth already face a heightened risk of mental health challenges, suicide, illicit drug dependency, and infliction of physical or emotional harm by immediate family members—and that mandatory disclosure of their gender identity or expression under the Amended Policy risked exacerbating those harms. (Da135). Such harms, especially while the State's challenge to the Amended Policy was pending in the administrative forum, would be irreparable. (Da135). And on the other side of the ledger, the trial court found that Appellants had not made "any compelling argument that adherence to the [Original Policy] governing transgender students while the administrative action is pending will result in any claim, liability or hardship," especially given that the Original Policy had been in place "uneventfully" since 2019. (Da137). This absence of hardship, when weighed against "the statistical possibility that even one transgender student affected by the [Amended Policy] should run away from home, or attempt or

commit suicide," was "sufficient to tip the balance of equities in favor of the State." (Da137).

This appeal followed.

ARGUMENT

Preliminary relief is appropriate when the moving party establishes "(1) a likelihood of success on the merits; (2) irreparable harm; (3) a showing that on balance the harm to the moving party is greater than the harm to the party to be restrained; and (4) the public interest will not be harmed." In re City of Newark, 469 N.J. Super 366, 387 (App. Div. 2021) (citing Crowe, 90 N.J. at 133); see also Waste Mgmt. of N.J., Inc. v. Union Cnty. Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008) (confirming that while "all the Crowe factors must weigh in favor of injunctive relief, a court may take a less rigid view than it would after a final hearing when the interlocutory injunction is merely designed to preserve the status quo"). This court also refuses to take "a grudging or narrow approach" to such relief if the State is seeking to maintain the status quo pending resolution of a DCR administrative action. Pfaus, 97 N.J. Super. at 8.

The trial court did not abuse its discretion in preliminarily maintaining the status quo in the Middletown school district while DCR's administrative action proceeds. See Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 395 (App. Div. 2006) (reviewing trial court's decision to grant or deny preliminary relief only

for abuse of discretion); Horizon Health Ctr. v. Felicissimo, 135 N.J. 126, 137 (1994) ("The authority to issue injunctive relief falls well within the discretion of a court of equity."); Interactive Brokers, LLC v. Barry, 457 N.J. Super. 357, 362 (App. Div. 2018) (emphasizing a preliminary-relief order should be upheld "unless it was 'made without a rational explication, inexplicably departed from established practices, or rested on an impermissible basis" (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002))). First, the court correctly held that the State is likely to succeed on the merits. Second, the court correctly held the remaining equitable factors—irreparable harm, balance of the equities, and public interest—all squarely support maintaining the status quo.

POINT I

THE COURT CORRECTLY FOUND THE STATE IS LIKELY TO SUCCEED ON THE MERITS.

The trial court correctly found, and Appellants do not seriously dispute on appeal, that the State had demonstrated a sufficient likelihood of success on its claim that the Amended Policy violates the LAD. Appellants' responses—that the State lacks a settled right to relief; that the Amended Policy finds support in federal and state recordkeeping laws; and that the Amended Policy is necessary to protect parents' constitutional rights—all fall short.

A. The Trial Court Correctly Found That The Amended Policy Likely Violates The LAD.

The trial court correctly found that the Amended Policy likely violates the LAD because it expressly mandates disparate treatment of transgender, gender non-conforming, and non-binary students or, alternatively, because it will have a disparate impact on those same students. (Da126-27).

i. *Disparate Treatment.*

The trial court correctly found that the State is likely to succeed in proving that Appellants have engaged in disparate treatment barred by the LAD because, under Appellants' Amended Policy, "only students who identify as transgender are singled out for mandatory parental notification." (Da129).

The plain terms of the Amended Policy impose disparate treatment on the basis of gender identity or expression. The new policy singles out transgender, gender non-conforming, and non-binary students for differential treatment, as it requires school staff to inform parents only about those students who request a "public name/identity/pronoun change, bathroom/locker room accommodation, or club/sports accommodations, or the like." (Da152). In other words, the new policy categorically and facially treats transgender students (subject to blanket notification) differently than it treats cisgender students (subject to no parental notification). Although Appellants below argued that the Amended Policy could apply to cisgender students who requested a social transition, as the court aptly

noted, "who but transgender, gender non-conforming, and non-binary students would request public and social accommodations or express a change in gender identity or expression?" (Da128). Indeed, Appellants no longer seriously argue that the Amended Policy applies equally to cisgender students.

Other evidence of differential treatment abounds. The Amended Policy's title—"Transgender Students"—underscores that it does not apply to cisgender students, and the remainder of its language eliminates any doubt. (Da152). The Amended Policy specifically refers to facilitating communication with the parents of a "transgender student." (Da152). The Amended Policy also provides that when "transgender students" require emotional support services, the school must provide a "full, complete, and accurate" explanation of that "counseling and/or referrals for mental health crisis"—without similarly requiring "parental notification/consent" for other school counseling services. (Da152-53). Even Appellants' brief characterizes their policy as requiring parental notification if "a transgender student" takes certain covered actions. (Db17).

Appellants' brief assertion that "the [Amended] Policy is not triggered by one's status alone" misses the mark. (Db30). Appellants say that the Amended Policy instead is triggered when a student takes "certain steps along their public social transition accommodation spectrum." Ibid. But those are actions inherent to transgender, gender non-conforming, and non-binary students, which is why

the policy mentions them specifically. (Da128; 152-53). Indeed, a school policy that disfavors Jews who observe the Sabbath would facially discriminate against Jewish people, even if not exclusively by dint of religious "status." Appellants engage in differential treatment on the basis of gender identity.

Appellants get no further by claiming that they did not violate the LAD because they were just seeking to comply with state and federal laws governing access to student records or with parents' federal substantive due process rights. (Db22-23; 30-32). As explained in detail below, Appellants misunderstand both the recordkeeping laws, see infra at 28-31, and federal substantive due process, infra at 31-41. But fundamentally, it does not matter whether Appellants were intending to comply with other laws: the LAD "is not a fault- or intent-based statute." C.V., 255 N.J. at 314 (explaining discrimination has harmful effects whether intentional or otherwise, and so "the perpetrator's intent is simply not an element of the [LAD] cause of action"). Whether conduct "involves disparate treatment through explicit facial discrimination does not depend on why the [entity] discriminates but rather on the explicit terms of the discrimination." A.D.P. v. ExxonMobil Research & Eng'g Co., 428 N.J. Super. 518, 537 (App. Div. 2012) (emphasis added). And here, the Amended Policy explicitly singles out transgender, gender non-conforming, and non-binary students and treats them differently than their cisgender peers. This disparate treatment is precisely

what the LAD is intended to prohibit, and the Amended Policy thus presents a textbook violation of the LAD. See Peper, 77 N.J. at 81; (Da129).

ii. *Disparate Impact.*

The trial court also rightly found that, in the alternative, the State is likely to succeed on its claim that the Amended Policy violates the LAD because it has a disparate impact on these transgender, gender non-conforming, and non-binary students. An unlawful disparate impact exists where "practices that are facially neutral in their treatment of different groups ... in fact fall more harshly on one group than another." Peper, 77 N.J. at 81; see also, e.g., Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 399 (2005) (agreeing that an otherwise "facially neutral policy" still violates the LAD when the plaintiff shows that it "'resulted in a significantly disproportionate or adverse impact on members of the affected class.'" (quoting United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 47 (App. Div. 2001))).

The Amended Policy's disparate impact is clear. Even assuming that this policy were somehow facially neutral, it is beyond dispute—and Appellant does not dispute on appeal—that the Amended Policy will disproportionately impact transgender, gender non-conforming, and non-binary students. The Amended Policy specifically requires school officials to proactively disclose to parents a student's "asserted gender identity and/or name change" when they request to

publicly change their gender identity and/or expression at school. (Da152). As the trial court correctly found, transgender, gender non-conforming, and non-binary students are the students who will make such requests, and therefore these students will necessarily be the ones that face "a far greater incidence of parental disclosure of their gender identity or expression." (Da129).

Moreover, these are the students who will also face "a far greater risk of harm from this involuntary disclosure." (Da129) (emphasis added). After all, whereas cisgender students typically consistently express their gender identity or expression at home and at school, transgender, gender non-conforming, and non-binary students are far more likely to express a different gender identity or expression at home than they do at school—often because they fear reprisal or harm. See, e.g., (Ra14) (detailing significant percentages of transgender survey respondents who report having unsupportive families, families who kicked them out of the home, and/or family members who engaged in violence against them); (Ra22) (study showing that 61% of transgender individuals facing high levels of familial rejection reported having attempted suicide—making them over 300% more likely to attempt suicide than those who experienced low or no family rejection); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F. Supp. 3d 118, 139 (D. Md. 2022) (finding transgender students "could hardly feel safe in an environment where expressing their gender identity resulted in

the automatic disclosure to their parents, regardless of their own wishes"), vacated for lack of standing, 78 F.4th 622 (4th Cir. 2023); Cf. Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000) (finding police violated teenager's rights when they threatened to tell his family he was gay, after which he died by suicide). That evidence suffices at this stage to show that the Amended Policy would likely "unlawfully subject these students to a disparate impact in violation of the LAD." (Da129). And as before, it is striking that Appellants' opening brief does not deny that the Amended Policy would have a disparate impact on transgender students.

Appellants argue that the trial court erred in its disparate impact analysis by citing "a number of studies and surveys" the State introduced into the record, (Db33-36), but that fails for two reasons. First, the court's ultimate conclusion on disparate impact did not depend on these studies and surveys. The decision below mentioned not only surveys, but undisputed facts, common sense, and a wealth of cases reaching the same conclusion. See, e.g., (Da133) (discussing Sterling, 232 F.3d 190). It hardly requires scientific evidence to conclude that, as compared to cisgender students, "some transgender students may feel more comfortable disclosing their gender identification or expression at school rather

than at home." (Da131). While the studies and surveys corroborate the court's conclusions, its holding does not depend on them. (Da131-33).[3]

Second, the court's consideration of studies and surveys at the preliminary stage was wholly appropriate. Appellants overlook the established principle that preliminary relief is "customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981). Indeed, New Jersey courts have repeatedly taken a flexible approach to consider probative information presented in a preliminary posture, especially when acting on an expedited timeline. See Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 640 n.10 (2000) (taking judicial notice of a report for the purpose of determining a preliminary injunction); Matter of T.I.C.-C., 470 N.J. Super. 596, 604 (App. Div. 2022) (citing New Jersey Transgender Equality Task Force Report to highlight "the significant amounts of violence, harassment, and discrimination experienced by transgender people in various areas of their lives"). Appellants implicitly admit as much by asking this court to give weight to unnamed "myriad other studies," and to an affidavit in an unrelated case. (Db35). And so the court appropriately

[3] In any event, the trial court's separate finding that the Amended Policy mandates disparate treatment did not reference the studies and surveys. (Da127-29). In other words, that holding—which is already sufficient to find a reasonable probability of success—is unaffected by this argument. Appellants do not argue otherwise.

exercised its discretion in the context of a preliminary injunction to take notice of the probative information the State introduced—information that, as laid out above, substantiates the Amended Policy's likely disparate impact.

The Amended Policy's exemption does not resolve these disproportionate harms. See (Db30-32). Its language requires affirmative parental notification any time a student requests a "public name/identity/pronoun change." (Da152). But see (Db30) (Appellants erroneously stating students could use a "different name in class" without notification). The sole exception to Appellants' blanket-notification rule applies where "documented evidence" reveals that notifying a student's parents "would subject the student to physical or emotional harm or abuse." (Da152). As an initial matter, the very inclusion of this exception is a "tacit acknowledgment" that disproportionate harms could manifest for these students. (Da132). And unfortunately, the exception does not ameliorate the problem: the Amended Policy provides no explanation of what "documented evidence" entails, how a school would come into possession of such evidence, or when the "documented evidence" would be sufficient to show that a particular notification "would subject" a particular student to "physical or emotional harm or abuse." Ibid. And even if such "documented evidence" could be identified, the Amended Policy still does not expressly preclude disclosure.

Nor can Appellants find refuge in a separate putative "district regulation" purportedly issued after the State filed suit. (Db30-32). There is nothing in the record to show that this purported regulation was ever enacted. The certification Appellants introduced from Acting Middletown Superintendent Jessica Alfone, dated nearly a month after the inception of the instant suit, states only that she "intend(s) to enact the Regulations attached hereto as Exhibit E concerning the implantation (sic) of Policy 5756." (Da160). The certification does not explain why the Amended Policy did not use the more limited language of the purported district regulation, or why it was proposed after the Amended Policy. And a search of Appellants' website reveals no public or available regulation.[4] With no record evidence to show the regulation was enacted or that it could somehow supersede or even materially impact the express terms of the Amended Policy, any attempt to belatedly redefine the Amended Policy fails.

B. Appellants' Responses Are Unavailing.

Unable to meaningfully contest the State's proofs showing it will likely succeed in demonstrating that the Amended Policy violates the LAD, Appellants

[4] Appellants' website includes a page for accessing its Policies and Regulations through a service called "PUBLICACCESSOnline." See Policies and Regulations, Middletown Township School District, https://www.middletownk12.org/board-of-education/policies-and-regulations. A search of that service conducted on Feb. 19, 2024, revealed no district regulation 5756.

raise three separate arguments instead: that (i) the State has no settled right to relief; (ii) the Amended Policy finds support in federal and state recordkeeping laws; and (iii) the preliminary injunction interferes with parents' constitutional rights. These arguments misunderstand the legal questions in this case, and do not support overturning this narrow injunction.

i. *Settled Right To Relief.*

Appellants' first response—that even if the State is likely to prevail on the merits, it lacks a "well-settled right" (Db12-17)—fails for multiple reasons.

As an initial matter, although some early cases described the "well-settled legal right" and "reasonable probability of success" analyses as two independent prongs under Crowe, courts have long since merged the settled-right inquiry into the reasonable-probability-of-success test. See e.g., Newark, 469 N.J. Super at 387 (defining the prongs for preliminary relief as "(1) a likelihood of success on the merits; (2) irreparable harm; (3) a showing that on balance the harm to the moving party is greater than the harm to the party to be restrained; and (4) the public interest will not be harmed"); Waste Mgmt., 399 N.J. Super. at 519-20 (same); McKenzie v. Corzine, 396 N.J. Super. 405, 413 (App. Div. 2007) (same). That makes sense: if there is a reasonable probability of success, there is logically an underlying well-settled right on which that reasonable probability is based. See Waste Mgmt., 399 N.J. Super. at 528 (explaining that the "time-

honored approach in ascertaining whether a party has demonstrated a reasonable likelihood of success" includes consideration of whether "the law upon which plaintiff's claim is based is well-settled"). And as explained above, Appellants do not challenge on appeal the State's arguments regarding the LAD itself.

In any event, the trial court properly found that the State's claims do rest on well-settled rights. As to substance, "the legal right underlying" the State's action, Crowe, 90 N.J. at 133, is explicit, well-recognized, and longstanding: the LAD itself. The LAD expressly prohibits unlawful discrimination in places of public accommodation; expressly extends this prohibition to schools;[5] expressly includes discrimination based upon gender identity or expression; and expressly extends to disparate-treatment and disparate-impact theories alike. See supra at 4-5; N.J.S.A. 10:5-5(1); N.J.S.A. 10:5-12(f). The LAD also expressly grants the State authority to seek relief enjoining ongoing or future statutory violations, as it did here. See supra at 5; (Da125-26) (decision below confirming this well-

[5] Appellants' claim that this right is not settled because "a school is not a traditional public accommodation" under the LAD, (Db16), is expressly belied by multiple decisions from our Supreme Court and by the statute itself. See L.W., 189 N.J. at 405 (explaining the LAD "applies universally to 'places[s] of public accommodation,' a defined term that includes schools" (quoting N.J.S.A. 10:5-5(l))); C.V., 255 N.J. at 319 (decision last year applying L.W. and explaining that "a school bus is 'a place of public accommodation' under the plain language of N.J.S.A. 10:5-5(l)"). Thus, a school is indeed a "traditional" place of public accommodation under both the plain language of the LAD and settled precedent in this State.

established right to relief); N.J.S.A. 10:5-14.1 (authorizing State to "proceed in a summary manner in the Superior Court of New Jersey to obtain an injunction" against any defendant violating the LAD after filing an administrative complaint against them before DCR); Pfaus, 97 N.J. Super. at 8 (same); Poff v. Caro, 228 N.J. Super. 370, 374-75 (Law Div. 1987) (preliminarily enjoining actions while LAD administrative litigation remained pending). Settled law thus recognizes both the kind of claim alleged and the type of remedy sought.

Appellants misconstrue the "well-settled right" inquiry. Appellants seem to believe that a right is only well settled where there is binding legal authority on the precise legal issue applied to the precise set of facts. See (Db14) (arguing the State lacks a well-settled right because it did not identify a specific precedent holding "that parental notification violates [the] LAD"). But this court's cases have long made clear that the inquiry is whether the underlying body of law is settled, not whether the specific outcome of a specific lawsuit is already settled by precedent. See Crowe, 90 N.J. at 133 (noting "the underlying legal claim … was settled as a matter of law" and observing that "mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo"); Waste Mgmt., 399 N.J. Super. at 528 (same).

Indeed, were the rule otherwise, under the "well-settled right" inquiry, the movant would have already had to establish that its exact claims had already

been decided with certainty under binding precedent, rendering the "reasonable probability of success" inquiry superfluous. Moreover, if Appellants' approach were the law, no claim applying established legal rights to new facts could ever meet the preliminary injunction standard—no matter how troubling the new statutory violation, and no matter how compelling the need to maintain the status quo. And Appellants' approach would create perverse incentives: a policy that is so clearly unlawful that no other school district has previously adopted it (or an argument made in defense so clearly incorrect that no other defendant had yet raised it) could avoid preliminary relief merely because no court had previously needed to address its validity. That has never been the law.

Appellants' other responses are a red herring. It is irrelevant to the "well-settled right" test whether (or how frequently) the Attorney General has sought to enjoin other parental-notification policies, or what the alleged current state of the "ongoing social discourse" on these topics may be. (Db13; 16). Neither has any bearing on whether New Jersey's LAD provides a clear source of law that undergirds these claims. (And even were it relevant, Appellants do not identify a single similar parental-notification policy that met with Division approval.) Nor do Appellants' repeated emphasis on cases evaluating parental-notification policies in other jurisdictions, (Db14-16), bear on whether there is a settled right under the LAD to be free from discrimination in public accommodations, such

as schools, and whether there is a well-settled path for the Attorney General and Director to vindicate that right. Indeed, none of Appellants' cases involved the LAD; some did not involve any state-law anti-discrimination claims, see Willey v. Sweetwater Cty. Sch. Dist., No. 23-69, 2023 WL 4297186 (D. Wyo. June 30, 2023) (Ra27-49);[6] and others even rejected Appellants' views, see John & Jane Parents, 622 F. Supp. 3d at 130. These cited cases at most speak to Appellants' purported defense that an injunction would interfere with the parents' federal substantive due process rights—an argument that goes only to the reasonable-success prong, and which fails for the reasons below. See infra at 31-41.

ii. *Recordkeeping Requirements*.

Appellants contend that their Amended Policy is necessary to comply with federal and state recordkeeping laws, and that the injunction threatens to put them in noncompliance. See (Db18-23). Initially, it is undisputed that their Original Policy was in place "uneventfully" for four years before Appellants amended it. (Da137). During that time, Appellants never expressed any concern that they had been actively violating these laws. In any event, Appellants cannot show that the court's injunction, and the policy that it reinstates, are inconsistent with—or even remotely implicate—the recordkeeping laws they now cite.

[6] Pursuant to R. 1:36-3, copies of all unpublished opinions cited within this brief are submitted as part of the State's Appendix (Ra27-80).

Contrary to Appellants' misunderstanding, the federal Family Education Rights Privacy Act ("FERPA") and New Jersey Pupil Records Act ("NJPRA") have little to do with this case. Among other things, these federal and state laws govern how schools must respond to parental requests to access certain official student records. FERPA requires that no State school or educational institution shall have a policy which "den[ies], or which effectively prevents, the parents of students ... the right to inspect and review the education records of their children." 20 U.S.C. § 1232g(a)(1)(A). NJPRA, for its part, similarly requires the State Board of Education to promulgate regulations governing "the creation, maintenance and retention of pupil records … to provide general protection for … the right of the parent or guardian … to be supplied with full information about the pupil, except as may be inconsistent with reasonable protection of the persons involved[.]" N.J.S.A. 18A:36-19. However, as the trial court explained, the plain language of FERPA and NJPRA "pertain to access to information in written student records, not to affirmative requirements of parental notification of a student's transgender orientation or expression." (Da136).

That distinction is dispositive. The question this case presents is not how a school district must handle specific parental requests for officials records—or what information must go in that record. Instead, the issue before the trial court, and now on appeal, is whether the Amended Policy's decision to require blanket

affirmative notification to parents regarding their transgender children's gender identity is likely consistent with the LAD. On that score, FERPA and NJPRA are silent: neither statute requires schools to affirmatively notify parents of their children's gender identity or expression in the absence of a records request. See (Da137) (finding that enjoining schools from affirmatively "notifying parents of a child's transgender identification or expression" on a blanket basis in no way "would prevent parents from 'inspect[ing] and review[ing] the education records of their children.'" (quoting 20 U.S.C. § 1232g(a)(1)(A))). Nor do they provide a justification for promulgating a blanket rule that discriminates on the basis of gender identity or expression. As a result, the trial court correctly determined, "[Appellants'] arguments that imposing restraints will compel them to violate state and federal law are not persuasive." (Da136).

Appellants' claim that the preliminary injunction would somehow require them to violate the terms of FERPA and NJPRA is particularly weak given that it simply restores the status quo ante—the Original Policy that has been in place since 2019. (Da121). Appellants have not pointed to any instance where the Original Policy exposed them to any liability or claim under FERPA or NJPRA. (Da137). The State confirmed at oral argument that under the State's requested relief, Appellants would still be required to supply school records to a parent making a valid request under state or federal law, just as they had presumably

been doing prior to the pre-2023 amendment. (Da127; 1T12:18-14:5; 1T58:23-60:1).[7] In other words, the preliminary injunction does not preclude Appellants from complying with federal and state recordkeeping laws, but rather requires compliance with the LAD. Appellants can and must do both.

iii. *Parents' Substantive Due Process Rights*.

Finally, the trial court correctly held that the preliminary injunction would not interfere with parents' substantive due process rights. Appellants' argument on this score is rather surprising: the trial court's injunction simply restores the very policy Appellants kept in place "uneventfully" for four years, without any suggestion that Appellants were in fact violating parents' federal constitutional rights throughout that long period. (Da137). In any event, this argument fails: the injunction does not interfere with fundamental parental rights, and even if it did, the court's order is narrowly tailored to serve a compelling interest.

1. The initial inquiry in any substantive due process challenge is whether the claimed right is fundamental. If the constitutional "right is fundamental, its

[7] Contrary to Appellants' assertion, it is not, nor has it ever been, the State's position "that transgender students are legally entitled to unilaterally alter their formal student records without parental notification and that the District conceal this information from the parents." (Db22). Such conduct is not required by the court's preliminary injunction, nor was it a part of Appellants' now-reinstated Original Policy. Instead, the "public social transition accommodation" covered by the Amended Policy, such as using different pronouns or going by a different name, do not themselves require any change to the student's official records.

infringement must be narrowly tailored to serve a compelling state interest," but where "fundamental rights or interests are not implicated," courts will generally "require only a legitimate state interest that the legislature could rationally conclude was served by the statute." Holland v. Rosen, 895 F.3d 272, 292 (3d Cir. 2018); see Washington v. Glucksberg, 521 U.S. 702, 721 (1997). Contrary to Appellants' bald assertions, the trial court's injunction does not interfere with any fundamental substantive due process rights. (Db24-32).

Courts exercise great caution before deeming any new federal substantive due process rights as fundamental. See Glucksberg, 521 U.S. at 720 (demanding "utmost care" before courts identify "new" liberty interests under due process, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of" federal judges). As a result, the "established method of substantive-due-process analysis" limits fundamental federal constitutional rights to those that "are, objectively, deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Id. at 720-21; see also Holland, 895 F.3d at 293 (adding courts may not construe either test "too broadly" and stray past the "guideposts for responsible decision-making"). It is not enough to merely assert some generalized interest; the analysis must consider "a careful description of the asserted fundamental liberty interest" at a more granular level.

Holland, 895 F.3d at 292 (quoting Chavez v. Martinez, 538 U.S. 760, 775-76 (2003)). That means the issue is whether the specific right is dictated by "[o]ur Nation's history, legal traditions, and practices." Ibid.

Although parents maintain a fundamental right "to care for and guide their children," Anspach v. City of Phila., Dep't of Pub. Health, 503 F.3d 256, 261 (3d Cir. 2007), courts have identified two bedrock limits that dispose of Appellants' arguments here. First, while courts "recognize the parental liberty interest" has been infringed when "the state actor compel[s] interference in the parent-child relationship," a failure to affirmatively provide information with parents about their child—even sensitive or important information—does not violate parents' fundamental rights. Id. at 263, 266 (emphasis added). For good reason: parents "cannot maintain a due process violation when the conduct complained of was devoid of any form of constraint or compulsion." Id. at 264. After all, failing to provide information does not actually prevent parents from guiding or raising their children as they see fit; at most, it means the State failed to "assist … the parents or affirmatively foster the parent/child relationship," to which they have no fundamental right in the first place. Id. at 266 (emphases added).

The facts of Anspach are also instructive. In that case, the complained-of conduct involved city health center personnel's failure to affirmatively advise a minor's parents that she sought reproductive care or "encourage" the minor to

do so. Id. at 261-62. The parents' claim failed because the minor was not "in any way compelled, constrained or coerced into" taking the pills, id. at 266, and "no one prevented [her] from calling her parents" first, id. at 264. The parents' "real problem" was "not that the state actors interfered with the Anspachs as parents," but that the government defendant "did not assist [them] as parents or affirmatively foster the parent/child relationship." Id. at 266; see Doe v. Irwin, 615 F.2d 1162, 1169 (6th Cir. 1980) (parents lacked a right to notice from public facility that distributed contraceptives to unemancipated minors); Sanford v. Stiles, No. 03-5698, 2004 WL 2579738, *11 (E.D. Pa. Nov. 10, 2004) (Ra50-62) (school did not violate parent's substantive due process rights when it "failed to provide information"), aff'd, 456 F.3d 298 (3d Cir. 2006).

The cases on which Appellants rely—and all of the United States Supreme Court's cases involving fundamental parental rights—fit the line between failure to inform and actual interference easily. See Meyer v. Nebraska, 262 U.S. 390 (1923) (statute barring the teaching of foreign languages to children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (law obligating parents to send children to public school); Wisconsin v. Yoder, 406 U.S. 205 (1972) (same); Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality) (ordering visitation rights for non-parents over parent's objections); Anspach, 503 F.3d at 263-64 (summarizing these precedents). Conversely, Appellants cannot cite a single decision from the

United States Supreme Court, our Supreme Court, the Third Circuit, or this court finding a fundamental substantive due process right to affirmatively provide parents with information, let alone regarding the gender identity or expression of transgender, gender non-conforming, and non-binary students—let alone on a blanket basis in violation of the LAD.[8]

That dichotomy between interference and failure to provide information is fatal to Appellants' challenge. Neither the trial court's preliminary injunction, nor the Original Policy it reinstates, in any way interferes with the parental right to direct the care, custody, and control of their own children. Contra (Db24-29). Neither the injunction nor the Original Policy prevents students from voluntarily sharing information about their gender identity or expression with their parents; neither even influences or encourages students not to share this information with their parents; and neither compels or coerces students to identify as transgender or gender nonconforming. See John & Jane Parents 1, 622 F. Supp. 3d at 130

[8] Appellants get no further with their reliance on Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000). Gruenke involved the opposite scenario: a government actor demanding information from a student that parents did not want to share. See id. 295-97 (coach required a student to take a pregnancy test and informed other students and their parents of the pregnancy). The compelled interference with parents' fundamental rights was clear: forcing the daughter to take a pregnancy test and disclosing her pregnancy status violated the parent's right to familial privacy and the student's individual privacy. Id. at 297. There is nothing similar here, where the trial court injunction merely precludes the school district from mandating parental notification over the student's express objections absent any compelling need to do so.

(emphasizing that parents' demand to be "informed of" a child's gender identity is constitutionally distinct from cases in which a school coerces a student not to speak with their parents). Nor do they restrict any parents from communicating with or counseling their children about gender identity and expression.

Because all this injunction does is prevent the school from discriminating via its blanket-notification policy against transgender, gender non-conforming, and non-binary students—and indeed, restores an approach Appellants had taken for years—the order infringes no fundamental rights. See Regino v. Staley, No. 23-32, 2023 WL 4464845, at *3 (E.D. Cal. July 11, 2023) (Ra63-69) (rejecting claim that schools have "an affirmative duty to inform parents of their child's transgender identity" and finding this claim reflects "an expansion of" "parental substantive due process rights that is not supported by precedent"); John & Jane Parents 1, 622 F. Supp. 3d at 130 (rejecting parents' claim that they maintain "a fundamental right to be promptly informed of" their child's gender identity). Because interference with the parent-child relationship and the court's narrow injunction are leagues apart, the decision below withstands scrutiny.

Second, Appellants' position runs headlong into the equally established rule that "in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 182 (3d Cir.

2005); see also Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395-96 (6th Cir. 2005) (finding that "[w]hile parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child"). This principle also makes sense: a contrary rule would make it impossible for the school to be "responsive to the overall educational needs of the community and its children." John & Jane Parents 1, 622 F. Supp. 3d at 130. And it would be nearly impossible to administer, for example, where the parents (including divorced parents) disagree about whether to affirm their child's gender identity. See, e.g., Vesely v. Ill. Sch. Dist. 45, ___ F. Supp. 3d ____, 2023 WL 2988833, *5-6 (N.D. Ill. Apr. 18, 2023) (Ra70-75). It is therefore particularly unlikely that the failure to provide information in the school context violates fundamental rights. That is especially clear here, where the reinstated Original Policy had simply sought to ensure the school could maintain a safe and inclusive school environment by empowering students to disclose gender identity without fear of discriminatory involuntary outing, while allowing disclosures to satisfy a compelling need, like "the health and safety of a student or an incident of bias-related crime." (Ra9). Appellants have thus failed to show that the injunction violates parents' fundamental rights, let alone that the trial court abused its discretion.

2. Even if fundamental rights were implicated, the State has met its burden to justify any intrusion from the preliminary injunction. If the challenged right is not fundamental, the injunction need only bear a "rational relationship" to a "legitimate interest." Heffner v. Murphy, 745 F.3d 56, 79 (3d Cir. 2014) (noting the "strong presumption of constitutionality" and deferential nature of rational basis review); see Heller v. Doe, 509 U.S. 312, 319 (1993) (noting rational basis is "not a license for courts to judge the wisdom, fairness, or logic of legislative choices"). If the right is fundamental, the injunction must be narrowly tailored to advance a compelling state interest. See Holland, 895 F.3d at 292.

This injunction satisfies either test. As the trial court correctly found, the State has a compelling interest in ensuring "that a protected class under a state law against discrimination does not suffer either disparate treatment or disparate impact." (Da132). Indeed, the Legislature expressly recognizes that protecting individuals from discrimination is a state interest of the highest order. N.J.S.A. 10:5-3 (legislative finding that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundations of a free democratic State"). And a significant body of case law is in accord. See, e.g., Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984) (holding that "eliminating discrimination ... plainly serves compelling state interests of the highest order"); Dixon v. Rutgers, 110 N.J. 432, 451 (1988) (confirming that

"[t]he eradication of 'the cancer of discrimination' has long been one of our State's highest priorities"); Peper, 77 N.J. at 80 (adding that "New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society"); Gallo v. Salesian Soc'y, 290 N.J. Super. 616, 643 (App. Div. 1996) (agreeing that the state interest in combatting discrimination "is compelling, beyond cavil").

The compelling interest in eradicating discrimination is particularly clear in cases involving discrimination against transgender students, especially when the action involves "notification" that they "specifically request[ed]" not occur. (Da132). The State always has a "compelling interest in protecting the physical and psychological well-being of minors," Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 528 (3d Cir. 2018), which includes transgender students, who are already facing "extraordinary social, psychological, and medical risks," id. at 529-29; see also N.J. Pub. L. 2018, c.60 § 1(a), 1(g) (noting that transgender individuals "face considerable challenges in society, including discrimination, harassment, physical abuse, and social isolation," and are at heightened risk of "mistreatment, including physical or sexual assault, between kindergarten and grade 12, due to their being out or perceived as transgender"). The State plainly has every interest in avoiding "discrimination" against transgender, gender non-

conforming, and non-binary students. See Boyertown, 897 F.3d at 528-29; John & Jane Parents 1, 622 F.Supp.3d at 139; T.I.C.-C., 470 N.J. Super. at 609.

The preliminary injunction directly advances these interests in eradicating discrimination. As explained above, the blanket notification regime at the heart of Appellants' Amended Policy discriminates against transgender, gender non-conforming, and non-binary students under a disparate-treatment or disparate-impact lens, see supra at 14-23; enjoining enforcement while the administrative proceeding unfolds ameliorates that discrimination. And the Amended Policy would likely cause some students not to disclose their gender identity at school for fear of involuntary outing, see John & Jane Parents 1, 622 F.Supp.3d at 139 (finding a transgender student "could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to their parents, regardless of their own wishes"), their schools would be hindered from "creating a support system and providing counseling" for them, id. at 138. The injunction thus "ensure[s] that transgender children feel safe and well at school," ibid., while Appellants' approach does precisely the opposite.

Finally, the preliminary injunction is carefully tailored. As laid out above, the injunction is exclusively focused on communications from the school based on a protected characteristic, while leaving intact the student's ability to disclose their gender identity to their parents (and the order certainly does not counsel

students against doing so). It has no bearing on parents' ability to communicate regarding any matters of gender identity to their children. The Original Policy this injunction reinstates also allows the school to notify parents of the student's gender identity if the student does not object or if the school has a compelling (nondiscriminatory) need—e.g., to discuss "the health and safety of a student or an incident of bias-related crime." (Ra9; Da259). And, of course, the order is temporary: it lasts only until DCR resolves the administrative proceeding, again tailored to the State's clear interest in preventing discrimination while its action proceeds. See (Da137) (emphasizing that court is merely granting "preliminary injunctive relief"; is "not rendering any final judgments or determinations as to the merits"; and is leaving further merits analyses "to the sound determination of the [OAL] after a full development of the factual and legal record").

Appellants never identify another approach the court could have taken that would have more narrowly achieved the same compelling goals in eradicating discrimination. Their blanket notification policy—which discriminates on the basis of a protected characteristic and includes only an undetermined exception for "documented" risks—certainly does not. It is difficult to see how the court's pause, which maintains the very status quo that Appellants saw no need to alter for four years, now undermines parents' federal constitutional rights.

POINT II

THE TRIAL COURT CORRECTLY FOUND THE EQUITABLE FACTORS WEIGH IN FAVOR OF MAINTAINING THE STATUS QUO.

The trial court also correctly found that the remaining Crowe factors cut in favor of maintaining the status quo that predated the Amended Policy.

A. The Trial Court Did Not Abuse Its Discretion In Finding That The Equitable Factors Supported A Preliminary Injunction.

The trial court concluded—and Appellants do not contest on appeal—that a preliminary injunction was necessary to avoid irreparable harm.[9] There are at

[9] Although the State below argued that it did not have to establish an irreparable harm when seeking preliminary injunctive relief under N.J.S.A. 10:5-14.1, the court found no need to evaluate that question because the State had amply shown irreparable harm. See (Da134-35). Since Appellants do not directly challenge that finding of irreparable harm on appeal, that issue is not squarely before this court. That said, the State need not establish irreparable harm. The Legislature authorized the Attorney General and the Director to "obtain an injunction" after filing an administrative complaint—an indication the Legislature believes it sufficient for the State to establish a defendant "has engaged in, is engaging in, or is about to engage in" a violation of the LAD. N.J.S.A. 10:5-14.1; see also, e.g., United States v. Nutri-cology, 982 F.2d 394, 498 (9th Cir. 1992) (holding that where the government has brought a "statutory enforcement case[]" and has shown a sufficient probability on the merits, "further inquiry into irreparable injury is unnecessary"; "the passage of the statute is itself an implied finding by Congress that violations will harm the public"); N.J. Dep't of Env't Prot. v. Boro Auto Wrecking Co., No. A-4920-04T3, 2006 WL 3007394, at *5 (App. Div. Oct. 24, 2006) (Ra76-80) (same); Hoffman v. Garden State Farms, Inc., 76 N.J. Super. 189, 201 (N.J. Ch. 1962) (same). That approach is not only textual but logical: this rule would "undeniably serve to underscore the remedial purpose of the LAD," (Da135), especially in cases where the Attorney General and the Director have found an urgent need for emergency relief.

least two relevant irreparable harms here. For one, as the trial court recognized, the mandatory, involuntary disclosure of transgender, gender non-conforming, or non-binary students' gender identity or expression will cause significant and irreparable harm to students. As the court reasoned, "there is no protected group more vulnerable, or more susceptible to physical or psychological harm, than transgender, gender non-conforming, and non-binary youth." (Da135); see also, e.g., Boyertown, 897 F.3d at 528-29 (discussing these students' "extraordinary social, psychological, and medical risks"); John & Jane Parents 1, 622 F.Supp.3d at 139; T.I.C.-C., 470 N.J. Super. at 609; N.J. Pub. L. 2018, c.60 § 1(a), 1(g). Those harms are exacerbated by "[m]istreatment": if "transgender, gender non-conforming, and non-binary students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening." T.I.C.-C., 470 N.J. Super. at 609 (quoting Boyertown, 897 F.3d at 522)).

Without this injunction, Appellants' transgender, gender non-conforming, and non-binary students would suffer under an Amended Policy that specifically targets them for mandatory disclosure, and that uniquely infringes their privacy interests. See id. at 611 (emphasizing their interest in privacy to protect against "violence, harassment, and discrimination because of their gender identity"). If a student is involuntarily outed, or if a student now declines to candidly express their gender identity at school for fear of mandatory reporting, the harm will be

tremendous—and that bell can never be un-rung. See (Da135) (concluding that the Amended Policy will threaten serious injuries on transgender, gender non-conforming, and non-binary students, including "mental health issues, suicide, illicit drug dependency, and infliction of emotional harm by immediate family members," which "constitute[] irreparable injury which may result if restraints are not imposed preliminarily"); John & Jane Parents 1, 622 F.Supp.3d at 139 (explaining that a transgender student "could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to their parents, regardless of their own wishes"). The trial court did not abuse its discretion in concluding that these overwhelming harms supported a preliminary injunction to temporarily protect the preexisting status quo.[10]

For another, the State would also experience an irreparable harm without this relief. See David v. Vesta Co., 45 N.J. 301, 327 (1965) (finding "prevention of unlawful discrimination" vindicates a "vital interest of the State" because the act of discrimination is "a public wrong and not merely the basis of a private grievance"); N.J.S.A. 10:5-3 (Legislature finding "the State suffers a grievous

[10] Appellants do not dispute any of these points; Appellants simply protest the trial court's decision to cite certain evidence. But as the State explained above, Appellants' quibble with these references to published studies and surveys fails on this posture. See supra at 21-22. Moreover, the court's mention of studies in assessing the equities was passing at best, (Da134), and simply bolstered the conclusions this court and a range of other jurists have already reached.

harm" from discrimination). Indeed, the Legislature gave the Attorney General and the Director the authority to "prevent and eliminate" all the "discrimination" the LAD prohibits. N.J.S.A. 10:5-6. And it gave them the authority to file an administrative complaint against entities that violate the LAD. N.J.S.A. 10:5-14.1. But absent preliminary relief to prevent the ongoing or future violations of the LAD, the State cannot stop this discrimination until the proceeding ends. That such discrimination could continue in the meantime, and may not be fully remediable after the fact, undermines "any adjudication [DCR] may make in this matter in vindication of [students'] rights." Pfaus, 97 N.J. Super. at 8 (adding "adequate enforcement" of the LAD ranks "high indeed in our public policy"). The court's order was further justified "to aid in the preservation of the subject matter of a proceeding pending before an administrative agency." Ibid.; see also ibid. (emphasizing that courts "cannot adopt a grudging or narrow approach" in this circumstance, because otherwise, administrative adjudication of LAD rights could become "a vain and useless act"); Poff, 228 N.J. Super. at 379 (enjoining landlord from renting apartment while an administrative proceeding under the LAD was pending concerning refusal to rent apartment to gay men).

Last, the trial court correctly found that the balance of hardships and the public interest weighed in favor of preliminary injunctive relief to maintain the status quo. As explained above, Appellants did not and have not demonstrated

any meaningful harm they would suffer from a temporary delay in implementing the Amended Policy—a delay only so long as is necessary to resolve the pending administrative action. See Pfaus, 97 N.J. Super. at 8. Strikingly, Appellants do not contest the court's factual finding that the Original Policy had been in effect "uneventfully since at least 2019," (Da137), nor do Appellants show that they were subject to liability during those four-plus years under any of the federal constitutional and statutory provisions on which they now rely. To the contrary, as a long line of cases instructs, Appellants' vague assertions of "abstract harms" and inconvenience are insufficient. See Garden State Equality v. Dow, 216 N.J. 314, 327-28 (2013); N.J. State Policeman's Benevolent Ass'n v. Murphy, 470 N.J. Super. 568, 594 (App. Div. 2022). By contrast, the State and the public have a significant and tangible interest in ensuring that school districts across the State fulfill their obligations to "[p]romote equal educational opportunity" and foster "a learning environment free from all forms of prejudice, discrimination, and harassment." N.J.A.C. 6A:7-14. The trial court's time-limited injunction promotes that public interest and causes no harm to Appellants as a result.

B. The Trial Court Did Not Abuse Its Discretion In Selecting A Careful Remedy That Temporarily Maintains The Status Quo.

Although Appellants do not challenge the trial court's fact finding on the equitable factors, they erroneously challenge the scope of preliminary relief that

Judge Bauman ordered. Appellants primarily contend that even if the trial court were correct to enjoin enforcement of Amended Policy 5756, the trial court erred in restraining Appellants from otherwise "amending, modifying, or superseding any portion of [Original] Policy 5756" as the administrative action proceeds. See (Db37-39); (Da118). That final claim is incorrect: the trial court did not abuse its discretion in crafting this careful injunction.

As an initial matter, the trial court's injunction fell comfortably within its legal authority. Courts, of course, have both the authority to preliminarily enjoin the enforcement of an unlawful policy and the authority to restore the status quo ante. See Crowe, 90 N.J. at 134; Waste Mgmt., 399 N.J. Super. at 520 (noting that "a less rigid" standard governs where "the interlocutory injunction is merely designed to preserve the status quo"). But the underlying law here goes further. N.J.S.A. 10:5-14.1 clarifies not only that the Attorney General and the Director may obtain a court order "prohibiting" the defendant from "continuing" in their unlawful "practices," but also that Attorney General and the Director may obtain relief to prohibit parties from "doing any acts in furtherance" of discrimination, to "prevent" future LAD "violations or "attempts to violate" the law, to "compel compliance" with the LAD, and to restrict "attempts to interfere with or impede the enforcement" of the LAD more generally. That broad language thus entitles

the State to seek, and the court to award, injunctive relief that not only restrains an ongoing LAD violation but prevents that actor's prospective ones.

There is a good reason for that sweeping authority: it protects the integrity and effectiveness of the administrative process the Legislature established, and the Division's ability to vindicate the rights the LAD protects. As noted above, New Jersey law vests in the Attorney General and the Director power to initiate administrative proceedings for violations of the LAD, and to seek a preliminary injunction to prevent ongoing violations before that process concludes. Pfaus, 97 N.J. Super. at 8. It thus makes eminent sense that the State would be free to seek and obtain injunctive relief that does not merely enjoin one unlawful policy, but freezes the status quo in place pending the administrative proceeding. Were the rule otherwise—if Appellants could again modify the Original Policy before the DCR proceeding concludes—then parties could repeatedly adjust policies in even minor ways to achieve the same unlawful goals. And if Appellants act on such a new policy before a court can preliminarily enjoin it, the affected students will experience significant and irreparable harm. N.J.S.A. 10:5-14.1 does not set up such a whack-a-mole system of law; rather, the law provides a regime by which DCR's administrative process will not be rendered "vain and useless" by the defendant's intervening actions. Pfaus, 97 N.J. Super. at 8.

And the trial court had every reason to include this language when crafting this particular preliminary injunction. As explained above, and as Appellants have never denied, the trial court found that the Original Policy was in effect for over four years without incident. (Da137). Appellants did not introduce record evidence substantiating any harms from that policy, or establish that it subjected them to federal or state liability. See supra at 46. Nor did they submit the terms of any new policy they wish to enact—let alone terms they would operate in a nondiscriminatory way. Said another way, Appellants have not put forward a proposal to this court, and did not put forward any proposal to the trial court, other than a blanket-notification policy. Nor is that a surprise, as they continue to wrongly claim that only blanket notification satisfies parental rights. (Db24-32). But if Appellants identify one, they can always seek a settlement with the State, or they can submit the policy to DCR for its approval in the administrative proceeding. See (Da137) (leaving all further "judgments or determinations as to the merits" to the Division and to OAL); see also Poff, 228 N.J. Super. at 379 (declining to decide propriety of requested relief because matter was pending in the DCR proceeding). All Appellants may not do—during the limited period in which DCR's administrative action is still proceeding—is unilaterally change the policy, potentially requiring another court action.

Appellants' contention thus misses the mark. Appellants claim that there is no "legal [or] factual basis" to require them to follow the Original Policy when the trial court did not find that the Original Policy is mandatory or represents the only way to comply with the LAD. (Db37). And it argues that the State has admitted the Original Policy is not mandatory. See (Da269) (counsel for State agreeing at argument in other case that the Original Policy "is not necessarily a mandatory policy"); (Da281-82) (Attorney General stating in radio interview that parents have an important role to play and that it can be important for them to maintain information about their children, but that schools could not establish a "blanket affirmative requirement based on a characteristic" protected by the LAD without running afoul of New Jersey law).[11]

But the State agrees with all of this. The State has maintained throughout this litigation that the State Guidance does not itself bind school districts, and the State has repeatedly explained that parental notice could be appropriate in a range of circumstances, including when a student does not seek confidentiality from their parents, and if there are any compelling, nondiscriminatory reasons—

[11] The transcript of the WNYC radio interview and oral argument transcript from that other case were the subject of a motion to supplement the trial record made by Appellants on October 13, 2023. This court took judicial notice of the oral argument transcript, but deferred a decision on the radio interview transcript. The State responds here to Appellants' arguments based on the radio interview transcript, but maintains the arguments it made in its Opposition to Appellants' motion to supplement the trial record.

like a student's health or safety—to disclose the information anyway. See supra at 3. Still, that has no bearing on the relief in this case, where the Amended Policy unlawfully subjects a protected class to discrimination in violation of the LAD; where N.J.S.A. 10:5-14.1 empowers courts to maintain the status quo to prevent future unlawful acts as the administrative proceeding remains pending; and where Appellants continue to claim that only blanket notification satisfies parental constitutional rights. The trial court's careful analysis in determining that the law and equities "tip[ped] in favor of" keeping the status quo, (Da137), thus did not abuse its considerable discretion in crafting a proper remedy.

CONCLUSION

This court should affirm the preliminary injunction.

Respectfully submitted,

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Reply to: Matawan Office

March 5, 2024

Via eCourts
New Jersey Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625-0970

Re: Platkin et al. v. Middletown Township Public Schools, et al.
Docker Number: A-000037-23

Dear Honorable Judges of the Appellate Division:

As the Court is aware, this office represents Appellant School District and Board of Education in the above-referenced matter. Kindly accept this letter brief pursuant to R. 2:6-5 and R. 2:6-2(b) in lieu of a more formal brief in further support of this appeal.

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PROCEDURAL HISTORY

Appellants rely upon the procedural history submitted in their initial brief. Appellants object, as procedurally inappropriate, to the legal arguments contained in Respondents' Procedural History concerning the history, purpose and construction of the LAD.

PRELIMINARY STATEMENT

It is painfully clear that Respondents either have not read amended Policy 5756 and its implementing regulation, or do not understand them. Their arguments make broad sweeping and inflammatory – but factually incorrect – characterizations of the Policy.[1]

Rather than reaching any conclusions based on the State's superficial approach to this layered matter, this Court must reconcile the Law Against Discrimination's ("LAD") gender identity and expression protections with the legal obligations and practical realities of running a New Jersey public school district.

The Policy at issue effectively navigates the legal requirements owed to students and parents alike. The Policy allows transgender students tremendous latitude to engage in the safe expression of their gender identity, while also

[1] "Policy," used herein, shall refer to District Policy 5756, adopted on June 20, 2023 (Da152-154), **and** the implementing Regulation, prepared by the Superintendent, which can be found at Da162-165.

recognizing certain unilateral actions in which the student engages – not the student's status – necessitate parental notification. Such notification occurs in a school-supportive environment rather than the State's preferred haphazard, arbitrary, and random manner.

STATEMENT OF FACTS

Notwithstanding the State's mischaracterization of the Policy, the Policy and implementing Regulation provide the following:

- The District shall utilize the student's chosen name, identity and pronouns;
- Neither parental consent nor a court order/legal name change is required;
- Documentation, such as ID cards, shall be in student's chose name;
- Students shall be allowed to dress in accordance with their gender identity;
- Students may participate activities consistent with their gender identity; and
- Students may use rest/locker rooms in consistent with their gender identity.

See Da152-154, 162-165.

Thus, students ***are not denied*** any public accommodation the school provides, and ***are allowed unfettered access to every accommodation consistent with their gender identity***.

Additionally, the process for parental notification is well-defined, thoughtful and narrowly-tailored. Parental notification occurs **only** when a student requests a "public social transition accommodation," or a "public name/identity/pronoun change," provided there is "no documented evidence" that doing so would subject the student to harm.

Despite all of these terms being well-defined in District regulations, the State incredulously question their meaning. "Public social transition accommodation" means (a) altering mandated student records as defined by N.J.A.C. 6A:32-7.3(b)(1); (b) Utilizing the restroom/locker room of one's gender identity; or (c) engaging in an activity/sport/club associated with one's gender identity and expression rather than one's gender assigned at birth. Da162. "Public name/identity/pronoun change" means formally changing one's student records as defined by N.J.A.C. 6A:32-7.3 to utilize the name/identity/pronoun of the gender with which one identifies. Id. "Documented evidence" includes, but is not limited to previous reports to DCPP, or student reporting of fear of physical and/or emotional harm upon disclosure. Id.

Indeed, the process for parental notification is thoughtful, student-centered, and in the best interest of the student. Despite the baseless assertion of staff "outing" students, only the Superintendent or her designed Administrator shall notify the parent, **and only after the following** steps are completed:

- Staff members may not notify parents but must immediately inform a student's counselor of an accommodation which may trigger notification;
- The counselor shall notify the building administrator of a student's request;
- Superintendent shall consult with the Board Attorney, School Counselor, and appropriate administrators and teaching staff members;
- Counselor and administrator will determine the level of risk for harm and/or abuse associated with disclosure, which may preclude disclosure;
- Inform the student of the intent to disclose;
- Offer the student the opportunity to personally disclose; and
- Provide supporting measures, such as: counseling; practicing visualization and role playing of conversation with parents;

> discussing the pros/cons of disclosure; evaluating the feasibility of various disclosure conversation options; collaborating with the student on reasonable and comfortable timeline for disclosure; or offering the student options for other trusted adults to be part of the conversation.

Da163-165.

As specifically stated in the Policy, and as demonstrated above, the Board supports healthy communication between a transgender student and their family. To do otherwise, "foster[s] an unreasonable expectation that a public in-school transition will remain confidential or require district staff to affirmatively misrepresent information to parents." See, e.g, Da152. To be clear, this case is about (1) allowing transgender students to do something not allowed by their cisgender peers, but putting reasonable rules on this special permission for the sensible operation of the school and in the best interest of the student.

LEGAL ARGUMENT

Respondents' brief consistently and repeatedly misrepresents the Policy and the application of LAD to this matter. This Court must reverse the Chancery Division for the following reasons: (1) the Court failed to determine that it is well-settled that the LAD prohibits parental notification under the circumstances presented here; (2) a school district has dual legal obligations to its students under LAD and their parents pursuant to every other law; (3) the parents of transgender and cisgender students are entitled to actual knowledge of the gender of their child; and (4) interpreting LAD to prohibit parental notification is a clear violation of parents' fundamental rights.

1. There is no well-settled legal right under Crowe

The State engages in legal revisionism and urges this Court to ignore the "well-settled legal right" prong of Crowe. Respondents write, "if there is a reasonable probability of success, there is logically an underlying well-settled right on which that reasonably probability is based," and therefore, no such finding is necessary. Pb23.

In its attempt to erase the "well-settled legal right" prong, the State ignores the fact that the Court actually analyzed the "well-settled legal right" prong, albeit incorrectly. Rather than apply the substantive application of the LAD, the Chancery Court determined that the Attorney General has a well-settled legal

right to enforce the LAD. This is so because the application of the LAD's transgender protection in the context of a public school is far from well-settled.

No binding caselaw, statute, regulation, or administrative decision exists to support Respondents' interpretation of the LAD to prohibit parental notification. The closest existing "authority" are the Transgender Student Guidelines promulgated by the Department of Education. These are not law and are not how we make law in this State. If the Legislature intended these guidelines to have the force of law, it would have adopted a statute or directed the Commissioner to adopt regulations in this area. It did neither. Further, to the contrary, there is a myriad of law and litigation around the nation, previously cited, which establishes that this matter is far from well-settled.

Granting preliminary injunctive relief without the opportunity for a hearing infringes on our normal notions of due process and is an extreme remedy only granted when the law is so clear that everyone knows what the law is. Indeed, it is the substantive application of underlying law that must be well-settled. The Court made no such finding here and the application of the LAD is not clear and is not well-settled. As such, the preliminary injunction must be lifted.

2. A school district is not a traditional public accommodation

It is not disputed that a public school is a public accommodation under the LAD; however, it is equally significant for this Court to recognize that a public school is not a traditional public accommodation, such as a restaurant or bakery. Schools are built on transparency with parents and, to that end, have legal obligations to parents and students, alike.

In recognition of the LAD's protection of gender identity and expression, the Policy requires to District to recognize and honor a student's gender identity. Further, we can certainly agree that gender transition and expression of one's gender identity appear on a spectrum. The parental notification provisions of the Policy are triggered only when students take specific unilaterally chosen steps far along that spectrum. For example, the Policy is not triggered by one's transgender status alone, nor by one's use of alternate names or gender-neutral bathrooms, nor by the issuance of student ID cards, nor by one's attire.

Rather, the Policy is triggered when a student changes their "mandated student record," which specifically includes, "name, address, telephone number, date of birth, name of parent(s), [and] **gender**." N.J.A.C. 6A:32-7.3(b)(1). Thus, when every child registers for school, District are legally required to obtain that student's gender and **all parents** know their child's gender.

In addition to New Jersey law mandating gender as a student record, the

law authorizes access to student records. Students do not have access to their own student record. Indeed, only "authorized organizations, agencies, or persons," i.e., parents, shall have access to student records. N.J.A.C. 6A:32-7.5(a). Students need express written permission of parents to access their student record, including their gender. N.J.A.C. 6A:32-7.5(e)(1)-(3). The State makes a disingenuous difference between "accessing" one's record and "changing" that record. It is axiomatic that one cannot change a record to which one does not have access.

Finally, the State's position belies its feigned concern for the well-being of transgender students and the absurdity of its position. The State readily admits that "Appellants would still be required to supply school records to a parent," including presumably, a student record that a transgender student has changed without parental consent or notification. Pb29-30. Thus, the State's desired result is for a parent to receive a student record which identifies a child with a gender unknown to the parent, in a vacuum, and without notice to the affected student.

This is dangerous and harmful to the student and antithetical to encouraging healthy communication between a transgender student and their family. Indeed, the State's position directly implicates a concern addressed in the Policy and "foster[s] an unreasonable expectation that a public in-school

transition will remain confidential or require district staff to affirmatively misrepresent information to parents." Da152.

For these reasons, the State's arguments fail and the preliminary injunction must be lifted.

3. There is no disparate impact or treatment under the Policy

The Chancery Division and Respondents fail to recognize the legal requirements of operating a school district. The gender of every student is required at the time of registration and is maintained as a mandatory student record. N.J.A.C. 6A:32-7.3(b)(2). Only parents have access to, and therefore maintain the sole right to change a student record. N.J.A.C. 6A:32-7.5(e)(1)-(3). Thus, the general rule is parents of every student inform the District of their child's gender, and only those parents have access to their child's student record.

While the LAD protects gender identity and expression in schools, there is no statute, regulation, caselaw or administrative decision which authorizes a student to unilaterally change their student record. Allowing as much is an application of LAD not previously endorsed. Indeed, the Policy affords transgender students a special and unique right to engage is a broad spectrum of activity to express their gender – all without parental notification.

Rather, parental notification occurs when students are afforded the special right to change a mandatory student record. A right not available to their

cisgender peers. Further, parental notification occurs in limited circumstances when parental discovery of a student's gender is otherwise inevitable – when participating in a gender-specific activity or team, or utilizing an alternate restroom or bathroom.

This Policy appropriately balances a student's rights to express their gender identity in school with concomitant parental rights. More significantly, the Policy is in the student's best interest to facilitate a healthy environment to communicate with parents rather than allow for haphazard notification of parents without the support school can provide. Indeed, as the State has recognized, "Appellants would still be required to supply school records to a parent," including presumably, a student record that a transgender student has changed without parental consent or notification. Pb29-30. Thus, the State's desired result is for the parents to learn of student's expressed gender, without the support of the school, and without notice to the affected student. It is painfully obvious that this is not a good result.

4. The State's interpretation of LAD violates parents' Fundamental Rights

Respondents' primary argument in reply to the Constitutional infirmities of its current position is that the original policy has been "in place 'uneventfully' for four years without any suggestion that Appellants were in fact violating parents' federal constitutional rights throughout that long period." Pb30. First,

four years is not a "long period." Secondly, a constitutional violation cannot be permitted to continue simply because it occurred "uneventfully for four years." Surely, that is not the test for constitutionality.

The State further attempts to identify this as a "new federal substantive due process right" or a "new liberty interest." Pb31. This is not a new right. The "fundamental parental right to care for and guide their children" is one of the bedrocks of our constitutional jurisprudence.

Likewise, the State's reliance on Anspach v. City of Phila. Dep't of Pub. Health, 503 F3d 256 (3d Cir. 2007) is also misplaced. As discussed in Point 2, above, New Jersey public schools sit in a unique space with legal obligations to students and parents. As such, appellants incorporate its arguments contained in Point 2, above, herein.

For this reason, the Court must reject Respondents' arguments and reverse the Chancery Court's August 18, 2023 Order.

CONCLUSION

For the foregoing reasons, the Chancery Division erred in entering a preliminary injunction on August 18, 2023 and that decision must be reversed.

Respectfully submitted,
/s/ Bruce W. Padula
Bruce W. Padula

c: Respondents' Counsel of Record
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MATTHEW J. PLATKIN, ATTORNEY GENERAL OF NEW JERSEY, and SUNDEEP IYER, DIRECTOR OF THE NEW JERSEY DIVISION ON CIVIL RIGHTS, Plaintiffs-Respondents, v. MIDDLETOWN TOWNSHIP BOARD OF EDUCATION and MIDDLETOWN TOWNSHIP PUBLIC SCHOOL DISTRICT, Defendants-Appellants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No. A-0037-23 Civil Action On appeal from: Superior Court of New Jersey Chancery Division, Monmouth County Sat Below: Honorable David F. Bauman, J.S.C. Docket No. MON-C-80-23

BRIEF AND APPENDIX OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AND GARDEN STATE EQUALITY

Date Submitted: March 5, 2024

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Abbreviation	**Source**
Manalapan/Middletown Db	Manalapan/Middletown Brief
Da	Manalapan/Middletown Appendix
Marlboro Db	Marlboro Brief
D2a	Marlboro Appendix
Manalapan Pb	State's Brief in Manalapan Appeal
Manalapan Ra	State's Appendix in Manalapan Appeal
Marlboro Pb	State's Brief in Marlboro Appeal
Marlboro Ra	State's Appendix in Marlboro Appeal
Middletown Pb	State's Brief in Middletown Appeal
Middletown Ra	State's Appendix in Middletown Appeal
CAL Br.	Amicus Center for American Liberty Brief
Aa	Amici ACLU and GSE Appendix

STATEMENT OF INTEREST OF AMICI CURIAE[1]

For more than 60 years, the **American Civil Liberties Union of New Jersey** ("**ACLU-NJ**") has defended liberty and justice guided by the vision of a fair and equitable New Jersey for all. The ACLU-NJ's mission is to preserve, advance, and extend the individual rights and liberties guaranteed to every New Jerseyan by the State and Federal Constitutions in courts, legislative bodies, and communities. Founded in 1960 and based in Newark, the ACLU-NJ is a nonpartisan organization that operates on several fronts—legal, political, cultural—to bring about systemic change and build a more equitable society. In all these arenas, the ACLU-NJ advocates for the rights of LGBTQ+ individuals, including children, on equal terms with all others. The ACLU-NJ is the state affiliate of the American Civil Liberties Union and has 30,000 members in New Jersey and hundreds of thousands of additional supporters. ACLU-NJ members and supporters include transgender and gender-nonconforming students and their parents and guardians.

Garden State Equality Education Fund ("GSE") was founded in 2004 and is the largest LGBTQ+ advocacy organization in New Jersey, with more than 150,000 members. Its mission is to provide quality, innovative community

[1] Amici file identical briefs in the Middletown, Manalapan, and Marlboro appeals.

programs, educate and train service providers, and pass pro-equality policies to protect and meet the needs of LGBTQ+ New Jerseyans.

In the arena of education, GSE engages in advocacy, policy work, and trainings to ensure that New Jersey schools are safe and affirming environments for transgender and nonbinary students. GSE engages with stakeholders in New Jersey schools at all levels, including by:

- Providing training and guidance to school administrators and staff,
- Advocating for students at state and local board of education meetings,
- Presenting at student assemblies,
- Supporting parents of transgender students, and
- Providing direct support to and programming for transgender and nonbinary students.

PRELIMINARY STATEMENT

The Constitution does not compel schools to notify parents, over the objection of their children, when their children express nonconforming gender identities at school. While the substantive component of the Due Process Clause protects the rights of parents to direct the upbringing of their children, nothing in the Constitution demands that governmental actors assist parents in exercising that right by outing students against their will. Whether or not they receive notice from their children's schools, parents remain free to talk to their children about gender identity and offer whatever direction they like about how their children explore and express their gender, in school and elsewhere. Likewise, students remain free to talk to their parents about these issues and even to seek their schools' help in broaching the subject at home. The school districts' original policies of presumptive nondisclosure, absent student consent, neither coerced parents to act nor prevented them from acting. The Constitution imposes no duty on the districts to alter their original policies, and certainly not to mandate parental notification over the student's objection.

The districts cannot rescue this unavailing constitutional defense by relying on the argument first raised by their amicus that social transition constitutes medical treatment requiring parental consent. Students who have been diagnosed with gender dysphoria may have health care providers who

recommend social transition to relieve the symptoms of this condition, which can be exacerbated by living in a way that does not match their gender identity. But that does not transform social transition into medical care. A student who changes their clothing and hairstyle, who asks to be called by a new name and pronouns, or who asks to use a different bathroom or join a different club is not seeking health care, and schools that honor these requests are not offering health care. Instead, the schools are showing courtesy and maintaining an inclusive and egalitarian environment where all students feel safe and affirmed in their gender identity, whether they are cisgender or transgender.

Even if a policy of presumptive nondisclosure conflicted with the rights of parents, however, the State has shown compelling interests in both enforcing nondiscrimination law and avoiding harm to students. These interests overcome the asserted parental right to affirmative notification of gender nonconformity, and the injunction the State seeks is narrowly tailored to achieve its objective of protecting students.

Moreover, the Court should defer to the State's straightforward interpretation of the Law Against Discrimination ("LAD") to prohibit a parental notification mandate that is triggered only when nonconforming students express their gender identities at school and not when cisgender students put their masculinity or femininity on display. Mandatory notification policies that

target gender-nonconforming students offend the New Jersey Constitution's independent and broad protection for equal rights. To avoid a constitutional problem, the Court should accept the State's reading of the LAD and affirm the preliminary injunction entered by the trial court.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt the Procedural Histories and Statements of Facts in the briefs of the Attorney General and Director of the Division on Civil Rights. Middletown Pb4–12; Manalapan Pb4–12; Marlboro Pb4–12.

Each school district's Amended Policy 5756, entitled "Transgender Students" ("Mandatory Notification Policies"), requires the school to notify a gender-nonconforming student's parent or legal guardian about the student's gender identity as expressed in school, regardless of the student's consent, unless doing so would harm the student. Under Marlboro's policy, notification is triggered by a "student's change in gender identity or expression," and under the Manalapan and Middletown policies, notification is triggered when a student requests "a public social transition accommodation." Marlboro Amend. Pol'y (D2a45); Middletown Amend. Pol'y (Da152); Manalapan Amend. Pol'y

(Da169–70).[2] Notification is required even when the student objects unless the harm exception applies.[3]

The school districts' pre-amended (2019) versions of the policies ("Original Policies") are currently in place under the trial court's orders of August 18, 2023, preliminarily enjoining the Mandatory Notification Policies pending resolution of this matter. The Original Policies contain the following identical provision: "There is no affirmative duty for any school district staff member to notify a student's parent of the student's gender identity or expression." Marlboro Orig. Pol'y 5657 (D2a54); Middletown Orig. Pol'y 5657 (Middletown Ra8); Manalapan Orig. Pol'y 5657 (Manalapan Ra8). While imposing no blanket requirement of parental notification, the Original Policies

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[2] See Table of Abbreviations of Briefs and Appendices, supra p. x.

[3] Manalapan and Middletown assert that their policies do not require parental notification when a student asks to use a different name or pronouns in classrooms or extracurricular activities, but only when a student seeks to change their official school records. Manalapan/Middletown Brs. at 18. The districts make this assertion based on draft regulations that the superintendents of each district attest they "intend to enact." Alfone Cert. ¶ 14 (Da160); Middletown draft regs ¶ A.1.-2. (Da162); Santora Cert. ¶ 10 (Da235); Manalapan draft regs ¶ A.1.-2. (Da262). Because the proposed regulations do not appear to have been promulgated, Amici treat the language of the policies as the operative mandate. Even if parental notification were not triggered by a student's request to use a different name or pronouns while at school, however, the policies still mandate parental notification over the student's objection if the student asks for other accommodations, such as to use a different restroom, play on a different sports team, or sing in a different chorus.

permit disclosure to parents in an array of circumstances, including "as allowed by law," and "[d]ue to a specific and compelling need, such as the health and safety of a student or an incident of bias-related crime." Marlboro Orig. Pol'y (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8–9). In the trial court, the State clarified further that it seeks to prohibit parental notification only when the student objects and that schools are obligated to answer truthfully if parents inquire about their children's gender expression at school.[4] The Original Policies also include instruction for school personnel on how to manage potential disagreements between students and their parents about how the schools accommodate the students' gender identity. Marlboro Orig. Pol'y (D2a54–55); Middletown Orig. Pol'y 5657 (Middletown Ra8–9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8–9).

ARGUMENT

I. Substantive Due Process Does Not Require School Districts to Provide Affirmative Notice to Parents About Their Children's Gender Identity.

The school districts argue that enjoining the Mandatory Notification Policies interferes with parents' fundamental rights because it "deprives parents

[4] Platkin v. Marlboro/Manalapan/Middletown Twp. Bds. of Educ., Nos. MON-C-78-23, MON-C-79-23, MON-C-80-23, slip op. at 9 n.2 (N.J. Super. Ct. Aug. 18, 2023) ("Tr. Ct. Op.") (Da127).

. . . of LGBTQ+ students of information critical to the parents' ability to actively guide and foster their children's moral and psycho-social development." Manalapan/Middletown Db29. This argument fails because, although parents have a fundamental right under the Due Process Clause of the Fourteenth Amendment "to make decisions concerning the care, custody, and control of their children," Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion), that right does not extend to being notified of their children's gender identity as expressed in school over their children's objections. The Constitution prohibits governmental actors from interfering with parental decision-making on matters of great importance, but it does not require governmental actors (here, the school districts) to assist parents in exercising their parental authority. Nor does the constitution prevent school districts from continuing to implement a policy of presumptive nondisclosure.

The districts' amicus, Center for American Liberty ("CAL"), advances an even more extreme parental rights claim: CAL argues that a student's social transition is medical care requiring parental consent in all cases. But this is wrong. A teacher who calls a student by their requested name or allows them to use the bathroom consistent with their gender identity is practicing decency, not medicine.

Moreover, even if fundamental parental rights were at stake—which they are not—such parental rights are not absolute or beyond regulation. Here, the State has demonstrated an overriding interest in creating a safe, inclusive learning environment, which precludes outing students to their parents over the students' objections.

A. Because the Original Policies neither compel nor constrain any conduct by students or their parents, there is no violation of parental rights and no constitutional duty to mandate affirmative notice to parents of their children's gender identity over the students' objection.

While federal and New Jersey courts have repeatedly recognized that parents have a liberty interest in the care, custody, and nurture of their children, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Troxel, 530 U.S. at 65–66; Moriarty v. Bradt, 177 N.J. 84, 101–02 (2003), courts have set a high standard for demonstrating unconstitutional interference with the parent-child relationship.

In J.S. ex rel. Snyder v. Blue Mountain School District, the Third Circuit held that "[a] conflict with the parents' liberty interest will not be lightly found, and, indeed, only occurs when there is some 'manipulative, coercive, or restraining conduct by the State.'" 650 F.3d 915, 933–34 (3d Cir. 2011) (quoting Anspach ex rel. Anspach v. City of Phila., Dep't of Pub. Health, 503 F.3d 256, 261 (3d Cir. 2007)). The court further explained that "parents' liberty

interest will only be implicated if the state's action 'deprived them of their right to make decisions concerning their child,' and not when the action merely 'complicated the making and implementation of those decisions.'" Id. at 934 (quoting C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 184 (3d Cir. 2005)). Applying these factors, the court held that a school's decision to suspend a student did not violate her parents' fundamental rights because it did not interfere with their "ability to make decisions concerning their daughter's upbringing." Ibid. The school's actions "in no way forced or prevented J.S.'s parents from reaching their own disciplinary decision, nor did its actions force her parents to approve or disapprove her conduct." Ibid.

Similarly, in Anspach, the court held that a public health center did not violate the plaintiff-parents' liberty interests by providing emergency contraception to a minor without first notifying her parents or encouraging her to consult them, because "the conduct complained of was devoid of any form of constraint or compulsion." 503 F.3d at 264. "[N]o one prevented [the minor] from calling her parents before she took the pills she had requested" or tried to dissuade her from speaking to her parents, and she was "only given the pills

because she asked for them." Id. at 264–65. Under such circumstances, there was no "coercion" and no constitutional violation. Id. at 265.[5]

The Anspach court explained further that the "real problem alleged by [the] [plaintiff-parents] is not that the state actors interfered with [them] as parents; rather, it is that the state actors did not assist [them] as parents or affirmatively foster the parent/child relationship." Id. at 266. But there is no "constitutional obligation on state actors to contact parents of a minor or to encourage minors to contact their parents." Id. at 262; accord Parents United for Better Schs., Inc. v. Sch. Dist. of Phila. Bd. of Educ., 148 F.3d 260, 275 (3d Cir. 1998) (condom distribution program in high schools did not "intrude" on the "strong parental interest in deciding what is proper for the preservation of their childrens' [sic] health" because "[p]articipation in the program is voluntary"); Doe v. Irwin, 615 F.2d 1162, 1168 (6th Cir. 1980) ("We can find no deprivation of the liberty interest of parents in the practice of not notifying them of their children's voluntary decisions to participate in the activities of [a

[5] Cf. Gruenke v. Seip, 225 F.3d 290, 303–07 (3d Cir. 2000) (finding student was coerced into a course of action she objected to and that her mother's parental liberty interest was violated when a school swim coach, without the student's invitation and against her wishes, spoke with her regarding his suspicion that she was pregnant, asked other school officials to speak with her to confirm the pregnancy, paid for a pregnancy test, and discussed the pregnancy with other school officials and parents of other students, but never with the student's mother).

publicly funded family planning clinic]."); C.N., 430 F.3d at 185 (fundamental parental right not violated by student participation in survey seeking information about drug and alcohol use, sexual activity, physical violence, and suicide attempts).

In cases involving school policies relating to the treatment of transgender and gender nonconforming students, courts have similarly refused to find a violation of parents' due process rights when there is no coercive conduct.[6] Indeed, just last month, the District of New Jersey declined to issue a temporary restraining order against a school board policy that is substantively identical to the Original Policies here. Doe v. Del. Valley Reg'l High Sch. Bd. of Educ., No. 24-cv-00107 (GC) (JBD), 2024 WL 706797, at *2, 13 (D.N.J. Feb. 21, 2024) (Aa17). Relying on the precedents reviewed above, the court held that "Board Policy 5756 does not impose the kind of 'constraint or compulsion' that the Supreme Court and the Third Circuit have found violative of parental rights."

[6] Amicus CAL wrongly relies on Ricard v. USD 475 Geary Cnty., Kan. Sch. Bd., No. 5:22-cv-04015-HLT-GEB, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022), voluntarily dismissed per settlement, ECF. No. 37 (Aa27), and Mirabelli v. Olson, No. 3:23-cv-00768-BEN-WVG, 2023 WL 5976992, at *9 (S.D. Cal. Sept. 14, 2023) (Aa44-45), to argue that courts have recognized a parental substantive due process claim in this context. CAL Br. at 17–18. Those cases involved plaintiff teachers who alleged that withholding a student's transgender status from their parents violated the teachers' free speech and religious free exercise rights under the First Amendment; the substantive due process rights of parents were not directly at issue in those cases.

Id. at *7 (Aa10). "[T]he Board Defendants only began referring to Jane by her preferred gender identity at Jane's request, did not coerce Jane into making the request, and did not prevent or discourage Jane from discussing the transition with Plaintiff [her father]." Id. at *9 (Aa11–12). In the absence of "proactive, coercive interference with the parent-child relationship," id. at *8 (Aa10), the court found no likelihood that the plaintiff could show a constitutional violation, id. at *13 (Aa17).

Other jurisdictions have reached the same conclusion. In Doe v. Manchester School District, No. 216-2022-cv-00117, at *7 (N.H. Super. Ct. Sept. 5, 2022), argued, No. 2022-0537 (N.H. Apr. 27, 2023) (Aa66), the court held that a policy prohibiting school personnel from disclosing information that may reveal a student's transgender status or gender-nonconforming presentation without the student's consent did not infringe on parents' fundamental rights:

> [T]he policy does not encourage or prevent students from sharing information with their parents. Moreover, the Policy does not prevent parents from observing their children's behavior, moods, and activities; talking to their children; providing religious or other education to their children; choosing where their children live and go to school; obtaining medical care and counseling for their children; monitoring their children's communications on social media; choosing with whom their children may socialize; and deciding what their children may do in their free time. In short, the Policy places no limits on the plaintiff's ability to parent her child as she sees fit.

See also Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., No. 2:23-cv-01595, 2023 WL 4848509, at *18–19 (S.D. Ohio July 28, 2023) (no due process violation where "[t]here is nothing in the Policies that suggests that they prohibit parents from discussing gender identity issues with their children, or reach in some other way into the privacy of families' homes"), appeal docketed, No. 23-3630 (6th Cir. July 31, 2023) (Aa99–101); John and Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F. Supp. 3d 118, 134 (D. Md. 2022) (no "coercive interference with the parent-child relationship" in school guidelines that prohibit disclosure of student's gender identity over student's objection), vacated and remanded for lack of standing, 78 F.4th 622 (4th Cir. 2023), petition for cert. docketed, No. 23-601 (U.S. Dec. 5, 2023); Regino v. Staley, No. 2:23-cv-00032-JAM-DMC, 2023 WL 4464845, at *3 (E.D. Cal. July 11, 2023) (declining to expand parental substantive due process rights to require affirmative notice of child's transgender identity and parental consent to use child's requested name and pronouns), appeal docketed, No. 23-16031 (9th Cir. July 25, 2023) (Middletown Ra65–66).[7]

[7] The decisions the districts rely on are not to the contrary. In Tatel v. Mt. Lebanon School District, 37 F. Supp. 3d 295, 326–27 (W.D. Pa. 2022), clarified on denial of reconsideration, No. 22-837, 2023 WL 3740822 (W.D. Pa. May 31, 2023) (Aa103-131), the district court held that parents raised a plausible substantive due process claim where the allegations included conduct by a first-grade teacher that could be construed as coercive interference with the parent-child relationship.

As in these cases, parental rights are not implicated here because there is no coercive conduct and no right to affirmative notice of a child's expressed gender identity. Del. Valley Reg'l High Sch., 2024 WL 706797, at *7–9 (Aa9–Aa12). Like the minor in Anspach who voluntarily went to the health center asking for emergency contraception and was not prevented or dissuaded from contacting her parents, the districts' students are not compelled to come forward to discuss their gender identities with school officials, and, far from discouraging students to talk to their parents, the Original Policies instruct the districts to be "mindful of disputes between minor students and parents concerning the student's gender identity or expression" and to refer families to an array of "support resources." Marlboro Orig. Pol'y (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra8); Manalapan Orig. Pol'y 5657 (Manalapan

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In Willey v. Sweetwater County School District No. 1 Board of Trustees, No. 23-CV-069, 2023 WL 4297186, at *13-14 (D. Wyo. June 30, 2023) (Middletown Ra37), the court held that parents were unlikely to be able to establish that the school had a constitutional obligation to affirmatively disclose their child's gender identity, but fundamental parental rights were burdened "[t]o the extent the Student Privacy Policy prohibits a teacher or school employee, upon inquiry by a parent or legal guardian, from responding or providing accurate and complete information concerning their minor child (and absent a threat to the wellbeing of the student)." Here, the Attorney General has acknowledged that "schools would be obligated to respond truthfully to a parent or a guardian who contacted the school to request confirmation that their child had made such a request [to use a chosen name or pronouns] or statement [expressing another gender]." Tr. Ct. Op. at 9 n.2 (Da127); see also Del. Valley Reg'l High Sch., 2024 WL 706797, at *11 (distinguishing Willey and Regino from Tatel) (Aa14-15).

Ra8). Moreover, there is nothing in the Original Policies preventing parents from "mak[ing] decisions concerning their [child's] upbringing," J.S., 650 F.3d at 934, or "discussing gender identity issues with their children," Parents Defending Educ., 2023 WL 4848509, at *18 (Aa99–101). The policies do not mandate what parents teach their children about gender identity or in any way alter how parents address their children's gender identity at home, including what names or pronouns parents use for their children. In other words, "[t]here is no requirement [by the school districts] that the children . . . avail themselves of the services offered . . . and no prohibition against the [parents] participating in decisions of their minor [children] . . . . The [parents] remain free to exercise their traditional care, custody and control over their unemancipated children." Doe v. Irwin, 615 F. 2d at 1168.

Unable to point to coercive conduct, the school districts cannot prevail in defending the Mandatory Notification Policies as constitutionally compelled.

B. Respecting a student's request to use a certain name or pronouns does not implicate the rights of parents to direct their children's medical treatment.

Although not raised below or on appeal by the school districts, Amicus CAL argues that the Original Policies violated the Due Process Clause by infringing on parents' rights to consent to their children's medical treatment because "social transitioning constitutes psychological treatment." CAL Br. at

9. Indeed, CAL argues further that even the revised Mandatory Notification Policies are unconstitutional for failure to require parental consent before using a student's preferred name and pronoun. CAL Br. at 16 n.2. These arguments fail because they are based on the faulty premise that the districts are providing medical treatment to students by using their requested name and pronouns or allowing them to use a different restroom or join a different team or club.

This Court should reject CAL's attempt to redefine an ordinary part of the school day as medical treatment. Addressing someone in a way that honors their identity—by using their correct name, pronouncing it correctly, or using their chosen pronouns—is an act of decency and courtesy, not the practice of medicine. Likewise, granting a student's request to use a different restroom or to play on a different sports team is not medicine, but rather a recognition and affirmation of their expressed gender identity.

Social transition—which includes non-medical steps to align one's gender expression with one's gender identity (e.g., different clothing, hairstyle, name, or pronouns)—may be part of a medical provider's package of recommendations for alleviating the symptoms of gender dysphoria in youth with this diagnosis. Notably, all the cases CAL cites in support of the proposition that courts have recognized social transition as a form of psychological treatment involve individuals with gender dysphoria. See CAL Br. at 9–10. These cases recognize

that social transition may be medically indicated for some transgender youth diagnosed with gender dysphoria. But that does not transform the school districts' policies, or individual instances of honoring students' requested accommodations, into a form of medical treatment. Similarly, CAL's repeated references to puberty blockers and hormone replacement therapy, CAL Br. at 4–5, 13, 32—medical treatments that do require parental consent—have no bearing on whether schools notify parents of their children's requests to use a different bathroom or a different name and pronouns.

Having conversations about using a different name, restroom, or clothing requires no medical skill or training, treatment plan, or diagnosis. See Foote v. Town of Ludlow, No. 22-30041-MGM, 2022 WL 18356421, at *5 (D. Mass. Dec. 14, 2022), appeal docketed, No. 23-1069 (1st Cir. Jan. 17, 2023) (Aa138–39). The teachers and counselors having these conversations are not medical professionals, and the students are not their patients. See Parents United for Betters Schs., 148 F.3d at 269 (quoting with approval trial court holding that, while condom distribution is a "health service," "[i]mpact upon health . . . does not transform a health service into a medical treatment"). Indeed, under CAL's reasoning, using a student's chosen name and pronouns would have the absurd result of subjecting teachers, counselors, and others to criminal penalties. See

N.J.S.A. 2C:21-20 (imposing criminal penalties on unauthorized practice of medicine).

For these and other reasons, the District of New Jersey recently concluded that "recognition of [a student's] preferred gender identity" does not violate a parent's right to "direct [the student's] medical treatment." Del. Valley Reg'l High Sch., 2024 WL 706797, at *11 (Aa14–15). Where "the school merely addressed the Student by the Student's requested preferred name and pronoun," and did not pressure the student to make such a request, there is no interference with a parent's right to make medical decisions for the student. Ibid.

The cases CAL relies on to show a purported right to parental consent all involve invasive actions taken by medical professionals that are undoubtedly medical treatment—a far cry from the school districts' conduct here. See Mann v. Cnty. Of San Diego, 907 F.3d 1154, 1158–62 (9th Cir. 2018) (concluding that parents' rights were violated by unconsented physical examination of their minor children involving "a gynecological and rectal exam," "visual and tactile inspection of the children," and blood and urine tests); Wallis v. Spencer, 202 F.3d 1126, 1141–42 (9th Cir. 2000) (similar); Mario V. v. Armenta, No. 18-cv-00041-BLF, 2021 WL 1907790, at *1–2, 5 (N.D. Cal. May 12, 2021) (teacher performing finger-prick blood sugar tests of students without parental consent violated parents' and students' rights) (Aa160–63, 166–67). Moreover, CAL's

reliance on T.F. v. Kettle Moraine School District, No. 202-cv-1650, 2023 WL 6544917 (Wis. Cir. Oct. 3, 2023) (Aa146–59), is likewise misplaced: in T.F., the student received treatment at a mental health center related to gender identity, and the school consulted with the student's therapist to determine that it would use the student's requested name and pronouns over the parents' objection. Id. at *1–2 (Aa146–49).

In sum, recognizing students for who they are and using the pronouns they request (whether corresponding with sex assigned at birth or not) is part of the basic level of respect necessary for a safe and supportive learning environment. That the use of gendered names and pronouns and other accommodations may be medically indicated for some students does not mean that respecting every student's identity is a form of medical treatment.

C. The State's overriding interest in protecting the rights of transgender and gender-nonconforming students satisfies any constitutional standard.

New Jersey has a compelling interest in prohibiting discrimination on the basis of gender identity and expression in public schools. Any countervailing parental rights are "not without limits, and the State may '[a]ct[] to guard the general interest in [a] youth's well being.'" Doe ex rel. Doe v. Governor of N.J., 783 F.3d 150, 156 (3d Cir. 2015) (quoting Prince, 321 U.S. at 166) (alteration in original); see also V.C. v. M.J.B., 163 N.J. 200, 218 (2000) ("The right of

parents to the care and custody of their children is not absolute."). Public schools in particular retain significant discretion in shaping students' educational experience. Thus, "in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." C.N., 430 F.3d at 182.

The New Jersey Supreme Court applies strict scrutiny when the State seeks "to interfere with family and parental autonomy." Moriarty, 177 N.J. at 103–04. The Third Circuit likewise demands a "compelling interest" to justify governmental intrusion on fundamental parental rights. Gruenke, 225 F.3d at 305 (when a "school's policies might come into conflict with [parents'] fundamental right . . . to raise and nurture their child, . . . the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest").

Because the State's actions in seeking to enjoin the Mandatory Notification Policies did not substantially intrude on constitutionally protected parental rights, they need only to be supported by a rational basis, which they are. See Lawrence v. Texas, 539 U.S. 558, 578 (2003) (O'Connor, J., concurring) (conduct at issue must be "rationally related to a legitimate state interest" when a fundamental right is not implicated). In fact, the State's interest in prohibiting school officials from disclosing a student's gender identity to their

parents over the student's objection is compelling enough to survive strict scrutiny, assuming the applicability of that standard.

As set forth in Section II.B.2.b. infra, disclosure of a student's gender nonconformity to their parents over their objection risks harm to the individual student's physical safety, mental health, and educational outcomes. It also disrupts a school's attempt to foster an educational environment that is inclusive and free of discrimination. In Moriarty, the New Jersey Supreme Court recognized that "avoidance of harm to the child" is a "sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit." 177 N.J. at 115. The "compelling interest in protecting the physical and psychological well-being of minors" extends to "a compelling state interest in not discriminating against transgender students" and "in protecting transgender students from discrimination." Doe ex rel. Doe v. Boyertown Area Sch. Dist., 276 F. Supp. 3d 324, 390 (E.D. Pa. 2017), aff'd, 897 F.3d 518, 528–29 (3d Cir. 2018) (school districts did not violate Title IX, 20 U.S.C. § 1681, by permitting transgender students to use restrooms consistent with their identity).

New Jersey has expressly recognized this compelling state interest by prohibiting discrimination on the basis of gender identity and expression in public schools. New Jersey Law Against Discrimination ("LAD"), N.J.S.A.

10:5-1 to -50. The State's compelling interests are advanced by the trial court's preliminary injunction against the Mandatory Notification Policies and reinstatement of the Original Policies, under which the school districts were "providing a safe, supportive, and inclusive learning environment for all students" and complying with the LAD and Title IX. Marlboro Orig. Pol'y 5657 (D2a54); Middletown Orig. Pol'y 5657 (Middletown Ra7); Manalapan Orig. Pol'y 5657 (Manalapan Ra7).

Notably, the preliminary injunction and the resulting reinstatement of the Original Policies are narrowly tailored to achieve the State's goals. While taking a student-centered approach, the Original Policies recognize that there are circumstances when parents will need to be notified over a student's objection, including "as allowed by law," and "[d]ue to a specific and compelling need, such as the health and safety of a student or an incident of bias-related crime." Marlboro Orig. Pol'y 5657 (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8–9). They also prepare school personnel to manage disagreements between parents and students on the schools' accommodation of the students' expressed gender identity. Marlboro Orig. Pol'y 5657 (D2a54–55); Middletown Orig. Pol'y 5657 (Middletown Ra8–9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8–9). In doing so, the Original Policies ensure that schools "provide a safe and supportive learning environment

that is free from discrimination and harassment for transgender students, including students going through a gender transition," while being "mindful of disputes between minor students and parents concerning the student's gender identity or expression." Marlboro Orig. Pol'y 5657 (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra8); Manalapan Orig. Pol'y 5657 (Manalapan Ra8). The preliminary injunction restored the status quo by reinstating these policies while the litigation proceeds—a remedy narrowly tailored to protecting the districts' gender-nonconforming students.

II. Deference to the Agency's Interpretation of the Law Against Discrimination Is Warranted Because Requiring Parental Notification Regarding a Student's Gender Identity Would Raise Serious Constitutional Questions That Should Be Avoided.

The State argues that the Mandatory Notification Policies violate the LAD's proscription of discrimination based on gender identity by mandating parental notification when a student asks to be called by a different name or pronouns, to use a different restroom, to play on a different sports team, or otherwise requests accommodations for gender-nonconformity. Middletown Pb14–22; Manalapan Pb14–22; Marlboro Pb14–22. Because the Division on Civil Rights has broad authority to enforce the LAD, its interpretation is entitled to "great deference, especially when its position is supported by the statutory language and is consistent with the history of the LAD." Lehmann v. Toys R Us, Inc., 132 N.J. 587, 625 (1993); see also Klumb v. Bd. of Educ. of

Manalapan-Englishtown Reg'l High Sch. Dist., 199 N.J. 14, 24 (2009) ("[I]nterpretations of the statute and cognate enactments by agencies empowered to enforce them are given substantial deference in the context of statutory interpretation.").

In this case, the agency's interpretation is entitled to even more than the usual deference because an alternative interpretation of the LAD, allowing the Mandatory Notification Policies to stand, would raise serious constitutional questions. The LAD is clear in banning discrimination "on account of . . . gender identity or expression" in public schools. N.J.S.A. 10:5-12(f), 10:5-5(l). But even if the statute were ambiguous, this Court would be obligated to give it a constitutional construction so long as it was susceptible to such a construction. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 365–66 (2007); Right to Choose v. Byrne, 91 N.J. 287, 311–12 (1982). The interpretation of the LAD advanced here by the Division on Civil Rights avoids a potential collision between the district policies and Article I, Paragraph 1, of the New Jersey Constitution, which offers independent and expansive protection for equal treatment for gender-nonconforming individuals.

A. Courts must interpret a statute to comport with the State Constitution so long as the statute is reasonably susceptible to such interpretation.

Generally, "[a] court is duty-bound to give to a statute a construction that will support its constitutionality." Whirlpool Props., Inc. v. Dir., Div. of Tax'n, 208 N.J. 141, 151 (2011). "[W]hen a statute is susceptible to two reasonable interpretations, one constitutional and one not," New Jersey courts apply the doctrine of constitutional avoidance. State v. Pomianek, 221 N.J. 66, 90–91 (2015) (citing State v. Johnson, 166 N.J. 523, 534 (2001)). This doctrine rests on the "assum[ption] that the Legislature would want [the court] to construe the statute in a way that conforms to the Constitution." Id. at 91 (citing Johnson, 166 N.J. at 540–41). The court may construe an ambiguous statute narrowly or broadly, depending on which interpretation aligns the statute with the Constitution. Compare State v. Carter, 247 N.J. 488, 520 (2021) (narrowly construing a statute requiring legible license plates), with Mueller v. Kean Univ., 474 N.J. Super. 272, 285–89 (App. Div. 2022) (broadly construing immunity granted by the Emergency Health Powers Act, N.J.S.A. 26:13-1 to -36).

B. The Mandatory Notification Policies raise serious constitutional questions by singling out gender-nonconforming students for disparate treatment.

1. The New Jersey Constitution's guarantee of equal protection is independent and robust.

Recognizing that "the original states, including New Jersey, and their Constitutions preceded the formation of the federal government and its Constitution," the New Jersey Supreme Court has long held that our Constitution affords independent protection to New Jersey residents. Right to Choose, 91 N.J. at 299. Because the New Jersey Constitution stands as an independent charter of rights, it can offer protections above the floor set by the United States Constitution. Id. at 300 ("Thus, in appropriate cases, the individual states may accord greater respect than the federal government to certain fundamental rights."); Sojourner A. v. N.J. Dep't of Hum. Servs., 177 N.J. 318, 325 (2003) ("'[T]here may be circumstances in which the [New Jersey] Constitution provides greater protections' than does the Federal Constitution . . . .") (alteration in original) (citation omitted).

In protecting individual rights to marry, raise children, seek an abortion, terminate life support, or make other kinds of deeply personal decisions, the New Jersey Supreme Court has relied on Article I, Paragraph 1, of the State Constitution. Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 618 (2000) (collecting cases); Lewis v. Harris, 188 N.J. 415, 442 (2006). This

provision guarantees to "[a]ll persons" the "natural and unalienable rights" of "enjoying and defending life and liberty" and "pursuing and obtaining safety and happiness." N.J. Const. art. I, ¶ 1. Although the provision "nowhere expressly states that every person shall be entitled to the equal protection of the laws, we have construed the expansive language of Article I, Paragraph 1 to embrace that fundamental guarantee." Lewis, 188 N.J. at 442; see also Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985) (explaining that Article 1, Paragraph 1 "protect[s] . . . against the unequal treatment of those who should be treated alike."); Sojourner A., 177 N.J. at 332 (same).

Departing from the rigid equal protection tiers that apply in federal analysis, the New Jersey Supreme Court has adopted a more flexible balancing test that "weigh[s] the governmental interest in the statutory classification against the interests of the affected class." Planned Parenthood v. Farmer, 165 N.J. at 630. The Court considers three factors: "the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction." Lewis, 188 N.J. at 443 (citations omitted). The more personal the right, the more the scales tip toward the individual and the greater the burden on the State to justify its action. Ibid. "Unless the public need justifies statutorily limiting the exercise of a claimed

right, the State's action is deemed arbitrary." Id. at 443–44 (citing Robinson v. Cahill, 62 N.J. 473, 491–92 (1973)).

Here, the students have a deeply personal right to express and live in accordance with their gender identity. Mandatory parental notification, without adequate regard for the needs and life circumstances of the individual student, can compromise their safety and impair their education. And the districts' proffered reasons for their policies fail to justify the potential harm to students.

2. The district policies raise serious equal protection issues by treating gender-nonconforming students differently from other students.

Each of the Mandatory Notification Policies requires parental notification or consent (for younger children in Manalapan) when a student seeks an accommodation at school for a gender identity that is inconsistent with their assigned sex at birth. The policies thus apply only to students who are gender nonconforming. As the trial court put it, "who but transgender, gender non-conforming, and non-binary students would request public and social accommodations or express a change in gender identity or expression?" Tr. Ct. Op. at 10 (Da128). Under the policies, cisgender students may decide at any time to lean more or less heavily into expressing their masculinity or femininity, and the school does not call their parents except in the unusual circumstance that a student's particular gender expression raises alarms that demand such an

intervention. For gender-nonconforming students, the presumption is reversed: the schools must notify their parents of their gender expression unless some showing of harm counsels against notification.

a. The nature of the right at stake

When this kind of differential treatment targets a group that is subject to severe and widespread discrimination or inhibits the exercise of defining, personal rights, the New Jersey Supreme Court has not hesitated to prohibit it as a violation of equal protection. Thus, in Right to Choose, the Court held that the State could not deny Medicaid funding for therapeutic abortions while funding "all other medically necessary care," including pregnancy-related care, for qualifying low-income beneficiaries. 91 N.J. at 310. Likewise, in Planned Parenthood of Central New Jersey v. Farmer, the Court struck down a parental notification law for abortion in part because the State had presented no "adequate justification for distinguishing between minors seeking an abortion and minors seeking medical and surgical care related to their pregnancies," for whom parental notice was not required. 165 N.J. at 642. When the Court considered challenges to the denial of marriage licenses to same-sex couples, it continued this focus on equal treatment, holding that "committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples." Lewis v. Harris, 188 N.J. at 457. After a

change in federal law deprived couples joined in civil unions of a host of federal benefits available to married couples, the Court declined to stay a trial court decision ordering the State to allow same-sex couples to marry in New Jersey. Garden State Equality v. Dow, 216 N.J. 314, 322–23, 330 (2013).[8]

The nature of the right at issue here weighs heavily in favor of the students the Division on Civil Rights seeks to protect. Gender-nonconforming students do better academically and face fewer mental health risks when their schools treat them in accordance with their gender identity. In Boyertown, the Third Circuit affirmed the denial of a preliminary injunction against a Pennsylvania school district policy that permitted transgender students to use the restrooms that matched their identity. 897 F.3d at 538. The court recognized, "[W]hen transgender students are addressed with gender appropriate pronouns and permitted to use facilities that conform to their gender identity, those students reflect the same, healthy psychological profile as their peers." Id. at 523

[8] Indeed, even when the rights at stake are of less overriding importance than the right to decide whether to end a pregnancy or to marry one's life-partner, the New Jersey courts have consistently enforced the state constitutional guarantee of equal treatment. E.g., Van Winkle v. N.J. Dep't of Corr., 370 N.J. Super. 40, 47–49 (App. Div. 2004) (prohibiting state prisons from denying work credits to a person serving a concurrent sentence out-of-state while permitting inmates to receive work credits for serving sentences in-state); Forstrom v. Byrne, 341 N.J. Super. 45, 48 (App. Div. 2001) (holding that, although the fundamental right to education was not implicated, school district was required to provide speech therapy to home-schooled student on the same basis as to others similarly situated).

(internal quotation marks and footnote omitted). While harassment at school is correlated with negative mental health outcomes, the "opposite is also true . . . : transgender students have better mental health outcomes when their gender identity is affirmed." Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 597 (4th Cir. 2020) (applying Title IX to invalidate Virginia school district policy that barred transgender students from appropriate restrooms and declined to reflect their gender identity in school records).

The record in this case supports the unsurprising finding that transgender students do better in school when they can be themselves and do worse when they are misgendered or mistreated. The 2019 National School Climate Survey, reflecting the experiences of LGBTQ students, reports that those in schools with higher numbers of supportive staff feel safer, miss fewer days of school, experience a greater sense of belonging, have more ambitious educational aspirations, and achieve higher grade point averages. Joseph G. Kosciw, Ph.D., et al., GLSEN, The 2019 National School Climate Survey (2020), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf (Da111).[9] Acceptance and support in school thus advance many aspects of students' personal and educational development.

[9] The 2021 survey confirms these findings. Joseph G. Kosciw, Ph.D., et al., GLSEN, The 2021 National School Climate Survey, at 66–69 (2022) ("2021

Gender-nonconforming students also benefit from policies, like the Original Policies, that allow the students to decide when and with whom to discuss their transgender or nonbinary status. Even for students whose families will be supportive—and there are many[10]—coming out is a deeply personal process that should be undertaken on the student's terms. Policies that out students against their will insert school personnel into parent-child conversations before families may be ready to have them on their own terms and make it harder for students who might actively want their school's assistance in broaching these topics with their parents.

Mandatory notification policies not only harm the parent-child relationship in families where parents may ultimately be affirming, but also

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National School Climate Survey"), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf.

[10] Hum. Rts. Campaign Found., 2023 LGBTQ+ Youth Report, Fig. 6 (Aug. 2023) ("2023 LGBTQ+ Youth Report") (trans and nonbinary youth who share their identities with their parents often find them supportive), https://reports.hrc.org/2023-lgbtq-youth-report#about-the-study; The Trevor Project, Research Brief: Behaviors of Supportive Parents and Caregivers for LGBTQ Youth at 2 (May 2022) (reporting frequency of supportive actions by parents of transgender, nonbinary, and gender-questioning youth), https://www.thetrevorproject.org/wp-content/uploads/2022/05/May-Research-Brief-Supportive-Caregiver-Behavior.pdf; The Trevor Project, U.S. Perspectives on Issues Impacting the LGBTQ+ Community, at 11–12 (June 2023) (reporting that more than half of parents state they would be "totally comfortable" if their children came out as transgender or nonbinary), https://www.thetrevorproject.org/wp-content/uploads/2023/06/2304052-THE-TREVOR-PROJECT_May-Adults-Survey-Presentation-PUBLIC-2.pdf.

create serious risks for students who would face rejection at home for expressing their gender identity. For those vulnerable students, the challenged district policies are harmful and dangerous. Infra Point II.B.2.b.

Gender-nonconforming students' right to be treated consistent with their gender identity has great meaning and lasting consequences for them. The right therefore weighs heavily in the equal protection balance.

b. The harm of the challenged policies

The Mandatory Notification Policies threaten to cause harm on an individual and schoolwide level. If students say they are not ready to disclose this personal information to their parents, but schools disregard this decision, then parental notification may harm the students' (1) physical safety, as this kind of notification exposes them to a high risk of familial rejection, leading to violence and homelessness, among other negative outcomes; (2) mental health, including increased risks of anxiety, depression, suicide, substance abuse, and self-injurious behaviors; and (3) educational outcomes, as discrimination against gender-nonconforming students is inversely correlated with academic success. In addition to harming individual students, the Mandatory Notification Policies will subvert schoolwide goals of creating open, safe, and inclusive environments where gender-nonconforming students, like all other students, are able to live in accordance with their gender identity.

i. Individual harm to students

Physical Safety

Disclosing transgender students' status to a parent without consent can endanger their physical safety. Every day, transgender and gender-nonconforming youth encounter alarmingly high rates of "discrimination, harassment, and violence because of their gender identity," including physical and sexual assault. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017). And whether a child is accepted or rejected by their immediate family is a strong safeguard, or risk, to their physical safety.

The 2023 LGBTQ+ Youth Report, which surveyed 13,000 LGBTQ youth from all fifty states, found that only four in ten (43.9%) transgender and gender-expansive youth are out to all their parents or guardians. 2023 LGBTQ+ Youth Report, Fig. 4a. Additionally, the 2015 U.S. Transgender Survey, with a sample of 27,715 respondents, reported that, among transgender people who were out to their immediate family, 40% had family members who did not support them or were "neutral" to their transgender status. Sandy E. James et al., Nat'l Ctr. for Transgender Equal., 2015 U.S. Transgender Survey, at 65 (Dec. 2016) ("2015 U.S. Transgender Survey"), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (Da91). One in ten reported that a member of their family had been physically violent toward them because they

were transgender. Ibid. And one half experienced at least one form of rejection from their immediate family because they were transgender. Ibid.

Additionally, family conflict is the primary cause of homelessness for LGBTQ youth. Nat'l Network for Youth, Prevalence of Youth Homelessness and LGBTQ+ Homelessness (2023), https://nn4youth.org/lgbtq-homeless-youth/. Transgender people whose families reject them are nearly twice as likely to have experienced homelessness (40%) as those who were not rejected (22%). 2015 U.S. Transgender Survey, at 65 (Da91). The 2015 U.S. Transgender Survey also reported that 15% of respondents either ran away from home or were kicked out of the house after coming out to their families. Ibid.

The students most in need of a safe and inclusive environment at school, precisely because they may not have that at home, are the students most likely to be harmed by a forced-outing policy.

Mental Health

Transgender students who are subjected to discriminatory policies and practices by their schools are more likely to experience negative mental health outcomes. The Third Circuit has stressed that "[w]hen transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening." Boyertown, 897 F.3d at 529. Transgender and nonbinary youth report feeling disproportionately scared and stressed about

a policy that would require schools to tell their parents if they asked to use a different name or pronoun at school. The Trevor Project, Issues Impacting LGBTQ Youth: Polling Analysis, at 12 (Jan. 2022), https://www.thetrevorproject.org/wp-content/uploads/2022/01/TrevorProject_Public1.pdf (Da88). Another study highlighted that 42.3% of a sample of 5,612 respondents reported a suicide attempt and "26.3% reported misusing drugs or alcohol to cope with transgender discrimination." Augustus Klein & Sarit A. Golub, Family Rejection as a Predictor of Suicide Attempts and Substance Misuse Among Transgender and Gender Nonconforming Adults, 3 LGBT Health 193, 195–96 (2016) (Da99–100).

Misgendering students or otherwise refusing to affirm their gender identity "exacerbate[s] the risk of 'anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness, and eating disorders among other adverse outcomes." Boyertown, 897 F.3d at 523; see also Grimm, 972 F.3d at 597. Researchers have found that gender-nonconforming children who have not socially transitioned experience higher rates of anxiety and depression, and lower self-worth, when compared to children who have socially transitioned. Lily Durwood et al., Mental Health and Self Worth in Socially Transitioned Transgender Youth, 56 J. Am. Acad. Child

& Adolescent Psychiatry 116, 116 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5302003/.

These risks are amplified with increased reports of parental rejection. Klein, supra, at 194 (Da98). This is because "familial rejection in itself is a stressor" that impacts mental health, economic security, and resulting health behavior, as well as depriving transgender individuals "of the protective buffering effects that are usually derived from social support from close others." Ibid. Transgender individuals who experience high levels of family rejection are three-and-a-half times more likely to attempt suicide and two-and-a-half times more likely to misuse substances compared to those who experience little or no family rejection. Id. at 195 (Da99). And those who experience moderate levels of family rejection are two times more likely to attempt suicide and one-and-a-half times more likely to misuse substances. Ibid. Further, 65.5% of transgender youth who reported that their families never refer to them with correct pronouns screened positive for depression, and 72.1% screened positive for anxiety. 2023 LGBTQ+ Youth Report, Figs. 5a, 5b. As stated, this risk of familial rejection may be increased in these circumstances. And even in the absence of familial rejection, the district policies are discriminatory and will exacerbate these mental health harms.

Educational Outcomes

Discrimination against gender-nonconforming students in school can also lead to negative educational outcomes. Boyertown, 897 F.3d at 529; Grimm, 972 F.3d at 597. Students who experience victimization and discrimination based on their gender expression perform less well academically (2.76 v. 3.17 average GPA), are twice as likely to report that they do not plan on pursuing post-secondary education, and feel lower levels of belonging to their school community. 2021 National School Climate Survey, at 35–37. Additionally, nearly a third of LGBTQ+ youth reported missing a day of school in the past month because they felt unsafe or uncomfortable. Id. at 12.

Poor educational outcomes lead to lower rates of employment, lower household incomes, and higher rates of poverty. Stephanie M. Hernandez et al., Sexual Orientation, Gender Expression and Socioeconomic Status in the National Longitudinal Study of Adolescent to Adult Health, J. Epidem. Cmty. Health, at 7, (Nov. 2023), https://jech.bmj.com/content/jech/early/2023/11/28/jech-2022-220164.full.pdf (finding that gender-nonconforming individuals had lower educational attainment and higher household debt when compared to cisgender individuals). Thus, the discriminatory district policies also threaten to impair transgender students' educational outcomes and livelihoods.

ii. Harm to schools

In addition to causing individual harms, the district policies will also disrupt schools' attempts to foster an inclusive culture, to the detriment of all students. Schools create a safe and inclusive learning environment by accepting and engaging all students, and, in so doing, model respect as the standard for participating in civil society. Conversely, schools that treat some students as unworthy of respect or full acceptance can expect other students to take notice and follow suit, targeting peers whom they come to view as fair game. By singling out gender-nonconforming students under the challenged policies, the districts in effect mark them for further discrimination. Students who seek to avoid these consequences, or who refuse to risk disclosure to their parents, will be unable to participate fully in the school environment and their education, increasing their exposure to the harms described above.

iii. Inadequate safeguards

The safeguards that the Board Defendants point to in their policies cannot realistically prevent these harms. The Board Defendants assert that gender non-conforming students will be safe because the Mandatory Notification Policies preserve confidentiality when "documented" (Middletown) or "credible" (Manalapan) evidence exists, or when "there is reason to believe" (Marlboro), that physical or emotional harm will result from parental notification. Tr. Ct.

Op. at 3–6 (describing policies) (Da121–24); Middletown/Manalapan Db31–32. But these exceptions depend on students to predict accurately when disclosure to their parents might cause harm, to amass some sort of evidence of this risk, and to share such evidence with school personnel. Any break in this fragile chain will defeat the exception and place the student in harm's way.

Additionally, this safeguard comes into play only for students who persevere and ask their school to help them socially transition. These policies will deter some gender-nonconforming students from coming out in the first instance. The exception cannot remedy any harms to these students.

c. The failed justification for the district policies

The school districts offer two justifications for their policies. They argue that parental notification is 1) compelled by the Constitution, and 2) required by state and federal school records law. Neither of these reasons is sufficient to justify the harm the policies pose to gender-nonconforming students.

i. Parental notification over students' objection is not constitutionally compelled.

As explained above, the school districts have no constitutional obligation to affirmatively notify parents about students' gender identity over the students' objections. Supra Section I.

ii. State and federal school records laws do not compel parental notification.

The school districts cannot rely on state and federal school records laws to justify the challenged policies' mandatory parental notification provisions. First, the policies are triggered by conduct that has nothing to do with altering official school records. In Middletown and Manalapan, the triggers include a student's request to join a different sports team or use a different bathroom. Middletown Amend. Pol'y (Da152); Manalapan Amend. Pol'y (Da169–70). In Marlboro, notification is triggered by any behavior that indicates a "change in gender identity or expression," with the latter term defined to include all "external manifestations of gender," such as through "clothing, haircut, behavior, voice, and/or body characteristics." Marlboro Amend. Pol'y (D2a43, 45). Even when a student asks to use a new name or pronouns at school—the conduct that is the focus of the districts' argument about the school records law—the request is rarely directed to the school's official records, which in any case students have no independent right to access or alter. Instead, the student is generally asking teachers, coaches, other school personnel, and fellow students to use their chosen names and pronouns.

Second, the districts mischaracterize the school records laws. Parents are entitled to access and request alterations in such records, N.J.A.C. 6A:32-7.5(e)(1) to (3), 6A:32-7.7(b); 34 C.F.R. § 99.20(a), but nothing requires schools

to affirmatively notify parents about anything contained in the records. Nor do parents possess "the unequivocal right to full, complete and accurate information contained in a student record." See Middletown/Manalapan Db19; Marlboro Db16–17. Instead, parents have the right "to be supplied with full information, about the pupil, except as may be inconsistent with reasonable protection of the persons involved." N.J.S.A. 18A:36-19 (emphasis added).

The school records laws cannot justify the policies because these laws are largely irrelevant to the operation of the policies and pose no conflict with an alternative policy of presumptive nondisclosure. Indeed, the Original Policies restricted disclosure of "a student's transgender status except as allowed by law." Marlboro Orig. Pol'y (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8). The school records laws thus pose no obstacle to a presumptive nondisclosure policy that avoids conflict with the LAD, an equally binding state law, and raises no issues under the New Jersey Constitution.

* * * * * * * * *

Because implementation of the Mandatory Notification Policies would raise serious issues under the equal protection provision of the New Jersey Constitution, the Court should avoid the constitutional problem by affirming the trial court's decision. The State has established at least a likelihood of success

on the merits of its claim that the Law Against Discrimination prohibits the enforcement of school district policies that single out gender-nonconforming students for mandatory affirmative notice to their parents of how they express their gender identities at school, regardless of the students' objections. The State has also shown that gender-nonconforming students would face irreparable harm under the challenged policies, and the other preliminary injunction factors favor the State as well.

CONCLUSION

For these reasons, Amici respectfully urge this Court to affirm the decision of the trial court preliminarily enjoining enforcement of the Mandatory Notification Policies.

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United States District Court, D. New Jersey.

JOHN DOE, said name being fictitious, Plaintiff,
v.
DELAWARE VALLEY REGIONAL HIGH SCHOOL BOARD OF EDUCATION, et al., Defendants.

Civil Action No. 24-00107 (GC) (JBD)
|
Filed 02/21/2024

OPINION

Georgette Castner United States District Judge

***1 THIS MATTER** comes before the Court by way of Plaintiff's motion for a Temporary Restraining Order (TRO) and Preliminary Injunction. (ECF Nos. 3 & 4.) The Court has carefully considered the parties' submissions and decides the motion without oral argument pursuant to Federal Rule of Civil Procedure (Rule) 78(b) and Local Civil Rule 78.1(b). For the reasons set forth below, and other good cause shown, Plaintiff's motion for a TRO is **DENIED**.

I. BACKGROUND

A. Factual Background

Jane Doe[1] is a freshman at Delaware Valley Regional High School in Frenchtown, New Jersey. (ECF No. 1 at 2-3, 5.)[2] Jane is a minor diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD) and Unspecified Mental Disorder (UMD), and has been under the care of a therapist for anxiety, depression, and gender confusion since April 2022. (*Id.* at 4.) Plaintiff John Doe is Jane's father. (*Id.* at 2-3.) Plaintiff alleges that he and mental health professionals "agreed to take a cautious approach to Jane's gender confusion" given her mental health diagnoses and the trauma following the death of Jane's mother. (*Id.* at 4.)

[1] The Court refers to Plaintiff's child as "Jane Doe," consistent with Plaintiff's Verified Complaint and the parties' briefing.

2 Page numbers for record cites (i.e., "ECF Nos.") refer to the page numbers stamped by the Court's e-filing system and not the internal pagination of the parties.

At school, Jane participated in an extracurricular club known as "Students Advocating for Equality," or "SAFE," which "promote[s] open discussion and awareness about modern cultures and topics surrounding intersectionality while aiming to make positive contributions to [the] community and school." (*Id.* at 5.) Defendant Ashley Miranda is a school counselor and the staff advisor of SAFE. (*Id.*; ECF No. 30-1 ¶ 3.)

According to the Complaint, "Jane attended a SAFE meeting and expressed to ... Miranda that she would like to undergo a social transition from female to male in school." (ECF No. 1 at 5.) Plaintiff alleges that Miranda "immediately affirmed Jane's expressed identity and began to facilitate Jane's social transition" and "asked Jane if she would like to change her name and pronouns and be known only as a male at school, to which Jane agreed." (*Id.* at 5-6.) Plaintiff alleges that Miranda subsequently emailed the entire high school staff, except two teachers, informing them of Jane's name change, but that Plaintiff was not notified. (*Id.* at 6)

Plaintiff alleges that Miranda and the school concealed Jane's social transition from him in several ways. In her email to the staff, Miranda informed the staff that Plaintiff "was not to be informed of Jane's social transition." (*Id.*) Miranda also allegedly excluded two teachers from the email because they "have contacts with members of the Doe household."[3] (*Id.*) And Plaintiff claims that when he communicated with the school about Jane, the school only ever referred to Jane by her given female name "for the purpose of concealing Jane's social transition." (*Id.*) Plaintiff learned of Jane's social transitioning at school "months after it commenced," when another parent called Jane by a male name in Plaintiff's presence. (*Id.*) In response, Plaintiff pulled Jane from the regular classroom and placed her "on home instruction." (*Id.* at 6-7)

3 This fact is contested by Miranda through a sworn declaration. (ECF No. 30-1.) In a responsive declaration, Jane Doe says that she asked Miranda not to include two teachers on the email because of their relationship with her family. (ECF No. 32-1.) Even accepting Plaintiff's allegations as true, it is currently undisputed that Miranda's alleged actions were done at Jane's request. The parties will have an opportunity to provide a more fulsome record on this point in advance of a preliminary injunction hearing.

***2** In December 2023, Plaintiff met with the high school administration, including Miranda. (*Id.* at 7.) Plaintiff informed the administration that he and Jane's therapist "were not in agreement with Jane's social transition and expressly denied his consent to the continuance of Jane's social transition." (*Id.*) The school district replied that it was compelled by law and policy to call Jane by her preferred male name until such time as Jane indicated otherwise. (*Id.*)

Following that meeting, Plaintiff sent a cease-and-desist letter to Scott McKinney, the superintendent of Delaware Valley Regional High School and chief executive of the school district. (*Id.*; ECF No. 1-3 at 2-3.) In the letter, Plaintiff reasserted his parental rights and demanded that the administration stop socially transitioning Jane. (ECF No. 1-3 at 2-3.) By letter dated December 14, 2023, counsel for the Board advised Plaintiff that "the District has and will continue to act in accordance with applicable federal and state laws, and the New Jersey Department of Education's guidance on transgender students." (ECF No. 1-5 at 2.) The Board also advised that because Jane had not attended school for more than ten days, she would "be considered truant and the District may have to take further action, as it is required by law to do ... if she continues to be absent." (*Id.* at 3 (citing N.J.A.C. 6A:16-7.6).)

In early January 2024, while the school district worked to implement approved home instruction for Jane, counsel for the Board informed Plaintiff that "during home instruction the teachers will comply with district policy, NJDOE guidance, and federal and state laws" regarding Jane's name preference. (ECF No. 4 at 11.) Plaintiff contends that the school's insistence to refer to Jane by her preferred name and pronouns against Plaintiff's wishes "interfere[s] with ... [Plaintiff]'s parent-child relationship," violates his "fundamental parental rights," and establishes "a policy that [makes] it impossible for Jane to receive a public education unless [Plaintiff] yielded his constitutional and statutory parental rights." (*Id.*)

Since commencing this lawsuit, Plaintiff has further alleged that "Jane was threatened with truancy" if Plaintiff did not send Jane to approved instruction. (ECF No. 27 ¶ 7.) Plaintiff also alleges that two workers from the Department of Children and Families, Division of Child Protection, visited his home to conduct a wellness check and that they "obviously had been sent" by the school. (*Id.* ¶ 9.)

Exhibit A to Plaintiff's Verified Complaint is a copy of Board Policy 5756, titled "Transgender Students." (ECF No. 1-1 at 2.) In relevant part, the Policy states the following:

> *The school district shall accept a student's asserted gender identity; parental consent is not required.* A student need not meet any threshold diagnosis or treatment requirements to have his or her gender identity recognized and respected by the school district, school, or school staff members. In addition, a legal or court-ordered name change is not required. *There is no affirmative duty for any school district staff member to notify a student's parent of the student's gender identity or expression.*
>
> [(*Id.* (emphases added).)]

If a parent disagrees with the minor student's use of a different name and pronouns, the Policy instructs "the Superintendent or designee [to] consult the Board Attorney regarding the minor student's civil rights and protections under the [New Jersey Law Against Discrimination]," but staff

"should continue to refer to the student in accordance with the student's chosen name and pronoun at school." (*Id.*) The Policy also notes that school officials "should have an open, but confidential discussion with the student" about the student's preferences and "parental communications," and "should also discuss with the student, and any other individuals at the student's request, the risks associated with the student's transgender status being inadvertently disclosed." (*Id.* at 3.)

***3** The Board Policy mirrors the New Jersey Department of Education's guidance that "provide[s] direction for schools in addressing common issues concerning the needs of transgender students." (ECF No. 1-2 at 2.) New Jersey's guidance also "assist[s] schools in establishing policies and procedures that ensure a supportive and nondiscriminatory environment for transgender students" consistent with the New Jersey Law Against Discrimination (NJLAD), and Title IX of the Education Amendments of 1972. (*Id.*)

B. Procedural History

On January 5, 2024, Plaintiff filed the Verified Complaint (ECF No. 1) together with the motion for a TRO and preliminary injunction (ECF Nos. 3 & 4).[4] Upon receipt, the Court declined to decide the motion *ex parte* and directed Plaintiff to serve Defendants in accordance with the applicable federal and state rules. (ECF No. 11.) On January 31, after the parties were served with Plaintiff's Complaint and motion, the Court held a telephonic status conference. The parties were permitted to submit further evidence and briefing through February 9. Plaintiff filed a supplemental brief with additional exhibits. (ECF No. 25.) Defendants opposed, and Plaintiff replied. (ECF Nos. 30-32.)

[4] The Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1331.

Plaintiff asserts three counts against Defendants, alleging violations of his constitutional parental rights. (ECF No. 1 at 9-18.) The Board Defendants include the Delaware Valley Regional High School Board of Education; Ashley Miranda; and Scott McKinney. (*Id.* at 6-7.) The State Defendants are Angela Allen-McMillan in her capacity as the Acting Commissioner of the New Jersey Department of Education,[5] and New Jersey Attorney General Matthew J. Platkin. (*Id.* at 3.)

[5] As of this Opinion, the Acting Commissioner of the New Jersey Department of Education is Kevin Dehmer.

Count One seeks relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiff alleges that the Attorney General is "actively litigating the legal position that ... school districts must follow" Board Policy 5756 and similar statewide guidance, "since to do otherwise would violate the New Jersey Law Against Discrimination." (*Id.* at 4.) Thus, under Count One, Plaintiff seeks a declaration that the NJLAD and Board Policy 5756 are "unconstitutional and void ... to the extent that [they] would deprive parents of fully informed knowledge and consent with respect to any aspect of their children's education including ... social transitioning in particular"; and that "there

is no fundamental constitutional right for a minor to socially transition." (*Id.* at 12-14.) Plaintiff also seeks to enforce statutory rights under the Department of Education Organization Act of 1979, 20 U.S.C. § 3401. (*Id.* at 13-14.)

In addition, Plaintiff asks the Court to permanently enjoin the New Jersey Attorney General from enforcing the NJLAD "or any other state law to the extent that it may" violate Plaintiff's substantive due process parental rights; "the Acting Commissioner of the NJDOE and anyone acting under her from providing guidance to school districts in accordance with Policy 5756"; and "the District, Superintendent, the Board, and all employees thereof, from enforcing Board Policy 5756 and otherwise acting to socially transition [Plaintiff's] daughter without his fully informed knowledge and consent." Plaintiff also seeks an order requiring "the Board to provide mainstream classroom instruction to Jane" and appointing "an independent monitor to protect [Plaintiff's] parental rights, at the Board's sole expense, upon Jane's return to school." (*Id.* at 13-14.)

***4** Count Two asserts a claim under 42 U.S.C. § 1983 for violations of Plaintiff's constitutional parental rights under the Fourteenth Amendment's substantive due process clause. (*Id.* at 15-17.)

Count Three asserts a violation of the New Jersey Civil Rights Act, N.J. Stat. Ann. § 10:6-2, *et seq.*, for interfering with Plaintiff's "right to parent a minor child who is receiving a thorough and efficient education." (*Id.* at 17-18.)

II. LEGAL STANDARD

A. Temporary Restraining Order

"Preliminary injunctive relief is an extraordinary remedy and should be granted only in limited circumstances." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (internal quotation marks and citation omitted). The elements for a preliminary injunction and a temporary restraining order are the same. *See Koons v. Reynolds*, 649 F. Supp. 3d 14, 22 (D.N.J. 2023). A plaintiff seeking a TRO must establish that (1) he is reasonably likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3rd Cir. 2017); *see also HR Staffing Consultants, LLC v. Butts*, Civ. No. 15-3155, 2015 WL 3492609, *7 (D.N.J. June 2, 2015) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). If a plaintiff meets the first two factors, the court "then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Reilly*, 858 F.3d at 179.

"A primary purpose of a preliminary injunction is maintenance of the status quo until a decision on the merits of a case is rendered." *Acierno v. New Castle Cnty.*, 40 F.3d 645, 647 (3d Cir. 1994). Thus, "[a] party seeking a mandatory preliminary injunction that will alter the status quo bears a

particularly heavy burden in demonstrating its necessity." *Id.* at 653 (citation omitted). The party seeking to alter the status quo "must meet a higher standard of showing irreparable harm in the absence of an injunction." *Bennington Foods LLC v. St. Croix Renaissance Grp., LLP*, 528 F.3d 176, 179 (3d Cir. 2008).

B. Burden of Proof

Generally, the moving party bears the burden to convince the court that all four factors favor preliminary relief. *Peter v. Att'y Gen. of N.J.*, Civ. No. 23-03337, 2023 WL 4627866, at *1 (D.N.J. July 19, 2023) (citing *AT&T v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994)). Because "the burdens at the preliminary injunction stage track the burdens at trial," there are instances when the burden may shift. *See* *Reilly*, 858 F.3d at 179 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, et al.*, 546 U.S. 418, 429 (2006)). For preliminary injunctions related to constitutional rights, the moving party must first demonstrate a likelihood of successfully showing that a fundamental right is being infringed. *See* *id.* at 180 n.5 (noting that the party seeking injunctive relief under the First Amendment "still retains the burden of proof in two principal ways: it must prove that the law restricts protected speech and that it will suffer irreparable harm" (citing *Goodman v. Illinois Dep't of Fin. & Prof'l Regulation*, 430 F.3d 432, 438 (7th Cir. 2005))).

***5** If the moving party makes that showing, the burden shifts to the government to justify its restriction under the appropriate level of scrutiny. *See id.* (citing *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011)). "If the government succeeds in justifying the restriction, then the motion for a preliminary injunction fails because there is no likelihood of success on the merits. And even if the moving party prevails on that prong, it still bears the burden of showing irreparable injury." *Id.*

Here, Plaintiff must show that he is reasonably likely to succeed in proving that Defendants infringed on a substantive due process right. If Plaintiff makes that showing, the burden shifts to Defendants to justify their actions under the appropriate level of scrutiny. Plaintiff also has the burden of establishing irreparable harm in the absence of preliminary relief. *Id.*

III. DISCUSSION

A. Likelihood of Success on the Merits

1. Counts One & Two

The Court will first address Plaintiff's likelihood of success on the merits. Because the Declaratory Judgment Act does not provide an independent cause of action,[6] the Court turns to Plaintiff's claims under § 1983 and the Department of Education Organization Act of 1979, 20 U.S.C. § 3401.

6 *See, e.g.*, *Malhan v. Sec. U.S. Dep't of State*, 938 F.3d 453, 457 n.3 (3d Cir. 2019) ("[T]he Declaratory Judgment Act is procedural only, and presupposes the existence of a judicially remediable right. It creates a remedy, not rights." (internal quotation marks and citations omitted)); *Everest Indem. Ins. Co. v. All Risks LTD*, Civ. No. 16-3582, 2023 WL 4295778, at *4 n.8 (D.N.J. June 30, 2023) ("Declaratory judgment is a remedy, not an independent cause of action." (collecting cases)).

Plaintiff's reliance on 20 U.S.C. § 3401(3) appears misplaced. Section 3401(3) provides that "parents have the primary responsibility for the education of their children, and States, localities, and private institutions have the primary responsibility for supporting that parental role." This provision is one of ten congressional findings enumerated in the legislation that created the U.S. Department of Education in 1979.[7] Plaintiff argues that § 3401 is "the supreme law of the land" and that Board Policy 5756 violates § 3401(3) by removing "parents from having primary responsibility for the education of their children." (ECF No. 4 at 15; ECF No. 1 at 10.) But Plaintiff has not cited, nor has the Court found, any authority supporting the argument that § 3401 confers an enforceable statutory right. Absent such authority, the Court finds that at this stage, Plaintiff has not demonstrated that these Congressional findings are anything more than "general statements of federal policy" as opposed to "newly created legal duties." *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 22-23 (1981); *see also E. Shoshone Tribe v. N. Arapaho Tribe*, 926 F. Supp. 1024, 1032 (D. Wyo. 1996) (finding reliance on "novel, untested" theory "does not provide any assurance of eventually prevailing on the merits"); *Ruppert v. Washington*, 366 F. Supp. 683, 685 (D.D.C. 1973) (denying preliminary injunction where the "issues [we]re novel" and "the likelihood of success on the merits appear[ed] very slight"). Therefore, Plaintiff has not met his burden to establish a likelihood of success on the merits for his claims based on § 3401.

7 Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979); *see Cottrell v. United States Department of Educ.*, 430 F. Supp. 3d 1287, 1290 (N.D. Fl. 2019) ("The Department of Education ('DOE') is an executive-branch agency that Congress created in 1979 through the Department of Education Organization Act ... codified at 20 U.S.C. §§ 3401-3508.").

***6** Next, to establish a claim under 42 U.S.C. § 1983, Plaintiff must show that he has been deprived of a federal constitutional right under color of state law. *See Anspach ex rel. Anspach v. City of Phila., Dept. of Pub. Health*, 503 F.3d 256, 261 (3d Cir. 2007) (noting that courts are to "remain mindful that section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law"). Here, Plaintiff asserts that

Defendants are "state actors who are violating [Plaintiff's] fundamental constitutional parenting rights" under the substantive Due Process Clause of the Fourteenth Amendment of the United States Constitution. (ECF No. 4 at 13.)

The Fourteenth Amendment forbids states from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The Due Process Clause enumerates both substantive and procedural rights. *See Steele v. Cicchi*, 855 F.3d 494, 501 (3d Cir. 2017). Plaintiff asserts only substantive due process violations. (*See* ECF No. 4 at 13.) To show a violation, Plaintiff must "demonstrate that he has 'been deprived of a particular interest that is protected by ... substantive due process.' " *Holland v. Rosen*, 895 F.3d 272, 292 (3d Cir. 2017) (quoting *Steele*, 855 F.3d at 501).

The substantive component of the Due Process Clause protects both those rights guaranteed by the first eight amendments, and fundamental rights that are not mentioned in the Constitution but are "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." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotation marks and citations omitted). Asserting a substantive due process right "requires 'a careful description of the asserted fundamental liberty interest.' " *Holland*, 895 F.3d at 292 (first quoting *Chavez v. Martinez*, 538 U.S. 760, 775-76 (2003); and then quoting *Glucksberg*, 521 U.S. at 721). "[V]ague generalities ... will not suffice." *Id.* "Both the Supreme Court and [the United States Court of Appeals for the Third Circuit] have repeatedly warned that we cannot read these phrases too broadly to expand the concept of substantive due process." *Id.* at 293. "A court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Id.* (quotations and citation omitted). Because a court's expansion of the concept of due process "place[s] the matter outside the arena of public debate and legislative action," the "doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever [they] are asked to break new ground in this field." *Doe by and through Doe v. Boyertown Area Sch. Dist.*, 276 F. Supp. 3d 324, 383 (3d Cir. 2017), *aff'd*, 897 F.3d 518 (3d Cir. 2018) (citations omitted).

In this case, Plaintiff asserts a liberty interest in "the care, custody, and control of" his child, which "is perhaps the oldest of the fundamental liberty interests" protected by the Due Process Clause. (*See* ECF No. 4 at 14 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).) In support, Plaintiff cites to Supreme Court precedent recognizing a parent's general right to make decisions concerning the care, custody, and control of their children. (ECF No. 25 at 11-14 (collecting cases).)

But the question before the Court is not whether there is a general parental right related to the care, custody, and control of children. The question is whether Plaintiff has a fundamental constitutional right that requires the Board Defendants to obtain Plaintiff's consent prior to recognizing and referring to Jane as to her preferred gender. At this stage, based on a careful review of all

submissions, the Court finds that Plaintiff has not shown a likelihood of success on the merits as to this question.

***7** For one, the cases that establish fundamental parental rights — and define the scope of those rights in a school setting — do not support the type of unqualified right that Plaintiff asserts in this case. Although United States Supreme Court precedent has affirmed the right of parents to control the upbringing of their children, it has also recognized that this right is not absolute in a school setting and that schools may impose reasonable regulations. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) ("The power of the state to compel attendance at some school and to make reasonable regulations for all schools ... is not questioned."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the state reasonably to regulate all schools ... and that nothing be taught which is manifestly inimical to the public welfare."); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (recognizing the power of the state "to impose reasonable regulations for the control and duration of basic education," which must be balanced "when it impinges on fundamental rights").

The Third Circuit has similarly recognized that although the "Supreme Court has never been called upon to define the precise boundaries of a parent's right to control a child's upbringing and education," it is "clear ... that the right is neither absolute nor unqualified." *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005) (collecting cases). And "despite the Supreme Court's 'near-absolutist pronouncements' concerning the right to familial privacy, the right is necessarily qualified in a school setting where 'the state's power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.' " *Id.* (quoting *Gruenke v. Seip*, 225 F.3d 290, 304 (3d Cir. 2000)).

The Third Circuit has also found dispositive that in each of the foundational Supreme Court cases recognizing the right of parents to direct the upbringing of their children, "the state was either requiring or prohibiting some activity" by the parents. *See Anspach*, 503 F.3d at 263-64. In *Anspach v. City of Philadelphia, Department of Public Health*, a public health center that provided a minor with emergency contraceptive pills without her parents' knowledge or consent was found not to have violated the parents' substantive due process rights. *Id.* at 264-65. The Third Circuit reasoned that the state in *Anspach* was not constraining or compelling any action by the parents, in contrast to the laws at issue in Supreme Court cases such as *Meyer, Pierce*, and *Yoder*.[8] *Id.* at 263-65. Phrased differently, "[e]very Supreme Court case discussing fundamental rights of parents with respect to their children address[es] a state law or regulation that *requires children to engage in an activity* their parents do not want them to engage in, or *prohibits children from engaging in an activity* their parents do want them to engage in." *Reardon v. Midland Comm. Schs.*, 814 F. Supp. 2d 754, 769 (E.D. Mich. 2011) (emphasis added).

8 In *Meyer*, the Supreme Court struck down a blanket prohibition against the teaching of foreign languages, holding that parents have a right "to engage [a teacher] ... to instruct their children" in a language other than English. 262 U.S. at 400. In *Pierce*, the Court found that a law requiring parents to send children to public schools violated the parents' right "to direct the upbringing and education" of their children because it prohibited sending the children to private schools. 268 U.S. at 534-35. And in *Yoder*, the Court found that a law prohibiting Amish parents from withdrawing children from school after a certain age violated both the First Amendment and the parents' substantive due process rights. 406 U.S. at 234.

Here, Board Policy 5756 does not impose the kind of "constraint or compulsion" that the Supreme Court and the Third Circuit have found violative of parental rights. *See Anspach*, 503 F.3d at 264. The Policy does not *require* Jane to engage in an activity that Plaintiff does not want her to engage in, nor does it *prohibit* Jane from engaging in an activity that Plaintiff wants her to engage in. Rather, Board Policy 5657 directs the school to refer to students by the their preferred gender identity without requiring the school to obtain a parent's consent or to affirmatively notify parents.

***8** In contrast, Plaintiff asks the Court to "impose a *constitutional* obligation on state actors to contact parents of a minor" who requests to be recognized by a different gender identity, regardless of the minor's preference as to parental notification. *Anspach*, 503 F.3d at 262 (emphasis in original). Based on the current record and posture of this case, the Court is not convinced that imposing such an affirmative obligation is within "the scope of the familial liberty interest protected under the Constitution." *Id.* Plaintiff has not demonstrated on the factual record at this preliminary stage that such a right is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty," and this Court is guided by the Supreme Court's and Third Circuit's admonitions not to "read these phrases too broadly to expand the concept of substantive due process ... with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Holland*, 895 F.3d at 293.

Nor does the current record establish the type of proactive, coercive interference with the parent-child relationship that the Third Circuit has found to violate parents' constitutional rights in analogous circumstances.

In *Gruenke v. Seip*, for example, a high school swim coach pressured a student to take a pregnancy test without her parents' knowledge or consent. 225 F.3d 290, 295-97 (3d Cir. 2000). The plaintiffs asserted several violations of constitutional rights, including that the coach's actions "violated [the mother's] constitutional right to manage the upbringing of her child" and "obstruct[ed] the parental right to choose the proper method of resolution" of her daughter's pregnancy. *Id.* at 306. Given the coach's "continued intrusion into what was a private family matter ... contrary to [the student's] express wishes that he mind his own business," the Third Circuit found that the plaintiffs had established an "unconstitutional interference with familial relations." *Id.* at 306-07.

Five years later, in *C.N. v. Ridgewood Board of Education*, the Third Circuit contrasted the *Gruenke* defendant's behavior with a school survey that questioned students without parental consent about sensitive topics, such as sexual activity. 430 F.3d 159 (3d Cir. 2005). The Third Circuit held that the survey did not violate the parents' right to control their children's upbringing because the survey, unlike the coach's actions in *Gruenke*, did not "strike at the heart of parental decision-making authority on matters of the greatest importance." *Id.* at 184. The Court reasoned that a "parent whose middle or high school age child is exposed to sensitive topics or information in a survey remains free to discuss these matters and to place them in a family's moral or religious context, or to supplement the information ... [but] School Defendants in no way indoctrinated the students in any particular outlook on these sensitive topics." *Id.* at 185. Thus, the Court concluded that the survey's interference with parental-decision making authority did not amount to a constitutional violation. *Id.*

The Court in *Anspach* similarly found that its holding in *Gruenke* "does not extend to circumstances where there is no manipulative, coercive, or restraining conduct by the State." 503 F.3d at 266. In *Anspach*, the Court emphasized that the coach in *Gruenke* acted "contrary to the student's express wishes that he mind his own business," and "against her express wishes, the coach ... attempt[ed] to have her admit to being pregnant, ... paid for a pregnancy test and told her, through other members on the team, that unless she took the pregnancy test, he would take her off the relay team." *Id.* at 266. The Third Circuit contrasted the coach's behavior with that of the health clinic, which neither coerced the minor into taking emergency contraceptives, nor discouraged her from discussing the issue with her parents. *Id.* at 266-67. The minor was "only given the pills because she asked for them," and no one at the center coerced her into taking the pills or discouraged her from discussing the issue with her parents. 503 F.3d at 264-65.

***9** The *Anspach* decision also distinguished *Arnold v. Board of Education of Escambia County, Alabama*, a case in the United States Court of Appeals for the Eleventh Circuit where school officials "not only pressured [minor students] to refrain from discussing [a] pregnancy and abortion with their parents, but also imposed their own will on the decision of the children regarding whether to abort the pregnancy in various ways, including by providing them with the money for the procedure and hiring a driver to take them to the appointment." *Id.* at 265 (citing *Arnold v. Bd. of Educ. of Escambia, County, Ala.*, 880 F.2d 305, 308-09 (11th Cir. 1989), *overruled on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 113 (1993)). Critical here, while the school officials' behavior in *Arnold* and *Gruenke* violated parental liberty rights, the Third Circuit highlighted that "neither *Arnold* nor *Gruenke* provide for a [parent's] constitutional right to notice." *Id.* at 270.

Here, Plaintiff has not established that the Board Defendants engaged in the type of proactive intrusion into private family matters that the Third Circuit found dispositive in *Gruenke*. The record so far indicates that the Board Defendants only began referring to Jane by her preferred gender

identity at Jane's request, did not coerce Jane into making the request, and did not prevent or discourage Jane from discussing the transition with Plaintiff. Plaintiff does not allege otherwise in the Complaint or the sworn declarations. Although Plaintiff, in his brief, makes a conclusory remark that the "Board Defendants convinced Jane ... that she should transition" (ECF No. 4 at 17), Plaintiff cannot amend his pleadings by way of his brief,[9] nor has Plaintiff alleged a factual basis to substantiate this assertion. The present record lacks particularized facts suggesting that the Board Defendants prompted Jane to initiate her request or proactively encouraged her to socially transition. Instead, Plaintiff alleges that "Jane attended a SAFE meeting and expressed to defendant Miranda that she would like to undergo a social transition." (ECF No. 1 at 5.) To the extent the Board Defendants "continue[ ] insisting on socially transitioning Jane" (ECF No. 27 ¶ 8), they are doing so only at Jane's affirmative request. (ECF No. 1 at 7 ("The District advised that it would continue to have Jane called by a male name until such time as Jane indicated otherwise.").)

9 *See, e.g.*, *Kwanzaa v. Brown*, Civ. No. 05-5976, 2009 WL 4139393, at *25 (D.N.J. Nov. 17, 2009) (finding that a plaintiff may not amend his complaint through arguments in a brief supporting a motion for a TRO (citing *Bell v. City of Phila.*, 275 Fed. App'x 157, 160 (3d Cir. 2008)).

Plaintiff's allegations show that the Board Defendants accepted Jane's request to be recognized by a different name and pronouns, and for the school not to report her request to her father, consistent with Board Policy 5657. Because the record indicates that Jane made her own request to be recognized by a different gender identity and to withhold this information from Plaintiff — as opposed to doing so at the direction of the Board Defendants — this Court is not yet persuaded that the Board Defendants have engaged in a level of interference comparable to that in *Gruenke*, where a school official "exploit[ed his] authority to persuade or coerce a minor into disclosure of a reproductive health condition," and "insist[ed] on a course of action." *Anspach*, 503 F.3d at 270 (citing *Gruenke*, 225 F.3d at 307).

This Court is further guided by the decisions of other District Courts that have weighed parental liberty interests against similar transgender student policies and have distinguished between school officials who proactively coerce students and those who recognize a student by the student's preferred gender identity.

***10** In *Littlejohn v. School Board of Leon County Florida*, a middle school developed a support plan for a student who requested to socially transition — including changing the student's name, pronouns, and preferred restroom — without including or immediately notifying the parents, despite the parents' previously informing the school that they did not consent. 647 F. Supp. 3d 1271, 1273-74 (N.D. Fla. 2022). The school was also aware that the student had previously been diagnosed with ADHD and was "expressing gender confusion." *Id.* at 1273. In bringing suit, the parents alleged that the school had violated their protected liberty interests in familial privacy, the

upbringing of their child, and the medical and mental health decision-making for their child. *Id.* at 1282. On a motion to dismiss, the District Court for the Northern District of Florida found that the school had not infringed on the parents' substantive due process rights in part because the student had approached the school on his own volition and asked the school to use his preferred name and pronouns. *Id.* at 1282 n.6. The student had not been "singled out" or "forced to adopt a support plan against [the student's] will. *Id.* at 1282-83.

Similarly, in *Willey v. Sweetwater County School District No. 1 Board of Trustees*, the parents argued that a school district's policy directing school officials to refer to students by their preferred names and pronouns, and to "respect the privacy of all students regarding such choice," violated the parents' Fourteenth Amendment rights to direct the upbringing of their children, make decisions regarding their children's medical care, and familial privacy. Civ. No. 23-069, 2023 WL 4297186, at *1, *10 (D. Wy. Jun. 30, 2023). On a motion for a preliminary injunction, the District Court for the District of Wyoming found it unlikely that the parents would successfully assert a right to direct medical care absent "evidence the Student was suffering or diagnosed with a mental health condition related to gender identity." *Id.* at *11. The court opined that even if the student had been diagnosed with a mental health condition related to gender identity, the school's policy did not constitute a "treatment" that interfered with the parents' right to make medical decisions, because the school did not actively suggest that the student change their name and pronouns — "the school merely addressed the Student by the Student's requested preferred name and pronoun." *Id.* The court found that the policy was likely unconstitutional only to the extent that it "would preclude a teacher or school district personnel, absent a minor student's consent, from answering or responding to a parent's or guardian's inquiry as to whether their child is being called by other than their legally given name or required to lie to a parent or guardian as to the name the minor student is being called by." *Id.* at *13-14 (but finding it unlikely that the Constitution imposes an affirmative obligation to actively disclose such information to parents absent a parent's inquiry or request).

And in *Regino v. Staley*, a school district's regulation permitted school personnel to refer to students by their preferred name and pronouns, and prohibited school personnel from informing a student's parents of the student's social transition without the student's consent, with some limited exceptions. Civ. No. 23-00032, 2023 WL 4464845, at *1 (E.D. Cal. 2023). An elementary school student then asked school officials to recognize her as a different gender, and not to inform the student's mother. *Id.* The student's mother filed suit, arguing that the regulation violated the mother's substantive due process rights to make important medical and social decisions for her child. *Id.* at *2. The plaintiff argued that "social transitioning is a significant form of psychological treatment" and "can have grave consequences for children." *Id.* at *3. The District Court for the Eastern District of California held that the plaintiff was "advocating for an expansion of her parental substantive due process rights that is not supported by precedent." *Id.* The regulations at issue, the court explained, were "not proactive, but reactive; District staff are not directed to force students to adopt transgender identities or keep their identities secret from their parents." *Id.* at *4.

"[T]he decision to openly express a transgender identity through the use of a different name and pronouns [was] made by the student, not the District." *Id.*

***11** The school officials' actions in *Littlejohn, Willey*, and *Regino*, like those in this case, are different from those at issue in *Tatel v. Mount Lebanon School District*, 637 F. Supp. 3d 295, 336 (W.D. Pa. 2022). In *Tatel*, the plaintiff parents were found to have asserted a plausible substantive due process claim against a teacher who discussed gender dysphoria and transgender transitioning with first graders. *Id.* at 303-04. The teacher did so despite the published first-grade curriculum not mentioning these topics, and despite a school official assuring parents who expressly objected to these topics that "there were no formal lessons about gender identity, especially in first grade." *Id.* at 304-06. The teacher in *Tatel* showed the children books and videos on transgender topics; told first graders that "parents make mistakes about gender; instructed students not to discuss this topic with their parents; told a child she would never lie (implying the parents may be lying about the child's [gender] identity); targeted one student for repeated approaches about his becoming like her transgender child; and caused another child to be confused about how her parents determined her gender." *Id.* at 326. Under these circumstances, the District Court for the Western District of Pennsylvania found that the plaintiffs asserted plausible substantive due process violations of parental rights because transgender topics "implicate a core parental interest in forming the identity of their children" and that "[t]eaching a child how to determine one's gender identity at least plausibly is a matter of great importance that goes to the heart of parenting." *Id.* at 326, 336 (citing *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018)).

Here, unlike in *Tatel*, Plaintiff has not yet established that the Board Defendants engaged in coercive behavior that violate parental rights. Again, it appears undisputed that the Board Defendants acted in response to Jane's affirmative request to be recognized as to her preferred gender identity. Under Board Policy 5756, "the decision to openly express a transgender identity through the use of a different name and pronouns is made by the student," not the Board Defendants. *See Regino*, 2023 WL 4464845, at *4. The Court's ruling aligns with several other courts' holdings that a school district's recognition of a student's preferred gender identity does not violate parental constitutional rights. *Id.*; *Littlejohn*, 647 F. Supp. 3d at 1282-83; *Willey*, 2023 WL 4297186, at *12-16. Nor does the Policy encourage students to keep their preferred gender identities secret from their parents.[10] The issue here, like in *Regino*, is "not whether it is a good idea for school districts to notify parents of a minor's gender identity and receive consent before using alternative names and pronouns, but whether the United States Constitution mandates such parental authority [and consent]." 2023 WL 4464845, at *4. The Court finds that it does not.

10 Even accepting Plaintiff's allegations that Miranda did not send her staff-wide email to two teachers close to the Doe family, and generally referred to Jane by her given name when speaking to Plaintiff, this conduct alone would not rise to the level of active deception resulting in a constitutional violation. *See Willey*, 2023 WL 4297186, at *13-14 (finding

> that the Constitution does not impose an affirmative obligation on the District to disclose a student's asserted gender identity to the student's parents, but that a policy precluding school officials from responding to a parent's inquiry, or requiring officials to lie upon a parent's inquiry, likely violated the Constitution). Plaintiff has not cited to any case law that would support a contrary finding. Nor has Plaintiff demonstrated that Board Policy 5756 categorically prohibits school officials from responding to parental inquiries, or requires them to lie about a child's preferred gender.

Plaintiff is also unlikely at this stage to succeed in showing an infringement of his "right to make healthcare and medical decisions for his child." (ECF No. 1 at 2.) Plaintiff alleges that Jane "has been under the care of a therapist for ... gender confusion" and that Plaintiff and "mental health professionals have agreed to take a cautious approach to Jane's gender confusion." (*Id.* at 4.) Gender dysphoria has been "recognized by the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders ('DSM') as clinically significant distress or impairment related to gender incongruence.' " *Willey*, 2023 WL 4297186, at *11 (citations omitted). But Plaintiff has not alleged here that Jane has been diagnosed with gender dysphoria. (*See* ECF No. 1 at 4.) And even if Jane's visits with therapists for "gender confusion" amount to a "mental health condition related to gender identity," Plaintiff has not yet shown that the Board Defendants' recognition of Jane's preferred gender identity has violated Plaintiff's right to direct Jane's medical treatment. Again, there are no allegations that the Board Defendants engaged in "treatment" by "actively approach[ing] [Jane] regarding [Jane's] preferred name," or that they suggested that Jane be referred to by a particular name and pronoun. *See* *Willey*, 2023 WL 4297186, at *11 (citing *Foote v. Town of Ludlow*, Civ. No. 22-30041, 2022 WL 18356421, at *5 (D. Mass. Dec. 14, 2022)). Where, as here, it appears that "the school merely addressed the Student by the Student's requested preferred name and pronoun," and that "it was the Student initiating and requesting the use of a different name, not the District," Plaintiff has not yet established a likelihood of showing that the Board Defendants have interfered with Plaintiff's right to make medical decisions for Jane. *Id.*

***12** In sum, Plaintiff has not identified precedent that would support a finding based on the current record that "the scope of the familial liberty interest protected under the Constitution" obligates the Board Defendants to refrain from recognizing Jane by her preferred gender identity without Plaintiff's consent or obligates the Board Defendants to notify Plaintiff about Jane's request. *See* *Anspach*, 503 F.3d at 262. Because Plaintiff has not yet established infringement of a fundamental right, Board Policy 5756 need only satisfy a rational basis review. *See Glucksberg*, 521 U.S. at 2271 (finding that a law that did not infringe on a fundamental liberty interest must "be rationally related to legitimate government interests"). And the Third Circuit has already held, under a strict scrutiny analysis, that a school district has "a compelling state interest in protecting transgender students from discrimination." *Boyertown*, 897 F.3d at 529. Specifically, the Third Circuit found that a school district's policy of allowing transgender students to use bathrooms and locker rooms consistent with the students' gender identities served the compelling interest of shielding transgender students from discrimination and was narrowly tailored to accomplish this purpose.

See id. at 529-30. The Third Circuit also recognized that "when transgender students are addressed with gender appropriate pronouns ... those students 'reflect the same, healthy psychological profile as their peers.' " *Id.* at 523 (citation omitted).

Here, the State Defendants argue that Board Policy 5756 advances the same compelling interest as that in *Doe* — "shielding [transgender students] from discrimination." (ECF No. 31 at 33.) The State Defendants further argue that the Policy advances the compelling state interests of "foster[ing] an environment of inclusivity, acceptance, and tolerance," and "protecting the physical and psychological well-being of minors," particularly where there is evidence that when transgender identities are affirmed, transgender students "reflect the same, healthy psychological profile as their peers." (ECF No. 31 at 33-35 (citing *Doe*, 897 F.3d at 528-29).) The Board Policy itself purports to address "common issues concerning the needs of transgender students, and to assist schools in establishing policies and procedures that ensure a supportive and nondiscriminatory environment for transgender students." (ECF No. 1-1 at 2.) For purposes of this TRO, Defendants are likely to successfully show that these objectives are legitimate state interests, and that Board Policy 5756 reasonably advances these legitimate objectives by requiring schools to recognize transgender students by their preferred gender identity without affirmatively notifying or seeking consent from a parent.

For these reasons, the Court concludes that Plaintiff has not yet proven a reasonable chance of success on the merits of his § 1983 claim sufficient to grant the extraordinary emergency injunctive relief that he seeks.

2. Count Three

Finally, Plaintiff does not advance a specific argument in his moving papers about his likelihood of success on the merits of Count Three, which alleges a violation of "the right to parent a minor child who is receiving a thorough and efficient education." (ECF No 1 at 17.) The New Jersey State Constitution sets forth that the New Jersey "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. Const. art. VIII, § 4, para. 1. Plaintiff generally asserts that Board Policy 5657 makes it "impossible for Jane to receive a public education unless [Plaintiff] yield[s] his constitutional and statutory parental rights." (ECF No. 4 at 11.) Nevertheless, because this Court finds that Plaintiff has not yet established an infringement of his parental rights, this argument cannot prevail at this time. Plaintiff has not cited any case law showing that this clause in the New Jersey Constitution applies under such circumstances. Therefore, at this stage, Plaintiff does not meet his burden of proving a reasonable chance of success on the merits with respect to Count Three.

B. Irreparable Harm

Turning to irreparable harm — Plaintiff's asserted irreparable harm is his loss of parental rights, "for even [a] minimal period[ ] of time." (ECF No. 4 at 15.) Plaintiff also asserts that an attorney for the school "threatened Jane with truancy" if Plaintiff continues to withhold her from school. (ECF No. 25 at 10.) Because Plaintiff has not shown a reasonable likelihood that he can prove that his fundamental parental rights are being infringed, Plaintiff has not established a likelihood that his parental rights will be irreparably harmed if the Board Defendants continue to recognize Jane by her preferred gender identity.

***13** Some record evidence suggests that the school may have to address Jane's absence from school, which may include initiating truancy proceedings. (*See* ECF No. 1-5 at 3 (a letter from counsel for the school district dated December 14, 2023, stating: "[Jane] will be considered truant and the District may have to take further action, as it is required by law to do, N.J.A.C. 6A:16-7.6, if she continues to be absent."); ECF No. 24-4 at 2 (a letter from counsel for the school district dated January 18, 2024 stating: "If [Jane] participates in scheduled home instruction regularly then the District will not have to take action regarding [Jane's] attendance. If [Jane] does not participate in home instruction the District is required to address the compulsory education requirements.").) But the record does not suggest that truancy proceedings are imminent. Moreover, Plaintiff states that "two workers from the Department of Children and Families, Division of Child Protection, visited [his] home and began inquiring about Jane for a well check and to make sure that she was okay." (ECF No. 27 ¶ 9.) Plaintiff further notes that the "workers indicated that they were very satisfied with the manner in which [Plaintiff] was handling the situation and protecting Jane." (*Id.*) And to the extent that truancy proceedings could occur if Plaintiff continues to withhold Jane from school, Plaintiff has not yet shown a likelihood of success on the merits that this potential harm is tied to an infringement of Plaintiff's constitutional parental rights. Thus, without a reasonable likelihood of success on the merits, Plaintiff has not met the "particularly heavy burden" to justify the extraordinary injunctive relief that would alter the status quo — that is, the Board Defendants' continued adherence to Board Policy 5756, *See* *Acierno*, 40 F.3d at 653 (citation omitted).

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for a Temporary Restraining Order (ECF Nos. 3 & 4) is **DENIED**. An appropriate Order follows.

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United States District Court, D. Kansas.

Pamela RICARD, Plaintiff,
v.
USD 475 GEARY COUNTY, KS SCHOOL BOARD, et al., Defendants.

Case No. 5:22-cv-04015-HLT-GEB
|
Signed 05/09/2022

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MEMORANDUM AND ORDER

HOLLY L. TEETER, UNITED STATES DISTRICT JUDGE

***1** Plaintiff Pamela Ricard brings constitutional claims against Defendants USD 475 Geary County, KS School Board; school board members Ron Johnson, Kristy Haden, Anwar Khoury, Jim Schmidt, Beth Hudson, Mark Hatcher, Jason Butler; Geary County Superintendent Reginald Eggleston; and Fort Riley Middle School Principal Kathleen Brennan ("the District"). [1] Doc. 1. These claims stem from Plaintiff's opposition to the District's policies that (1) require her to refer to students by preferred first name and pronouns ("Preferred Names and Pronouns Policy") and (2) prohibit her from referring to a student by the student's preferred names and pronouns in her communications with the student's parents unless the student requests the administration or counselor to do so ("Communication with Parents Policy").

1 The Court recognizes that Plaintiff has sued some defendants in a personal and official capacity. The parties make

no effort to analyze this nuance in briefing and in arguing the preliminary-injunction motion. And given the very tight timelines in this case, the Court does not either. The Court refers generally to the District.

Plaintiff moves for a preliminary injunction on her free speech, free exercise, and due process claims. Doc. 5. The Court received evidence and heard arguments at the May 6, 2022 hearing. Because the District affirmatively stated that Plaintiff's current practice would not be deemed a violation of the Preferred Names and Pronouns Policy, the Court finds that Plaintiff is unlikely to experience irreparable harm from enforcement of that policy before the Court rules on the merits in this case and denies a preliminary injunction on the Preferred Names and Pronouns Policy on that basis. But the Court finds that Plaintiff has made a sufficient showing that her free exercise claim merits a preliminary injunction of the Communication with Parents Policy, so the Court enjoins Defendants in the manner set forth below.

I. BACKGROUND

The Court makes the following factual findings based on the record. The Court includes additional facts throughout the order as needed. Plaintiff has taught in the District since 2005. Doc. 1 ¶ 1. Plaintiff is a Christian who believes that God immutably creates each person as male or female; these two distinct, complementary sexes reflect the image of God; and rejection of one's biological sex is a rejection of the image of God within that person. *Id.* ¶¶ 84, 86. Additionally, she believes that there are only two anatomical sexes except in very rare scientifically demonstrable medical circumstances. *Id.* ¶ 79. Plaintiff also believes that the Bible prohibits dishonesty and lying. *See id.* ¶ 88. Plaintiff further believes that referring to children with pronouns inconsistent with biological sex is harmful because it is untrue. *Id.* ¶ 89. And Plaintiff believes that parents have a fundamental right to control the upbringing and education of their children. *Id.* ¶ 74.

Plaintiff taught Math Strategies for sixth, seventh, and eighth grade students at Fort Riley Middle School during the 2020-21 school year. *Id.* ¶ 95. There were two students in her class that school year who were biological females and enrolled in the District's record system (e.g., Skyward) under their legal first and last names and their biological sexes. *Id.* ¶¶ 96-97. Both students requested to go by names that were different than their legal names and by pronouns inconsistent with their biological sex.

***2** Plaintiff was suspended and disciplined for not using one student's preferred name and because both students felt discriminated against based on Plaintiff not using the preferred name. Plaintiff returned from her suspension on April 15, 2021. *Id.* ¶ 134. Then-Principal Shannon Molt gave Plaintiff a formal written reprimand for violating three board policies. *Id.* These policies did not have any specific guidance for handling a social transition for transgender students. *See* Doc. 1-4. But Plaintiff was nevertheless found to have violated those policies because her behavior

was "against the guidance provided by building leadership via email on March 31, 2021 and the building's weekly newsletter on April 4, 2021." *Id.* at 4.

Six days later, Molt emailed Fort Riley Middle School staff diversity training on gender identity, gender expression, and guidance on "Use of Preferred Names and Pronouns." *See* Doc. 1 ¶ 139; *see also* Doc. 1-6; Doc. 1-7. Several months later, in September 2021, the board formally amended its policies such that "[s]tudents will be called by their preferred name and pronouns" (i.e., the Preferred Names and Pronouns Policy). Doc. 1-18 at 5. On October 8, 2021, Defendant Brennan informed teachers that Defendant Eggleston had emailed parents and guardians the previous day to tell them that students would be referred to by their preferred name and pronouns, but the District would "not communicate this information to parents unless the student requests the administration or counselor to do so, per Federal FERPA Guidance" (i.e., the Communication with Parents Policy). Doc. 1-16 at 2.[2], [3]

[2] Plaintiff unsuccessfully appealed the disciplinary action to the superintendent and the Board. *See* Doc. 1 ¶¶ 138-149, 154-174, 183-87. The Board also rejected Plaintiff's religious accommodation request. *Id.* ¶¶ 150, 184.

[3] The parties have heavily litigated whether certain district directives are a "policy," "guidance," or "implementation" material. Form does not matter. *See* *Ashaheed v. Currington*, 7 F.4th 1236, 1243 (10th Cir. 2021) ("[T]he First Amendment applies to exercises of executive authority no less than it does to the passage of legislation." (citation omitted)). What matters is what the governmental rule is, and whether Plaintiff is entitled to preliminarily enjoin that rule pending judgment on the merits.

Plaintiff currently has two new transgender students in her class. One student told Plaintiff of a preferred name and preferred pronouns in fall 2021 and the other informed Plaintiff in March 2022. Plaintiff refers to both students by their preferred first names, but she avoids using their preferred pronouns to be consistent with her religious beliefs. Plaintiff does not generally use pronouns in class for any student and avoids the use of pronouns. But she does occasionally use pronouns when referring to students in class. Plaintiff has had to email one of the transgender student's parents regarding that student's performance in school. Because the student has not authorized the district to disclose the student's transgender status to the student's parents, Plaintiff used the student's legal name and biological pronouns in the email. Plaintiff believes that addressing students one way at school and a different way when speaking to their parents is dishonest. Being dishonest violates her sincere religious beliefs.

II. STANDARD

To obtain a preliminary injunction, the movant must show that she is (1) substantially likely to succeed on the merits, (2) will suffer irreparable injury if the injunction is denied, (3) her

threatened injury outweighs the injury the opposing party will suffer under the injunction, and (4) the injunction would not be adverse to the public interest. *State v. U.S. Env't Prot. Agency*, 989 F.3d 874, 883 (10th Cir. 2021) (citations omitted). If a movant is seeking a disfavored injunction, she faces a higher standard. *Id.* Preliminary injunctions are disfavored when the injunction alters the status quo, constitutes a mandatory injunction, or gives the movant all the relief that she would recover at trial. *Id.* at 883-84. Disfavored injunctions require a strong showing on the likelihood of success and balance of harms elements. *Id.* at 884.

III. ANALYSIS

***3** Plaintiff contends the Preferred Names and Pronouns Policy and the Communication with Parents Policy violate her free speech, free exercise of religion, and due process rights. The Court analyzes each below.

A. Preferred Names and Pronouns Policy

As noted above, the District's Preferred Names and Pronouns Policy states: "Students will be called by their preferred name and pronouns." Doc. 1-18 at 5. Plaintiff argues this directive violates both her freedom of speech and free exercise rights under the First Amendment and her due process rights under the Fourteenth Amendment.

While the directive appears mandatory and without exception, the District represented at the hearing that: (1) an employee is not required to use preferred pronouns and may refer to students only by their preferred first name, provided the employee elects not to use pronouns for any student; and (2) inadvertent or unintentional use of pronouns to refer to some students, where an employee's standard practice is to refer to all students only by preferred first name, will not transform the employee's standard practice into a policy violation. [4]

[4] There appear to be numerous other exceptions and caveats to this policy. For example, the District itself refers to a student by the student's legal name, even when the student has requested to be referred to by a preferred name, in official records; as a login credential for Skyward; for the student's email address; and in yearbooks. Further, coaches and gym teachers are apparently allowed to use last names to refer to students in lieu of preferred names and pronouns because the use of last names is more convenient in a sports setting. And District employees are not required to use preferred names and pronouns when employees are speaking about a student outside the student's presence.

Plaintiff testified at the hearing that she has been and is willing to continue referring to all students by their preferred first names (albeit, not their preferred pronouns). The District's counsel indicated that this practice would not violate the District's policy provided any occasional use of pronouns by Plaintiff, despite her default practice of referring to students by their preferred first name, was

inadvertent or unintentional. Given the parties' apparent agreement that Plaintiff's present practice is acceptable to both, the Court finds Plaintiff is unlikely to experience any irreparable harm from this policy before the Court rules on the merits in the ordinary course of this case. *See* State, 989 F.3d at 884. Therefore, the Court will deny injunctive relief at this time and without prejudice to Plaintiff's ability to seek preliminary injunctive relief should circumstances change.

In denying preliminary injunctive relief regarding the Preferred Names and Pronouns Policy, the Court specifically relies on statements made by the District that Plaintiff's current practice is not subject to discipline. The Court is not making any ruling on the merits of Plaintiff's free speech, free exercise, and due process claims as it pertains to the Preferred Names and Pronouns Policy. These claims remain live given Plaintiff's requests for a permanent injunction, declaratory judgment, damages, and attorney fees. The Court will resolve these merits questions in the ordinary course of the litigation.

B. Communication with Parents Policy

***4** While the parties may have reached détente regarding the Preferred Names and Pronouns Policy, the parties remain very much at odds over the Communication with Parents Policy and the potential for disciplinary action should Plaintiff violate it. This policy prohibits employees from revealing to parents that a student has requested use of a preferred name or different set of pronouns at school "unless the student requests the administration or a counselor to do so, per Federal FERPA guidance." Doc. 1-16 at 2. In application, the policy prohibits teachers not only from initiating communication with parents for the express purpose of disclosing preferred names and pronouns, but it also prohibits teachers from revealing preferred names and pronouns as part of a communication with parents about an unrelated matter, such as grades or attendance. It is this latter application of the policy from which Plaintiff seeks relief. [5]

[5] In other words, Plaintiff disclaims any plan to affirmatively reach out to parents for the purpose of telling them that their child is using preferred names or pronouns.

Like her challenge to the Preferred Names and Pronouns Policy, Plaintiff contends the Communication with Parents Policy violates her free speech and free exercise rights under the First Amendment, and her due process rights under the Fourteenth Amendment. The Court finds that Plaintiff is entitled to a preliminary injunction based on her free exercise rights. Therefore, the Court declines to address Plaintiff's free speech and due process arguments at this time; it will instead address those matters in the ordinary course of the litigation.

1. Likelihood of Success

The free exercise clause of the First Amendment states, in pertinent part, that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. amend. I. While the First Amendment by its terms applies only to Congress, it was incorporated by the Fourteenth Amendment and now applies to state and local governments, including public school districts. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The fundamental principle of the free exercise clause is that "government commit 'itself to religious tolerance.' " *Meriwether v. Hartop*, 992 F.3d 494, 512 (6th Cir. 2021) (citing *Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018)). Under this principle, government laws and rules that burden religious exercise are "presumptively unconstitutional unless they are both neutral and generally applicable." *Id.* (citing *Emp't Div., Dept' of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877-78 (1990)). A law "is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.' " *Fulton v. City of Phila., Penn.*, 141 S. Ct. 1868, 1877 (2021) (alteration in original) (citations omitted). "A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* (citation omitted).

In considering whether a law is neutral and generally applicable, this Court must "look beyond the text and scrutinize the history, context, and application of a challenged law." *See Hartop*, 992 F.3d at 512 (citing *Masterpiece*, 138 S. Ct. at 1731; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (discussing the neutrality prong)). If a rule that burdens religious exercise is not neutral and generally applicable, it will survive constitutional challenge only if the government can demonstrate "interests of the highest order" and that the rule in question is "narrowly tailored" to achieve those interests. *Fulton*, 141 S. Ct. at 1881 (citation omitted).

Here, Plaintiff demonstrates that the Communication with Parents Policy burdens her exercise of religion. Plaintiff has testified that she is a Christian and believes the Bible prohibits dishonesty and lying. She believes it is a form of dishonesty to converse with parents of a child using one name and set of pronouns when the child is using and being referred to at school by a different name and pronouns, unbeknownst to the parents. The Court finds Plaintiff's testimony concerning her religious beliefs to be credible and subjectively sincere. *See City of Hialeah*, 508 U.S. at 531 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment Protection." (internal quotations and citation omitted)).

***5** Plaintiff has also demonstrated that, as part of her job, she regularly communicates with parents, whether by email or in person. In fact, she has had to communicate in writing with the parents of a transgender student earlier this year, and it is highly likely she will further communicate with transgender students' parents before the end of the academic year. Neither of Plaintiff's transgender students have authorized the District to disclose their preferred names

and pronouns to their parents. Plaintiff would face the Hobbesian choice of complying with the District's policy and violating her religious beliefs, or abiding by her religious beliefs and facing discipline.

The District counters that its policy does not require Plaintiff to use any student's name or pronouns in conversations with parents—it merely prohibits Plaintiff from revealing to a student's parents a preferred name or pronouns the student is using at school if the student has not authorized the parents to know. Thus, argues the District, Plaintiff can simply refer to students in conversation with parents as "your child" or "your student," never referring to the child by name or pronoun. But Plaintiff has testified to her belief that having a conversation with parents about a child, and not disclosing the name and pronouns used at school, is itself a form of "conceal[ment]"[6] — a material omission if you will—given Plaintiff's belief that parents have a fundamental right to control the upbringing of their children. Moreover, it is simply unrealistic to suppose that a teacher can communicate with parents about their child and never refer to the child by name or pronoun. Such a system would be "impossible to comply with," and when Plaintiff "slipped up," she could face discipline. *See* *Hartop*, 992 F.3d at 517. This Court agrees that Plaintiff's religious rights "do not hinge on such a precarious balance." *Id.* Therefore, the Court finds Plaintiff has demonstrated continued application of the Communication with Parents Policy to her burdens her religious exercise.

[6] Plaintiff's subjective perception that this is "conceal[ment]" is not fanciful. The District grants parents access to its Skyward system. When a parent logs in, Skyward displays certain information about their child, including the child's legal name as reflected on District records and any preferred name the parent has disclosed to the District. The Skyward database also contains preferred names and pronouns that students are using at school but that parents may be unaware of. Although the District's administrators and teachers can see these preferred names and pronouns when they login into Skyward, this data is not populated and visible in the version of Skyward that parents are granted access to.

Because the Communication with Parents Policy burdens Plaintiff's religious rights, the Court must determine whether the Communication with Parents Policy is neutral and generally applicable. The Court concludes the policy is not generally applicable because the District has created multiple exceptions that either necessitate consideration of the putative violator's intent or the District has exempted conduct for secular reasons but is unwilling to exempt Plaintiff for religious reasons. *See* *Fulton*, 141 S. Ct. at 1877.

First, testimony at the hearing established that at least a "couple" of other District employees had inadvertently disclosed to parents the preferred name or pronouns of children who had not authorized the District to disclose this information to parents. The District stated that such persons were not disciplined for violating the policy despite the policy's language drawing no distinction

between unintentional or purposeful violations. Thus, in the District's practice, to determine whether the policy has been violated by a particular disclosure, the District must determine whether the putative violator intended to violate the policy or not.

***6** Second, while the policy by its terms would prohibit any disclosure of a child's preferred name and pronouns to parents absent a child's permission, the District admitted at the hearing that if parents requested copies of education records that included information concerning preferred names and preferred pronouns, the District would disclose the information to parents without a child's permission because the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99, requires it. Thus, the District is willing to make an exception for the secular purpose of complying with federal law, but not religious reasons.

Third, at the hearing, the Court asked what the District would expect a teacher to do if, during a conversation with parents, parents specifically asked the teacher if their child was being addressed at school by a preferred name or pronouns. The District's counsel indicated that such a teacher should refer the parents to an administrator and the administrator would then answer the question and disclose the requested information in a subsequent conversation or meeting.[7] But the policy does not facially carve out administrators from its scope. Thus, the District has created another exemption in practice for administrators to disclose information when necessary for the secular purpose of responding to a parent's direct[8] question, but again is unwilling to grant an exemption for religious purposes.

7 As explained by *Fulton*, the Court must consider whether the secular exemption undermines the District's asserted interests in a similar way. As discussed below, the District told parents the policy was adopted for the purpose of complying with FERPA. But, as also discussed below, FERPA does not restrict parental access to student records; to the contrary, it requires a school district to provide education records to parents whether a child wants the records disclosed or not. Thus, allowing an administrator to disclose to parents because they asked is no less a violation of the District's flawed understanding of FERPA than if the District allowed a teacher to disclose for religious reasons. The District later articulated it did not want preferred name and pronoun information disclosed because it is not the District's "place" to "out" students to parents who might disagree with the child's desire to go by a preferred name or pronoun. This stated interest is undermined just as much by an administrator disclosing the information to parents who ask, as it is by a teacher doing so when necessary to avoid a religious conflict.

8 Of course, some parents may be totally ignorant of the fact that their minor child is being called by a different name and pronouns at school, in which case they would never know to ask for education records. Under the District's practice, it is only those parents who affirmatively ask the right question who would receive this information. This seems rather

inconsistent with the District's stated position that parents are "full partners in their child's education."

Because the Communication with Parents Policy is not generally applicable, the District has the burden to demonstrate the policy is justified by "interests of the highest order"—a so-called, "compelling" interest—and that the policy in question is "narrowly tailored" to achieve those interests. *Fulton*, 141 S. Ct. at 1881; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429-30 (2006) (government bears the burden to satisfy strict scrutiny even at the preliminary injunction phase).

When operating under a strict scrutiny standard, the Court must consider the genuine interest that the District believed supported the policy when it adopted the policy. *See Yellowbear v. Lampert*, 741 F.3d 48, 58-59 (10th Cir. 2014); *see also Fox v. Washington*, 949 F.3d 270, 283 (6th Cir. 2020) ("[B]ecause the government's asserted interest must be genuine, not hypothesized or invented *post hoc* in response to litigation, [the government] will be limited to raising justifications it cited at the time it made the decision" (internal citations and quotations omitted)).

***7** To that point, the policy was announced by the District's Superintendent, Dr. Reginald Eggleston in an email dated October 7, 2021, and sent to all parents and guardians. That email stated, in pertinent part, "USD 475 will not communicate [preferred names and pronouns] to parents unless the student requests the administration or counselor to do so, per FERPA guidelines." (emphasis added). Thus, the District told parents that the reason for its policy was to comply with FERPA. There is no reason to believe the District told parents one thing, while having a hidden, subjective motivation it did not disclose. Therefore, the Court accepts the October 7, 2021 email as an accurate explanation of the District's contemporaneous justification for adopting the policy.

The problem for the District is that FERPA does not prohibit the District from communicating with parents about their minor child's preferred name and pronouns. To the contrary, FERPA is a law that specifically empowers parents to receive information about their minor students; it mandates the District to make education records[9] available to parents upon request—whether the child wants their parents to have the records or not. *See* 34 C.F.R. § 99.10(a) ("Except as limited under § 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records" (emphasis added)).[10] And FERPA does not exempt from its disclosure obligation education records that deal with preferred names and pronouns. Thus, the District's contemporaneous justification for adopting the policy is predicated on an erroneous understanding of the law. And the District's statement to parents that "FERPA guidelines" prevented the District from disclosing preferred name and pronoun information without a child's permission, was misleading. The District could not have a legitimate, compelling interest in withholding information based on FERPA when FERPA in fact required the District to disclose

the very information at issue—at least to the extent the information was contained in an education record.

9 Under FERPA, an education record is a record that is "directly related" to a student and that is "maintained" by a school or party "acting for" the school. 34 C.F.R. § 99.3. Evidence at the hearing established that the District maintains information about a student's preferred name and pronouns in Skyward and, for some students, in a binder stored in the registrar's office. It also maintains such information in emails sent and retained by the counselor and completed forms that the District previously required students to fill out. All these documents seem to be education records under FERPA.

10 *See generally* U.S. Dep't of Educ. Student Priv. Pol'y Off., *A Parent's Guide to the Family Educational Rights and Privacy Act* (2021), https://studentprivacy.ed.gov/resources/ferpa-general-guidance-parents.

Even if the Court were to consider the post hoc explanation the District has given in the context of this litigation, the Court still concludes that the District has failed to establish the Communication with Parents Policy is supported by a compelling interest. Specifically, at the hearing, the District's administrator took the position it was not the District's place to "out" a student to their "parents." And the District's counsel argued that "if the home life is such that the —the student doesn't want to be out to their parents, it's not our job to do it."

But as noted above, federal policy as evidenced by FERPA is that parents do have a right of access to information held by the school about their minor children. Moreover, even if FERPA did not mandate that schools make education records available to parents who ask for them, the fact that it is not the school's duty to disclose information to parents does not mean the school has a compelling interest in directing teachers to withhold or conceal such information and punishing teachers if they violate the policy.

***8** Moreover, as the District conceded at the hearing, parents in the United States have a constitutional right to control the upbringing of their children. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). This is not a trivial right—it is a fundamental one that is "perhaps the oldest of the fundamental liberty interests" recognized by the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). It rests on a fundamental premise that a child is "not the mere creature of the State," *id.* (emphasis added) (citation omitted), and that parents—"those who nurture him and direct his destiny"— "have the right, coupled with the high duty, to recognize and prepare him for additional obligations," *id.* (citation omitted). It is difficult to envision why a school would even claim—much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns. 11

11 Of course, Plaintiff does not have standing to assert constitutional claims on behalf of parents, nor does she attempt to. But the fundamental rights that parents have are a valid consideration in determining whether the District has established a legitimate, compelling interest in prohibiting Plaintiff from disclosing to parents the preferred name and pronouns the child is using, while threatening Plaintiff with disciplinary sanctions if she violates the policy.

Presumably, the District may be concerned that some parents are unsupportive of their child's desire to be referred to by a name other than their legal name. Or the District may be concerned that some parents will be unsupportive, if not contest, the use of pronouns for their child that the parent views as discordant with a child's biological sex. But this merely proves the point that the District's claimed interest is an impermissible one because it is intended to interfere with the parents' exercise of a constitutional right to raise their children as they see fit. [12] And whether the District likes it or not, that constitutional right includes the right of a parent to have an opinion and to have a say in what a minor child is called and by what pronouns they are referred.

12 Because it is illegitimate to conceal information from parents for the purpose of frustrating their ability to exercise a fundamental right, there are real questions whether the District's claimed interests in the Communication with Parents Policy—broadly written as it is—would satisfy even the rational basis standard that would govern if the rule were neutral and generally applicable.

The Court can envision that a school would have a compelling interest in refusing to disclose information about preferred names or pronouns where there is a particularized and substantiated concern that disclosure to a parent could lead to child abuse, neglect, or some other illegal conduct. Indeed, at least in Kansas, were such a case to arise, a school would likely have to report the matter to the Department for Children and Families. *See generally* K.S.A. § 38-2223. But the District has not articulated such an interest here—either abstractly or in the case of the specific students in Plaintiff's class. [13]

13 To be clear, there is no evidence in the record that the transgender students in Plaintiff's class are at risk of harm from their parents.

Even if the District had articulated an interest in preventing abuse by a parent (that is, abuse as the law defines it, and not simply as an administrator might subjectively perceive it), the Communication with Parents Policy would not be narrowly tailored to achieve such an interest. The policy is overinclusive because it prohibits the disclosure of preferred name and pronoun information to parents without any assessment of whether disclosure would actually pose a risk. Moreover, the policy would also be underinclusive insofar as it permits administrators to disclose preferred name and pronoun information to parents simply if parents ask, and without any determination whether such disclosure poses a risk to the child. *See City of Hialeah*, 508

U.S. at 546 (finding laws not narrowly tailored where they were "overbroad or underinclusive in substantial respects"). An appropriately tailored policy would, instead, make an individualized assessment whether there is a particularized and substantiated concern of real harm—as opposed to generalized concern of parental disagreement—and prohibit disclosure only in those limited instances.

***9** Because the Communication with Parents Policy substantially burden's Plaintiff's exercise of religious rights, is not generally applicable, and fails both prongs of the strict scrutiny analysis, the Court finds that Plaintiff has demonstrated a substantial likelihood of success on her free exercise claim as it concerns this policy.

2. Irreparable Harm

The District argues that Plaintiff is not at serious risk for future irreparable injury. Any employment discipline she could receive would be compensable with money damages and her chances of being disciplined are low because she has not been disciplined this school year and Plaintiff is not returning to work at Fort Riley Middle School next year. Plaintiff counters by arguing that the District's past practice shows that she can be disciplined within a few days. [14] Additionally, Plaintiff has already not been able to follow her conscience with regards to parental communications.

14 Plaintiff was issued a notice of suspension one day after the April 2021 incidents.

Any deprivation of any constitutional right is an irreparable injury. *Free the Nipple-Fort Collins v. City of Fort Collins, Colo.*, 916 F.3d 792, 806 (10th Cir. 2019). Here, the Court has already determined that Plaintiff is likely to succeed on her free exercise claim on the Communication with Parents Policy. And the Court also finds it reasonable that she would communicate with the parent of one of the transgender students before the end of the academic year. Although the short timeline and change in work next year does not obviate irreparable harm, it is a reason for limiting the timeframe of the preliminary injunction. Thus, Plaintiff has established irreparable injury.

3. Balance of Harms

The District argues that a preliminary injunction would significantly hinder the District's "obligations to protect young persons entrusted to its care." Doc. 11 at 36. But "[w]hen a constitutional right hangs in the balance, though, 'even a temporary loss' usually trumps any harm to the defendant." *Free the Nipple*, 916 F.3d at 806 (citation omitted). The Court recognizes that the District is trying to create a stable learning environment for children. But the District fails

to articulate any specific, concrete harms sufficient to outweigh Plaintiff's weighty interest in preliminary relief. Therefore, the balance of harms favors Plaintiff.

4. Public Interest

It is "always in the public interest to prevent the violation of a party's constitutional rights." *Id.* at 807. Because the Court finds that Plaintiff is likely to succeed on her free exercise claim for the Communication with Parent Policy, this factor also favors Plaintiff. Thus, Plaintiff has made a sufficient showing as to all four elements for a preliminary injunction against enforcement of this policy.[15] Because the Court holds for Plaintiff on her free exercise basis for a preliminary injunction, it does not address Plaintiff's other arguments for her other claims on this policy.

[15] The District argues that Plaintiff seeks a disfavored injunction. Plaintiff is not seeking a disfavored injunction. Plaintiff is seeking a prohibitory injunction rather than a disfavored mandatory injunction because she seeks to prohibit the District from taking adverse action against her for a violation of her constitutional rights. Plaintiff is not seeking a disfavored injunction that grants her all the relief she'd receive after a trial on the merits either because she could receive other relief (such as damages and attorneys' fees). Finally, this injunction simply seeks to preserve "the last peaceable uncontested status existing between the parties before the dispute developed." *Free the Nipple*, 916 F.3d at 798 n.3 (citation omitted). That peaceable status with regards to the Communication with Parents Policy was prior to the policy's implementation. So Plaintiff does not seek a disfavored preliminary injunction that alters the status quo.

IV. CONCLUSION

***10** The Court has carefully analyzed the record and the law in the limited time afforded by this case. And the Court realizes that this is a difficult and complex area of the law that continues to develop. But based on the record before the Court, the Court denies a preliminary injunction as it relates to the Preferred Names and Pronouns Policy but grants a limited preliminary injunction on the Communication with Parents Policy because Plaintiff has shown the four necessary factors for her free exercise rights.

THE COURT THEREFORE ORDERS that Plaintiff's motion for a preliminary injunction (Doc. 4) is GRANTED IN PART and DENIED IN PART. The Court denies a preliminary injunction on the Preferred Names and Pronouns Policy based on statements made by the District that Plaintiff's current practice would not be deemed a policy violation.

THE COURT FURTHER ORDERS that Defendants are ENJOINED from disciplining Plaintiff for referring to a student by the student's preferred name and pronouns in her communications with the student's parents within the regular course of her duties. The Court relies on Plaintiff's statements that she does not intend to communicate with a parent for the sole purpose of disclosing a student's preferred name and pronouns. This injunction terminates on May 18, 2022, or at the conclusion of Plaintiff's contractual responsibilities to the District, whichever is later.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2022 WL 1471372

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Only the Westlaw citation is currently available.
United States District Court, S.D. California.

Elizabeth MIRABELLI, an individual, and Lori Ann West, an individual, Plaintiffs,
v.
Mark OLSON, in his official capacity as President
of the EUSD Board of Education, et al., Defendants.

Case No.: 3:23-cv-00768-BEN-WVG
|
Signed September 14, 2023

Synopsis

Background: Public school teachers brought § 1983 action against members of school district board of education, certain district staff, members of California State Board of Education, and State Superintendent, alleging that district's policy, of not allowing teachers, absent student's consent, to disclose to student's parents that student identified as new gender or wanted to be addressed by new name or pronouns during school day, violated their rights to free speech and free exercise of religion under the First Amendment. Teachers moved for preliminary injunction and defendants moved to dismiss for failure to state a claim.

Holdings: The District Court, Roger T. Benitez, J., held that:

policy was not generally applicable, thus triggering strict scrutiny;

teachers showed likelihood of success on merits of claim that policy violated their rights under Free Exercise Clause of First Amendment;

teachers showed irreparable harm;

balance of equities favored issuance of preliminary injunction;

teachers had Article III standing against state defendants;

state defendants were not entitled to Eleventh Amendment immunity; and

whether district defendants were entitled to qualified immunity could not be resolved on motion to dismiss.

Plaintiffs' motion granted; defendants' motions denied.

Procedural Posture(s): Motion for Preliminary Injunction; Motion to Dismiss for Failure to State a Claim.

Attorneys and Law Firms

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ORDER:

(1) GRANTING MOTION FOR PRELIMINARY INJUNCTION;

(2) DENYING MOTIONS TO DISMISS

[ECF Nos. 5, 7, 17, 25]

ROGER T. BENITEZ, United States District Judge

***1** Plaintiffs Elizabeth Mirabelli and Lori Ann West ("Plaintiffs") are teachers with fifty-five years of experience between them in the Escondido Union School District ("EUSD"). They bring claims against members of the EUSD Board of Education and certain members of the EUSD

administrative staff (collectively, "EUSD Defendants"), as well as members of the California State Board of Education and the State Superintendent (collectively, "State Defendants") for school district policies that violate the First Amendment to the United States Constitution, under 42 U.S.C. § 1983. Plaintiffs move for a preliminary injunction and the EUSD Defendants and the State Defendants move to dismiss the claims. A hearing was held on August 30, 2023.

I. BACKGROUND

If a school student suffers a life-threatening concussion while playing soccer during a class on physical fitness, and the child expresses his feelings that he does not want his parents to find out, would it be lawful for the school to require its instructor to hide the event from the parents? Of course not. What if the child at school suffers a sexual assault, or expresses suicidal thoughts, or expresses aggressive and threatening thoughts or behavior? Would it be acceptable not to inform the parents? No. These would be serious medical conditions to which parents have a legal and federal constitutional right to be informed of and to direct decisions on medical treatment. A parent's right to make decisions concerning the care, custody, control, and medical care of their children is one of the oldest of the fundamental liberty interests that Americans enjoy. However, if a school student expresses words or actions during class that may be the first visible sign that the child is dealing with gender incongruity or possibly gender dysphoria, conditions that may (or may not) progress into significant, adverse, life-long social-emotional health consequences, would it be lawful for the school to require teachers to hide the event from the parents?

Plaintiffs Elizabeth Mirabelli and Lori Ann West are two teachers at Rincon Middle School, which is part of EUSD. Mrs. Mirabelli teaches English, and Mrs. West teaches physical education. According to the Complaint, both have been named "Teacher of the Year" at different times while teaching for EUSD. The district is a public school district with approximately 16,000 students in kindergarten through eighth grades. As a government-created entity it is obligated to follow the laws of the State of California and the California Constitution as well as the laws of the United States and the U.S. Constitution. Local school districts have traditionally been guided by local school boards familiar with the needs and opportunities of the local community. In the process of providing a public education for Escondido's school-age children, EUSD hires, trains, and supervises teachers and as part of their duties its teachers must communicate from time to time with the parents of students.

One current subject that EUSD faces in its community is how to address changing concepts of gender identification, gender diversity, gender dysphoria, gender incongruence, and self-transitioning among its student body. Gender dysphoria[1] is a clinically diagnosed incongruence between one's gender identity and assigned gender. If untreated, gender dysphoria may lead to anxiety, depression, eating disorders, substance abuse, self-harm, and suicide. *Eknes-Tucker v. Marshall*, 603 F.Supp.3d 1131, 1138 (M.D. Ala. 2022). Plaintiffs allege in their Complaint

that EUSD has a newly adopted policy of: (1) school-wide recognition of a student's newly expressed gender identification, and (2) when communicating with a student's parents, an enforced requirement of faculty confidentiality and non-disclosure regarding a student's newly expressed gender identification. The policy is known as AR 5145.3.

[1] According to DSM-5, the criteria for Gender Dysphoria is:
A marked incongruence between one's experienced/expressed gender and natal gender of at least 6 months in duration, as *manifested by at least two of the following*:
A. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics)
B. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics)
C. A strong desire for the primary and/or secondary sex characteristics of the other gender
D. A strong desire to be of the other gender (or some alternative gender different from one's designated gender)
E. A strong desire to be treated as the other gender (or some alternative gender different from one's designated gender)
F. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's designated gender)
The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

***2** The result of the new EUSD policy is that a teacher ordinarily may not disclose to a parent the fact that a student identifies as a new gender, or wants to be addressed by a new name or new pronouns during the school day – names, genders, or pronouns that are different from the birth name and birth gender of the student. Under the policy at issue, accurate communication with parents is permitted *only if* the child first gives its consent to the school. A teacher who knowingly fails to comply is considered to have engaged in discriminatory harassment and is subject to adverse employment actions.

EUSD has other formal policies that are consistent with existing law but are in tension with the new policy. For example, BP 0100(7) states that, "Parents/guardians have a right and an obligation to be engaged in their child's education and to be involved in the intellectual, physical, emotional, and social development and well-being of their child." Compl. Exh. 15(7). And BP 4119.21(9) states that, "Being dishonest with students, parents/guardians, staff, or members of the public, including ... falsifying information in ... school records" is inappropriate employee conduct. Compl. Exh. 14 (9). Both existing policies BP 0100(7) and BP 4119.21(9) are consistent with federal constitutional rights but appear to be at odds with AR 5145.3.

The plaintiffs in this action are two experienced, well-qualified, teachers. The teachers maintain sincere religious beliefs that communications with a parent about a student should be accurate; communications should not be calculated to deceive or mislead a student's parent. The teachers also maintain that parents enjoy a federal constitutional right to make decisions about the care and upbringing of their children. The teachers allege a well-founded fear of adverse employment action should they violate the EUSD gender identification confidentiality policy by communicating accurately to a student's parents her own observations or concerns, as a teacher, about the student's gender incongruence.

The plaintiffs bring a facial and as-applied challenge to the EUSD policy, and seek a preliminary injunction to enjoin the defendants from taking any adverse employment action against them in the event that they violate the gender identification confidentiality policy. Because the plaintiffs have shown a likelihood of success on the merits as applied to them, a preliminary injunction would restore the status quo ante, and the other preliminary injunction factors tip in the plaintiffs' favor, the motion for preliminary injunction is granted.

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 65 governs the issuance of preliminary injunctions. Plaintiffs seeking injunctive relief must show that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *Baird v. Bonta*, ––– F.4th ––––, ––––, 2023 WL 5763345, *2 (9th Cir. Sept. 7, 2023). "It is well-established that the first factor is especially important when a plaintiff alleges a constitutional violation and injury. If a plaintiff in such a case shows he is likely to prevail on the merits, that showing usually demonstrates he is suffering irreparable harm no matter how brief the violation." *Id.* at ––––, 2023 WL 5763345, at *3 (citations omitted). "And his likelihood of succeeding on the merits also tips the public interest sharply in his favor because it is 'always in the public interest to prevent the violation of a party's constitutional rights.' " *Id.* (citations omitted). The Ninth Circuit evaluates "these factors on a sliding scale, such 'that a stronger showing of one element may offset a weaker showing of another.' When the balance of equities 'tips sharply in the plaintiff's favor,' the plaintiff must raise only 'serious questions' on the merits—a lesser showing than likelihood of success." *Fellowship of Christian Athletes v. San Jose Unified School District et al.*, No. 22-15827, ––– F.4th ––––, ––––, 2023 WL 5946036, at *35 (9th Cir. Sept. 13, 2023) (en banc) (citations omitted).

III. DISCUSSION

***3** Since 2003, EUSD has maintained a nondiscrimination policy and a policy against discriminatory harassment that prohibits, *inter alia*, harassment based on a student's actual or perceived gender identity. *See* BP 0410 and BP 5145.3. Those policies are not questioned here.

However, on August 13, 2020, during the COVID-19 pandemic and related school shutdowns, it is alleged that EUSD adopted Administrative Regulation ("AR") 5145.3. AR 5145.3 gives definition to what is considered discriminatory harassment under BP 5145.3. Compl. at ¶¶ 115-116. It is this regulation (AR 5145.3) and its application that is at the center of this controversy.

It is alleged that AR 5145.3 was not discussed at a public school board meeting. It is alleged that AR 5145.3 was not passed upon by the EUSD Board of Trustees. It is alleged that AR 5145.3 was not widely circulated to all staff. Rather, it is alleged that AR 5145.3 was adopted by school district administrative staff, without fanfare, and without opportunity for parental or public input. In fact, apparently few even knew of its existence or significance until February 3, 2022. On that day it is alleged that EUSD held a district-wide video conference meeting for certificated staff (*i.e.*, teachers) regarding the rights of gender diverse students under the newly adopted AR 5145.3, *et al.* Compl. at ¶¶ 118 and Exh. 4.

Among the policy points discussed was an instruction that a teacher who knew of a student's transgender status and revealed that status to "individuals who do not have a legitimate need for the information," the teacher's communication would be considered discriminatory harassment. *Parents* were specifically identified as individuals who do not have a legitimate need for the information. And the presentation made it clear that a student's consent to reveal gender information is required, regardless of the age of the student. Compl. at ¶ 129.

According to the Complaint, the February 2022, training presentation was conducted by Defendant Tracy Schmidt, Director for Integrated Student Supports, and introduced by Albert Ngo, Director of Certificated Human Resources. In the presentation, Schmidt describes the rights of "protected students." Schmidt says,

> "So, now, lets go through what these rights [of protected students] are. And this is taken from our own adopted EUSD policy on discrimination and harassment. So, first off, determining gender identity. The school or District shall accept the student[']s assertion of their gender identity and begin to treat the student immediately, consistently with that gender identity. The student's assertion is enough. There is no need for a formal declaration. There's no requirement for *parent or caretaker agreement or even for knowledge* for us to begin treating that student consistent with their gender identity. Students also have a right to privacy. A student's status is their private information, and the District shall only disclose the information to others with the student's prior consent. When disclosure of a student's gender identity is made to a District employee by a student, that employee shall seek the student's permission to share with others including *parents* or ... caretakers. The main take away is this: It always comes back to the student's comfort. If one wants to take any action to share a student's status, they must be granted that permission, and *that includes parents*, caretakers, other teachers, administrators, even support staff. You have to seek out permission first."

Compl. at Exh. 4, p 3-4 (emphasis added). Schmidt then describes actions deemed to be discrimination or harassment -- which includes revealing a student's gender diverse status to people without a legitimate need for the information. Schmidt says that parents are included among those who do not have a legitimate need to know. Schmidt instructs that discrimination/harassment includes, "revealing a student's transgender status or gender diverse status to individuals who do not have a legitimate need for the information without the student's consent, and *this includes parents* or caretakers." Compl. at Exh. 4, p 7 (emphasis added).

***4** In August 2022, at the outset of the new school year, the plaintiffs received emails from school staff with a list of students with student-preferred names and pronouns. The list included directions on whether or not said names and pronouns were to be disclosed to the students' parents. Compl. at ¶¶ 163-164; Exh. 23. For example, Mirabelli received an email with a list of students and entries such as: "[student name]: Preferred name is [redacted] (pronouns are he/him). Dad and stepmom are NOT aware, please use [redacted] and she/her when calling home."

Both plaintiffs sought relief from EUSD in the form of a religious accommodation. Although it did not contest the sincerity of their religious convictions, EUSD did not extend that accommodation to the plaintiffs for communications with parents. *See e.g.*, Compl. Exh. 7 (Letter from attorney for EUSD, dated Feb. 8, 2023) ("Finally, (4) teachers are required to follow the 'privacy' policy that requires them to not share a student's gender identity status with their parent or guardian without the student's permission."); Compl. Exh. 9 (Letter from attorney for EUSD, dated Mar 10, 2023) ("Question (1): What if a parent directly asks [the teachers] to reveal a student's gender identity? Clarification. Your clients should respond that that [sic] the inquiry is outside the scope of the intent of their interaction and state that the intent of the communication, may involve behavior as it relates to school and class rules, assignments, etc. If your clients have questions about questions from parents related to gender identification or equity laws/regulations, they should contact the principal, who will provide the necessary guidance.").

Consequently, when it comes to communicating with parents, the plaintiffs have been told by EUSD through its attorneys that they can say only: "*the inquiry is outside the scope of the intent of [my] interaction and state that the intent of the communication, may involve behavior as it relates to school and class rules, assignments, etc.*" Teachers may refer the parent to the school principal, but the principal will not disclose more information either, without the student's consent. Without a student's consent (regardless of the student's age), the school district operates within a veritable cone of silence. Parents are left outside. This was explained at the hearing.

> EUSD Attorney: Yes. So ultimately, though, to go back to your question, if a child went through this whole process, and then we get to a parent, and the teacher is not being told to lie but saying this is beyond my purview; they speak

> to an administrator; ultimately, an administrator would respect the child's wishes not to disclose and respect their privacy.

Hearing Transcript, at 98. It is alleged that neither plaintiff Mirabelli nor plaintiff West have a desire to telephone parents to specifically report a child's gender identification; on the other hand, to be consistent with their sincerely-held religious beliefs, they cannot conceal pertinent information that can impact the health and well-being of a student or affirmatively mislead a student's parent. Compl. at ¶ 212.

EUSD responds in part, that AR 5415.3 is required by California law as explained and communicated through the California Department of Education's publication titled *Frequently Asked Questions* about the School Success and Opportunity Act (Assembly Bill 1266) (hereinafter "FAQs"). Compl. Exh. 4; Hearing Transcript at 26. Page 5 of the FAQs provides an answer to the question, "May a student's gender identity be shared with the student's parents, other students, or members of the public?" It says,

> ***5** A transgender or gender nonconforming student may not express their gender identity openly in all contexts, including at home. Revealing a student's gender identity or expression to others may compromise the student's safety. Thus, preserving a student's privacy is of the utmost importance. The right of transgender students to keep their transgender status private is grounded in California's antidiscrimination laws as well as federal and state laws. Disclosing that a student is transgender without the student's permission may violate California's antidiscrimination law by increasing the student's vulnerability to harassment and may violate the student's right to privacy.

FAQs page 7 explains that if a student chooses to be addressed by a name or pronoun all school district personnel are required to use said chosen name/pronoun. The student's age is not a factor, "as children as early as age two are expressing a different gender identity."

To this end, the state Department of Education's FAQs contemplate a sort of double set of books to be kept by a school district – specifically for transgender or gender nonconforming students. For example, FAQs page 6 says, "it is strongly recommended that schools keep records that reflect a transgender student's birth name and assigned sex (e.g., copy of the birth certificate) apart from the student's school records. Schools should consider placing physical documents in a locked file cabinet in the principal's or nurse's office." And at FAQs page 7, "[i]f the school district has not received documentation supporting a legal name or gender change, the school should nonetheless

update all unofficial school records (e.g. attendance sheets, school IDs, report cards) to reflect the student's name and gender marker that is consistent with the student's gender identity."

The upshot of the Board of Education direction seems to be that once a student, whether in kindergarten, eighth grade, or somewhere in between, expresses a desire to be called by a new name or new pronouns, school faculty and staff are to refer to that student by the newly preferred indicators. "Unofficial" school records such as attendance sheets, school IDs, and report cards are to be changed. From that point forward, the student may go through each school day with the faculty and staff addressing the student in person and on records according to the changed moniker.

However, under the antidiscrimination policy, a teacher is not permitted to inform the parents of this change without the student's consent. Classroom teachers who are in the best position to observe the student and forms the opinion that the intellectual or social health and well-being of the student may be at risk related to gender nonconformance or dysphoria, under the antidiscrimination policy, is not permitted to inform the parents without the student's consent. Regarding gender confidentiality and nondisclosure, FAQs page 6 says, "schools must consult with a transgender student to determine who can or will be informed of the student's transgender status, if anyone, including the student's family. With rare exceptions, schools are required to respect the limitations that a student places on the disclosure of their transgender status, *including not sharing that information with the student's parents*." (Emphasis added.)

A. Medical Opinion

The government approach articulated in AR 5145.3 is dramatically inconsistent with respected medical opinions. The plaintiffs in this case provide a declaration from an expert in the field of children and adolescents dealing with gender-identity related issues. *See* Declaration of Dr. Erica E. Anderson, Dkt. 5-2. Dr. Erica E. Anderson, is a well-credentialed clinical psychologist with forty years of experience. As part of her clinical practice, Anderson has seen and supported hundreds of children and adolescents for gender-identity-related issues, many of which have transitioned socially, medically, or both, to a gender identity that differs from their natal sex. *Id.* at ¶ 3. Anderson describes herself as a transgender woman. *Id.* at ¶ 5. Anderson's testimony is summarized in the following excerpts:

***6** "A child or adolescent who exhibits a desire to change name and pronouns should receive a careful professional assessment prior to transitioning;" "A request to change name and pronouns may be the first visible sign that the child or adolescent may be dealing with gender dysphoria or related coexisting mental-health issues;" "Parental involvement is necessary to obtain professional assistance for a child or adolescent experiencing gender incongruence, to provide accurate diagnosis, and to treat any gender dysphoria or other coexisting conditions;" "A school-facilitated transition without parental consent interferes with parents' ability to pursue a careful assessment and/or therapeutic approach prior to transitioning, prevents parents from making the decision about

whether a transition will be best for their child, and creates unnecessary tension in the parent-child relationship. Nor is facilitating a double life for some children, in which they present as transgender in some contexts but cisgender in other contexts, in their best interests." *Id.* at ¶ 8.

Anderson opines, "a social transition represents one of the most difficult psychological changes a person can experience. [And] embarking upon a social transition based solely upon the self-attestation of the youth without consultation with parents and appropriate professionals is unwise." *Id.* at ¶ 42. Opining directly on the point of concern for the plaintiffs/teachers, Anderson says, "to place teachers in the position of accepting without question the preference of a minor and further direct such teachers to withhold the information from parents concerning their minor children is hugely problematic." *Id.* at ¶ 43. Anderson continues, "it can be appropriate for parents to say 'no' to a social transition (whether at school or elsewhere) to, among other things, allow time for assessment and exploration with the help of a mental health professional before making such a significant change. Part of parents' job is to help their children avoid making bad decisions." *Id.* at ¶ 60. Concerning medical standards, the World Professional Association for Transgender Health's ("WPATH") Standards of Care ("SOC") 7 and 8 recognize, "it is appropriate for parents to decide whether to 'allow' a social transition for their children. Neither SOC 7 nor SOC 8 suggest that school personnel should decide whether a minor should socially transition, let alone doing so and hiding this information from parents." *Id.* at ¶ 60.

Parental involvement is not optional for correct medical diagnosis of gender incongruence. After all, "Parents are often the only people who have frequently and regularly interacted with a child or adolescent throughout the child's or adolescent's entire life, and therefore they have a unique view of the child's development over time. Indeed, parents often have more knowledge than even the child or adolescent does of whether their child or adolescent exhibited any signs of gender incongruence or gender dysphoria during the earliest years of life." *Id.* at ¶ 65. Consequently, as Anderson explains, "parental involvement is a critical part of the diagnostic process to evaluate how long the child or adolescent has been experiencing gender incongruence, whether there might be any external cause of those feelings, and a prediction of how likely those feelings are to persist." *Id.* at ¶ 66. Anderson continues,

> And, as WPATH notes, "a parent/caregiver report may provide critical context in situations in which a young person experiences very recent or sudden self-awareness of gender diversity and a corresponding gender treatment request, or when there is concern for possible excessive peer and social media influence on a young person's current self-gender concept."
>
> ...
>
> Indeed, WPATH's SOC 8 recommends "involving parent(s) or primary caregiver(s) in the assessment process ... in almost all situations," and adds that "including parent(s)/caregiver(s) in

> the assessment process to encourage and facilitate increased parental understanding and support of the adolescent may be one of the most helpful practices available."

***7** *Id.* at ¶¶ 68-69. Concealing from a parent the fact of a student's transitioning at school is not in the best medical interests of a student, according to Anderson. "By facilitating a social transition at school over the parents' objection, a school would drive a wedge between the parent and child. Similarly, facilitating a double life for some children, in which they present as transgender in some contexts but cisgender in other contexts, is not in their best interest." *Id.* at ¶¶ 77-78. After all, "[c]ircumventing, bypassing, or excluding parents from decisions about a social transition undermines the main support structure for a child or adolescent who desperately needs support." *Id.* at ¶ 80.

Anderson's opinion regarding EUSD's confidentiality and parental exclusion policies is,

> contrary to widely accepted mental health principles and practice. I am not aware of any professional body that would endorse EUSD's policies which envision adult personnel socially transitioning a child or adolescent without evaluation of mental health professionals and without the consent of parents or over their objection.
>
> Rather, when a child presents with a desire to use a new name or pronouns, the very first step should be a careful professional assessment by a mental health professional with expertise in child gender incongruence. The first step should not be, as EUSD's policies provide, the immediate and unhesitating affirmance of the child's request without parental involvement or knowledge.

Id. at ¶¶ 82-83. Anderson concludes,

> EUSD's policies are contrary to best practices regarding maintaining the relationship between parents and their children. Best mental health practices abhor activity that drives a wedge between parents and children, creating distrust and tension. In all cases, parental consent is required to provide medical and psychological treatment to minors. In part, this is because the science of mental health recognizes that the best evidence regarding a minor's mental and emotional well-being comes from first-hand accounts by parents, rather than biased accounts from immature children.

Id. at ¶85.

To sum up, the plaintiffs correctly understand that the EUSD policy of confidentiality and non-disclosure to parents explicated by AR 5414.3 is not conducive to the health of their gender incongruent students. Anderson's expert opinion is unrebutted. As such, for purposes of a motion for preliminary injunction, it is entitled to substantial weight.

B. Youthful Impetuosity

Though it does not require the wisdom of a Supreme Court Justice to see, the Supreme Court recognizes that youth tend to make impetuous and ill-considered life decisions. "First, as any parent knows and as the scientific and sociological studies ... tend to confirm, 'a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' " *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (citations omitted). In the same vein, and perhaps especially true in the school setting, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* And "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 570, 125 S.Ct. 1183 (citation omitted). "Indeed, notes the Court, "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Id.*

C. Federal Constitutional Rights of Parents

***8** Although the plaintiffs ultimately seek a declaration that EUSD's AR 5415.3 policy violates state law, a decision on that claim need not be made in order to grant preliminary injunctive relief. This is because the plaintiffs also correctly understand that EUSD's policies are in direct tension with the federal constitutional rights of parents to direct the upbringing and education of their children. The interpretation of federal constitutional rights is plainly committed to both state and federal courts and is a subject upon which federal courts may decide legal questions with authority. Indeed, it is the duty of federal courts to do so.

The United States Supreme Court has historically and repeatedly declared that parents have a right, grounded in the Constitution, to direct the education, health, and upbringing, and to maintain the well-being of, their children. In *Troxel v. Granville*, 530 U.S. 57, 67-68, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), the Court remarked, "the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child. The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment." The Court commented that the principle, first formulated in *Meyer* and *Pierce*, "long ha[s] been interpreted to have found in Fourteenth Amendment concepts of liberty an independent right of the parent in the 'custody, care and nurture of the child,' free from state intervention."

Beginning with *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the Court said, "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."

In *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the Court acknowledged "the liberty of parents and guardians to direct the upbringing and education of children under their control," and said, "[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."

In *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944), the Court pointed out that "[i]t is cardinal with us 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."

In *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the Court recounted that it "has frequently emphasized the importance of the family, and explained, "[t]he rights to conceive and to raise one's children have been deemed 'essential.' "

In *Parham v. J.R.*, 442 U.S. 584, 604, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979), the Court declared, "[o]ur 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.' " The Court continued, "[t]he 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." *Id.* (citations omitted). "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." *Id.* at 603, 99 S.Ct. 2493. The *Parham* court recognized the parental right to be involved in -- and even override their child's opinion on -- the need for medical care or treatment.

> ***9** Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The

> same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.

Parham, 442 U.S. at 603-04, 99 S.Ct. 2493 ("The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.").

In *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), the Court recognized that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents"

In *Hodgson v. Minnesota*, 497 U.S. 417, 447, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990) (plurality), the Court said, "[a] natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference."

In *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 529, 127 S.Ct. 1994, 167 L.Ed.2d 904 (2007), the Court said, "it is not a novel proposition to say that parents have a recognized legal interest in the education and upbringing of their child."

These are not strange or novel notions. The United States Court of Appeals for the Ninth Circuit recently acknowledged, yet again, the continuing vitality of a parent's constitutionally protected interest in raising a child. In *David v. Kaulukukui*, 38 F.4th 792, 799 (9th Cir. 2022), the court observed, "[t]he interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court. Our caselaw has long recognized this right for parents and children under the Fourth and Fourteenth Amendments." (citations omitted).

The constitutional right of parents to direct their child's education is further protected through Congressional policy, as exemplified by the Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g; 34 CFR part 99). FERPA requires schools to provide parents the opportunity and the right to inspect and review their child's education records (34 CFR 99.10 - 99.12). FERPA speaks to the Congressional elevation of the importance of parents being involved in their child's education. That involvement includes more than academics and extends to matters of health. The privacy right of a child, according to FERPA, takes second place to his or her parents' right to know.

In the end, EUSD's policy of elevating a child's gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that kind of choice, is as foreign to federal constitutional and statutory law as it is medically unwise.

D. State Law Right to Privacy

EUSD responds that the policy is required by state law. AR 5145.3 is not a state statute. Rather, the argument goes that AR 5145.3 gives meaning to a child's state right to privacy as applied to the school setting. A state's highest court is the final arbiter of the meaning of state law and federal courts look to decisions of a state's highest court for binding interpretations. *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991). Where there are none, federal courts look to decisions from state appellate courts for guidance in predicting the decision of the state's highest court. In *American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307, 315, 66 Cal.Rptr.2d 210, 940 P.2d 797 (1997), California's Supreme Court observed that the "requirement that medical care be provided to a minor only *with the consent of the minor's parent or guardian* remains the general rule, both in California and throughout the United States." (Emphasis added.) It did note the existence of several statutory exceptions to the general rule (*i.e.*, "medical emancipation" statutes)[2] permitting minors to obtain specific types of medical services without a parent's consent, however gender transitioning is not among the exceptions.

[2] These are described as "statutes that authorize minors, without parental consent, to obtain medical care only for specific, designated conditions, without authorizing the minor to consent to medical care for other medical needs." *Id.* at 316, 66 Cal.Rptr.2d 210, 940 P.2d 797.

***10** Concerning the California's state constitutional right to privacy for minors and regulations like AR 5415.3, the state's highest court has not had occasion to issue a binding interpretation, and no state appellate court decisions have been identified. Whether a child's state law right to privacy includes a right of confidentiality from their own parents after the child has expressed a desire to be publicly (at school) known by a new name and referred to by new pronouns, seems unlikely. After all, one element of a right to privacy is a reasonable expectation of privacy. A student who announces the desire to be publicly known in school by a new name, gender, or pronoun and is referred to by teachers and students and others by said new name, gender, or pronoun, can hardly be said to have a reasonable expectation of privacy or expect non-disclosure.

While the Court is unaware of state appellate court decisions recognizing a child's right to quasi-privacy about their gender identity expressions, and none placing such a right above a parent's right to know, there are decisions describing parents' rights and obligations. For example, in *Brekke v. Wills*, 125 Cal.App.4th 1400, 23 Cal.Rptr.3d 609 (Cal. App. 2005), a California court of appeal made clear that a parent's rights are superior to a child's rights. "We categorically reject the absurd suggestion that defendant's freedom of association trumps a parent's right to direct and control the

activities of a minor child, including with whom the child may associate. *Id.* at 1410, 23 Cal.Rptr.3d 609 (citations omitted). "The liberty interest ... of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by the United States Supreme Court." *Id.* (quoting *Troxel*, 530 U.S. at 65, 120 S.Ct. 2054). *Brekke* continues, "[w]hether a child likes it or not, parents have broad authority over their minor children." *Id.* *Brekke* then lays out parents' obligations regarding children. "Not only do parents have a constitutional right to exercise lawful control over the activities of their minor children, the law requires parents to do so." *Id.* at 1410-11, 23 Cal.Rptr.3d 609 (citing Cal. Penal Code, § 272, subd. (a)(1), (a)(2) [parents of a child "under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child" so as not to "encourage" or "cause" the child to "become or to remain a person within the provisions of Section 300 [juvenile dependency], 601 [habitually disobedient or truant], or 602 [juvenile delinquency] of the Welfare and Institutions Code" and are subject to criminal punishment for a violation of that duty]; Ed.Code, §§ 48260.5, subds. (b), (c); 48293 [parents who fail to compel their child's attendance at school are subject to criminal prosecution]; *see also* Civ.Code, § 1714.1 [parents may be liable for the torts of their minor child]; Gov.Code, § 38772, subd. (b) [parents are jointly and severally liable with their minor child for the child's defacement of property by graffiti]; Ed.Code, § 48904, subd. (a) [parents are liable for damages caused by the willful misconduct of their minor child in injuring or killing a pupil or school employee or volunteer, or in damaging property belonging to a school or school employee]; Pen.Code, § 490.5, subd. (b) [parents may be liable for petty theft committed by a minor child under their custody and control].)

Another California court of appeal made it clear that, in a similar Fourth Amendment context, a child's right to privacy and to object to a warrantless search of his room must give way to a parent's superior right to consent. *See* *In re D.C.*, 188 Cal.App.4th 978, 115 Cal.Rptr.3d 837 (Cal. App. 2010). The appellate court wrote,

> [The minor] Appellant argues the officers' failure to honor his objection to their entry constituted a violation of his constitutional rights, noting minors are entitled to the protections of the Constitution and, in particular, the search and seizure provisions of the Fourth Amendment. While there is no question minors are entitled to the protection of the Fourth Amendment, adults and minors are not necessarily entitled to the same degree of constitutional protection.

***11** *Id.* at 989-90, 115 Cal.Rptr.3d 837 (citations omitted). *In re D.C.* explains why. "To fulfill their duty of supervision, parents must be empowered to authorize police to search the family home, even over the objection of their minor children." *Id.* at 990, 115 Cal.Rptr.3d 837. A child's right to privacy may be superior to other, unrelated individuals. Nevertheless, California appellate

courts recognize that parents have constitutional rights and legal responsibilities and that generally a parent's rights are superior to a right of privacy belonging to their child. [3]

[3] In the case of a child's home bedroom, where a child ordinarily has a high expectation of privacy as to others, parents have the stronger case to authorize a search over the child's objection.

> "When the child is a minor, there is an even stronger case for apparent authority in a parent to consent to the search of the child's bedroom. Unlike the parents of adult children, the parents of minor children have legal rights and obligations that both permit and, in essence, require them to exercise common authority over their child's bedroom ... Most fundamentally, parents have the "responsibility" to support their minor children (Fam. Code, § 3900) and must "exercise reasonable care, supervision, protection, and control" over their conduct."

In re D.C., 188 Cal.App.4th at 984, 115 Cal.Rptr.3d 837 (quoting *Brekke*, 125 Cal.App.4th at 1410, 23 Cal.Rptr.3d 609).

IV. LIKELIHOOD OF SUCCESS ON THE MERITS

In their motion for preliminary injunction, plaintiffs claim their First Amendment rights to free speech and the free exercise of religion are being violated. Tangentially, plaintiffs claim that the federal constitutional rights of parents of school district students are being violated. As an initial impression, it would seem so. However, no parents have joined as plaintiffs at this time. Moreover, at least for purposes of their preliminary injunction motion, plaintiffs are not claiming to stand in the place of parents. Consequently, the issue is not resolved here.

A. Section 1983 liability

Local government units such as public school districts are included among those persons to whom 42 U.S.C. § 1983 applies. "Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The language of § 1983 "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." *Id.* at 692, 98 S.Ct. 2018; *cf. United States v. Town of Colo. City*, 935 F.3d 804, 808 (9th Cir. 2019) (same).

B. Freedom Speech Clause

Plaintiffs first claim for relief asserts that EUSD's policy conflicts with their own constitutional right to freedom of speech. They argue that their right to speak freely on matters of public concern

do not end at the schoolhouse door and that the policy forces them to adhere to an ideological orthodoxy (with which they directly disagree), as a condition of their employment. *See* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

It is clear from the supporting documents that plaintiffs have a direct disagreement with the policy. However, the argument that they may speak freely on matters of curricular speech is foreclosed by *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011). *Johnson* considered the speech of a high school math teacher whose expression took the form of posters about history on his classroom walls. There, the court "recognize[d] that 'expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary.' " *Id.* at 967. "Certainly, Johnson did not act as a citizen when he went to school and taught class, took attendance, supervised students, or regulated their comings-and-goings; he acted as a teacher—a government employee," according to *Johnson*. *Id.* The court explained that because the speech was that of a school teacher, the speech belonged not to the teacher, but to the school district. "Because the speech at issue owes its existence to Johnson's position as a teacher, Poway acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire." *Id.* at 970. *Johnson* concluded, "[a]ll the speech of which Johnson complains belongs to the government, and the government has the right to 'speak for itself.' When it does, 'it is entitled to say what it wishes,' 'and to select the views that it wants to express.' " *Id.* at 975.

***12** Here, like *Johnson*, the plaintiffs are public school government teachers. The plaintiffs are not asserting that they are simply acting ad hoc as citizens when they go to school and teach class, take attendance, supervise students, or regulate their comings-and-goings, as employees. These activities are part of their employee duties. Included among their duties as teachers is the duty to communicate with a student's parents from time to time about the student's school performance. It is difficult to say that their speech during the school day as teachers is their own and not the school district's during the regular course of their employment duties. Consequently, at least where the teachers' compelled speech takes place during the school day on curricular matters in carrying out the duties of their positions, *Johnson* appears to foreclose a freedom of speech claim. [4]

[4] Plaintiffs argue that *Johnson* is no longer controlling law, citing to *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014) and *Oyama v. University of Hawaii*, 813 F.3d 850 (9th Cir. 2015). However, these cases address issues of "academic freedom" in the post-secondary education context, which the Court is not convinced apply in this instance.

The teachers could make out a freedom of speech claim if they are compelled to speak in accordance with the school policy in casual, non-school contexts. Here, neither plaintiff has said that they have been conversing with parents in casual, non-school settings where the AR 5145.3 policy stifled their speech. The teachers could also make out a freedom of speech claim if the policy compels them to violate the law or deliberately convey an illegal message. Here, the plaintiffs'

come closest to making out a successful freedom of speech claim on the merits. This is because the policy of AR 5145.3, as presented to faculty, and EUSD's response to the plaintiffs' request for accommodations, appears to demand that these teachers communicate misrepresentations to parents about the names and pronouns adopted by their students. As discussed above, that would *likely* be unlawful and in derogation of the constitutional rights of parents. The merits of the first claim for relief for violation of the Free Speech Clause can be decided later, however, because the teachers' second and third claims for relief are sufficiently clear to be entitled to preliminary injunctive relief.

C. Free Exercise Clause

The plaintiffs' second and third claims for relief assert that EUSD's policy requiring non-disclosure (or parental exclusion) violates their right to the free exercise of religion as guaranteed by the First Amendment. Both Mirabelli and West hold sincere religious beliefs. Their beliefs are well-articulated, integrated, and comprehensive. Their beliefs are better described and developed than mentioned in the limited space here. In short, Mirabelli believes that the relationship between parents and children is an inherently sacred and life-long bond, ordained by God, in which the parents have the ultimate right and responsibility to care for and guide their children. Compl. at 257. In a similar vein, West believes that the relationship between parents and their child is created by God with the intent that the parents have the ultimate responsibility to raise and guide their child. Both Mirabelli and West believe that God forbids lying and deceit. Compl. at 269-70.

EUSD preliminarily argues that AR 5145.3 does not infringe on plaintiffs' religious beliefs at all because the policy does not require plaintiffs to "lie" to parents. But that cannot be fairly said when the policy requires plaintiffs to conceal from parents, by misdirection and substitution, accurate information about their child's use of a new name, gender, or pronouns at school. It is one thing if the policy merely delegated the task of talking with parents about a student's gender incongruence to dedicated, trained personnel. It is quite another to require teachers to withhold this information with the knowledge that the information will be *impossible for the parents to obtain* from the school. It is that aspect which infringes on the plaintiffs' free exercise of their religious beliefs. *See* Hearing Transcript, at 100.

***13** "The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that 'Congress shall make no law ... prohibiting the free exercise' of religion.' " *Fulton v. City of Philadelphia*, —— U.S. ——, 141 S. Ct. 1868, 1876, 210 L.Ed.2d 137 (2021); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (same). "Nor may the government 'act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.' " *Fellowship of Christian Athletes*, —— F.4th at ——, 2023 WL 5946036, at *38 (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, —— U.S. ——, 138 S. Ct. 1719, 1731, 201 L.Ed.2d 35 (2018)). To avoid violating the Constitution, "the government must demonstrate that 'a law restrictive of religious

practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.' " *Id.* (quoting *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217). And while "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection,"[5] in this case Mirabelli's and West's beliefs are logical, acceptable, consistent, and align with federal constitutional principles, state law, and EUSD policies BP 4119.21(9) (required honesty) and BP 0100(7) (right to parental involvement).

5 *Fulton*, 141 S. Ct. at 1876 (quoting *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)).

"Distilled, Supreme Court authority sets forth three bedrock requirements of the Free Exercise Clause that the government may not transgress, absent a showing that satisfies strict scrutiny. First, a purportedly neutral 'generally applicable' policy may not have 'a mechanism for individualized exemptions.' Second, the government may not 'treat ... comparable secular activity more favorably than religious exercise.' Third, the government may not act in a manner 'hostile to ... religious beliefs' or inconsistent with the Free Exercise Clause's bar on even 'subtle departures from neutrality.' The failure to meet any one of these requirements subjects a governmental regulation to review under strict scrutiny." *Fellowship of Christian Athletes*, —— F.4th at ——— – ———, 2023 WL 5946036, at *40-41 (citations omitted).

Under the First Amendment, a plaintiff makes out her case if she shows "that a government entity has burdened her sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.' " *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1159 (9th Cir. 2022) (quoting *Kennedy v. Bremerton Sch. Dist.*, —— U.S. ——, 142 S. Ct. 2407, 2422, 213 L.Ed.2d 755 (2022)). General applicability requires, among other things, that the laws be enforced in an evenhanded manner. *Id.* (citations omitted). "A government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way,' or if it provides 'a mechanism for individualized exemptions.' Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny." *Kennedy*, 142 S. Ct. at 2422 (citations omitted).

1. General Applicability.

"A law is not generally applicable if it 'invites' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.' " *Fulton*, 141 S. Ct. at 1877 (citations omitted). Moreover, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given." *Id.* at 1879 (citations omitted). That is so because such a policy " 'invites' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id.*

Categorical exemptions. EUSD argues the policy is generally applicable because it provided training on the policy to all staff – not just to teachers. However, this does not appear to be wholly accurate. EUSD cites the declaration of its trainer, Tracy Schmidt. EUSD Oppo. Dkt 16 at 16. But Schmidt declares that she trained all certificated staff in January 2018 and classified staff in June 2018. *See* Declaration of Schmidt, Dkt 16-1 at ¶2. Yet, AR 5145.3 was adopted two years later (in 2020), and the first training on AR 5145.3 specifically took place in 2022. To date, the only evidence presented supports the teachers claim: that training regarding AR 5145.3 was limited to full-time teachers. Evidence is lacking showing the policy is being applied to instructional aides, substitute teachers, office staff, or non-teaching administrators.

***14** *Discretionary exemption.* EUSD next asserts that the policy is generally applicable because the only exceptions in the policy are "exceptions to discipline" for teachers who violate the policy. EUSD Oppo at 17. Not only is potential disciplinary action exactly the harm plaintiffs seek to prevent, but this argument tends to prove the plaintiffs' point. Under the policy, communications to parents are deemed discrimination/harassment when EUSD decides that the parent lacks a legitimate need for the information. There are no standards written in the policy for determining what is a "legitimate need[,]" only that it requires a case-by-case decision. This means whether disciplinary action is taken by EUSD depends on an undefined *ad hoc* determination of whether the parent receiving gender-related information has a legitimate reason to be informed. This is the very definition of a discretionary exemption. "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877. "Properly interpreted, *Fulton* counsels that the mere existence of a discretionary mechanism to grant exemptions can be sufficient to render a policy not generally applicable, regardless of the actual exercise." *Fellowship of Christian Athletes*, —— F.4th at ——, 2023 WL 5946036, at *43 (citation omitted).

2. Scrutiny.

The reasons proffered by the defendants for the policy pass neither the strict scrutiny nor the rational basis tests. "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217.

EUSD contends that the government purpose of protecting gender diverse students from (an undefined) harm is a compelling governmental interest and the policy of non-disclosure to parents is narrowly tailored. EUSD Oppo at 17. This argument is unconvincing. First, both the Ninth Circuit and the Supreme Court have found overly broad formulations of compelling government interests unavailing. *See* *Green v. Miss United States of Am., LLC*, 52 F.4th 773, 791-92 (9th Cir. 2022) (citation omitted) (identifying the issue as "not whether [the government] has a compelling

interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [plaintiff].") Second, keeping parents uninformed and unaware of significant events that beg for medical and psychological experts to evaluate a child, like hiding a gym student's soccer concussion, is precisely the type of inaction that is likely to cause greater harm and is not narrowly tailored.

The record includes an instance where a substitute teacher, unaware of a student's preferred name, referred to the student by the student's official name, which was met with laughter by the class. One would think that a teacher would want to inform the parents about such an event. If the child really does have gender incongruence, then being the subject of laughter and potential ridicule could have profound effects. If informed, the parents could do something, whether it be arranging counseling or holding at home discussions. On the other hand, if the child is acting to amuse himself or herself, or others, or to be disruptive and discourteous, the parents could also do something to approach the problem. Either way, ignoring the issue or concealing it within the school universe disregards plaintiffs' right to free exercise in particular, and parents' constitutional rights in general. Ignoring a problem is seldom an appropriate solution.

EUSD has at best articulated an overly broad state interest, as applied to these plaintiffs. EUSD has not demonstrated a narrowly tailored policy, tailored so as not to unnecessarily impinge on the plaintiffs' free exercise rights. EUSD's blanket prohibition on the plaintiffs' (and any EUSD employee's) accurate communications, in all instances, with all parents, of all of their assigned students, does not fit the notion of narrow tailoring. EUSD has not offered any showing that it has genuinely considered less restrictive measures than those implemented here, although plaintiffs offered at least six different potential accommodations. As such, EUSD's policy as applied to the plaintiffs fails at least the tailoring prong of the strict scrutiny test. *Cf.* *Fellowship of Christian Athletes*, —— F.4th at ——, 2023 WL 5946036, at *56.

***15** In the end, Mirabelli and West face an unlawful choice along the lines of: "lose your faith and keep your job, or keep your faith and lose your job." *Cf.* *Keene v. City & Cnty. of San Francisco*, 2023 WL 3451687, *2, 2023 U.S. App. LEXIS 11807, *6 (9th Cir. May 15, 2023). Yet, "[r]espect for religious expressions is indispensable to life in a free and diverse Republic." *Kennedy*, 142 S. Ct. at 2432-33. The only meaningful justification the District offers for its insistence that the plaintiffs not reveal to parents gender information about their own children rests on a mistaken view that the District bears a duty to place a child's right to privacy above, and in derogation of, the rights of a child's parents. The Constitution neither mandates nor tolerates that kind of discrimination. The plaintiffs have demonstrated a strong likelihood of success on the merits for their free exercise claim against EUSD.

In their opposition briefing, the state defendants do not argue the merits of plaintiffs' First Amendment claims for relief. Instead, the state defendants argue the plaintiffs lack Article III

standing and that state defendants enjoy Eleventh Amendment immunity. These are addressed *infra* in the discussion on the motions to dismiss.

D. Remaining *Winter* Factors

The plaintiffs have succeeded in demonstrating a likelihood of success on the merits, which is the first and most important factor for awarding a preliminary injunction. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20, 129 S.Ct. 365. The remaining factors easily tip towards the plaintiffs, as well.

"[A] finding that the plaintiff is likely to succeed on the merits of [a constitutional] claim sharply tilts in the plaintiff's favor both the irreparable harm factor and the merged public interest and balance of harms factors." *Baird v. Bonta*, —— F.4th at ——, 2023 WL 5763345, *6, 2023 U.S. App. LEXIS 23760, *15 (citations omitted). It is black letter law that the deprivation of constitutional rights "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *see also Fellowship of Christian Athletes*, —— F.4th at ——, 2023 WL 5946036, at *56 (describing the principle as "axiomatic"). Moreover, " 'irreparable harm is relatively easy to establish in a First Amendment case' because the party seeking the injunction 'need only demonstrate the existence of a colorable First Amendment claim.' " *Id.* (citation omitted). Plaintiffs have accomplished that in this case. Under 42 U.S.C. § 1983, the plaintiffs may be entitled to an award of money damages for past mental anguish, cancellation of summer teaching contracts, and constitutional damages, after proof at trial. These are reparable harms. However, without an injunction, it is certain that plaintiffs will continue to suffer present and future irreparable constitutional harm due to the existence of the state and EUSD policies and the fact that plaintiffs have involuntarily been placed on administrative leave from their teaching positions.

When the nonmovant is the government, the last two *Winter* factors merge. *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009); *Fellowship of Christian Athletes*, —— F.4th at ——, 2023 WL 5946036, at *57 ("Where, as here, the party opposing injunctive relief is a government entity, the third and fourth factors—the balance of equities and the public interest —"merge."). Here, the balance of the equities favor issuance of a preliminary injunction as the defendants have not established that they will be harmed if an injunction preserving the status quo ante stands while further proceedings take place for a final judgment on the merits. Finally, the public interest is always furthered by enjoining unconstitutional policies. *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 731 (9th Cir. 2022) ("it is always in the public interest to prevent the violation of a party's constitutional rights.").

V. MOTIONS TO DISMISS [6]

[6] For purposes of a motion to dismiss, the Court assumes the facts pled in the complaint are true. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

***16** Both groups of defendants move to dismiss the Complaint.

A. *State Defendants*

In their motion to dismiss and opposition to plaintiffs' motion for preliminary injunction, the state defendants do not argue the merits of AR 5145.3. Instead, the state defendants argue the plaintiffs lack Article III standing and that state defendants enjoy Eleventh Amendment immunity. The briefing makes fair arguments. However, statements at the hearing and subsequent litigation by the state against another school district seriously undercut their arguments.

The state defendants argue that plaintiffs lack standing because the FAQs page at issue does not directly affect the plaintiffs. Counsel for EUSD at the hearing, in contrast, twice said that EUSD adopted AR 5145.3 precisely because of the state's FAQs page. First, at the outset of the hearing counsel was asked, "Is the school district's position that this rule that you've adopted that says that parents are not entitled to notice, that that rule is mandated by the state?" Counsel responded, "Yes, we are taking that position." Hearing Transcript at 3. Later, a similar question was asked and the same answer was given. "The Court: Okay. So to cut to the chase, you're telling me that this rule exists because the state is telling the school board that they must do this; am I correct? EUSD Attorney: Yes, your honor." Hearing Transcript at 37.

The state defendants maintain that the State Board of Education FAQs publication is not a state law but only attempts to describe state law. EUSD, on the other hand, considers itself bound by the statements in the FAQs publication as a matter of law. Suggesting that EUSD is correct in its characterization, the Attorney General for the State of California recently relied on the FAQs publication in suing a school district for violating state law.

The Attorney General filed a lawsuit against another California public school district and obtained a temporary restraining order stopping school employees from disclosing gender identification information to the parents of students. *See People v. Chino Valley Unified School Dist.*, San Bernardino Superior Court Case No. CIV SB 2317301 (filed Aug. 28, 2023). In its Complaint, the Attorney General asserts that the school district is violating state law by adopting a policy of notifying parents whenever a student requests to be identified as a gender other than the student's biological sex or gender listed on a birth certificate. Complaint, ¶67. As part of the Complaint filed against the Chino Valley Unified School District, the Attorney General specifically refers to the same FAQs publication identified in this proceeding. The Complaint asserts, "the California Department of Education has issued statewide guidance since at least 2014, generally

recommending that school officials and staff members not 'out' student to their parents or guardians against the student's wishes. (Cal. Dept. of Ed., Frequently Asked Questions, https://www.cde.ca.gov/re/di/eo/faqs.asp.)." Complaint, ¶ 37 (emphasis added).

The state Board of Education, the state Department of Education, the Superintendent of Public Instruction and the Attorney General are all arms of the State of California. The state defendants do not argue otherwise. They agree that "[i]n California, the 'State' includes state offices, officers, departments, boards and agencies." *See* State-Level Defendants Mot., Dkt. 25 at 9 (citing Cal. Govt. Code § 900.6). The attorney for EUSD asserts that the District is compelled by the State to adopt and enforce AR 5145.3 based on the State's FAQs page. The Attorney General, another arm of the state, is currently suing another school district for not following the State's FAQs page and its rationale. With no evidence to the contrary at this point, it must be concluded that the State is the driving force behind EUSD's alleged violations of plaintiffs' constitutional rights. If the plaintiffs succeed in proving their case, a permanent injunction against the state defendants will be necessary to accord full relief. Therefore, plaintiffs have Article III standing.

***17** The state defendants also assert that they enjoy Eleventh Amendment immunity from suit. Insofar as the defendants are sued in their official capacities they are treated as arms of the State of California, and because the state has not waived its immunity from suit, the state defendants are correct. However, to the extent that plaintiffs seek only prospective injunctive relief to remedy an ongoing violation of federal or constitutional law, there is no immunity. *See* *Ex parte Young*, 209 U. S. 123, 159-160, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Here, the state defendants named are not arbitrarily chosen governmental officers with only general responsibilities but are the officers and board members responsible for and empowered to change state education policy. "A plaintiff seeking injunctive relief in a § 1983 action against the government 'is not required to allege a named official's personal involvement in the acts or omissions constituting the alleged constitutional violation.' Instead, 'a plaintiff need only identify the law or policy challenged as a constitutional violation and name the official within the entity who can appropriately respond to injunctive relief.' " *Riley's Am. Heritage Farms*, 32 F.4th at 732 (citation omitted). Therefore, the *Ex parte Young* exception applies and the motion to dismiss on the basis of Eleventh Amendment immunity is denied. *Berger v. N.C. State Conf. of the NAACP*, ___ U.S. ___, 142 S. Ct. 2191, 2197, 213 L.Ed.2d 517 (2022) ("So usually a plaintiff will sue the individual state officials most responsible for enforcing the law in question and seek injunctive or declaratory relief against them." (citation omitted)); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

B. ***Escondido Union School District Defendants***

The EUSD defendants also move to dismiss for failure to state a claim. Additionally, they seek qualified immunity. Rule 12(b)(6) permits dismissal for "failure to state a claim upon which relief

can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) may occur where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable, plausible claim. In contrast, a complaint may survive a motion to dismiss if, taking all well pled factual allegations as true, it contains enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

The EUSD defendants repeat their arguments regarding the merits from the preliminary injunction briefing, claiming that EUSD's policies are consistent with state and federal law. As a preliminary matter, that is not wholly accurate, but the question is to be fully and finally determined later in the case. These are issues of law and fact that are to be decided later on a fuller record. The claims as articulated in the Complaint, at the time the Complaint was filed, describe plausible claims of violations of constitutional rights of free speech and free exercise sufficient to merit further proceedings. There is a sufficient question to raise plausible claims for relief and permit the claims to proceed. *See* generally discussion on likelihood of success on the merits, *supra.* The EUSD defendants will have the opportunity to assert their defenses more forcefully and completely on summary judgment or at trial. However, at this juncture, the motion to dismiss for failure to state a claim is denied.

Finally, the EUSD defendants ask for a ruling that they are entitled to qualified immunity. Certainly, "a plaintiff seeking injunctive relief for an ongoing First Amendment violation (e.g., a retaliatory policy) may sue individual board members of a public school system in their official capacities to correct the violation." *Riley's Am. Heritage Farms*, 32 F.4th at 732. The EUSD defendants posit that "[t]here is no possibility that the school employees could have known that complying with their employer's policy could have violated the Plaintiffs' right to free speech or religion." *See* School Employee Defendants' Mot., Dkt 17 at 18-19. There is no evidence presented with the motion to support this factual assertion. The EUSD defendants, or some of them, may be entitled to qualified immunity after a motion for summary judgment or a trial on the merits. Without testimony on a full record, however, qualified immunity in this case is unwarranted. Therefore, the motion to dismiss and for qualified immunity is denied.

C. *Objections to judicial notice of miscellaneous documents*

***18** All parties make objections to miscellaneous documents attached to, or made supplements to, their pleadings. The objections are overruled.

VI. CONCLUSION

A request to change one's own name and pronouns may be the first visible sign that a child or adolescent may be dealing with issues that could lead to gender dysphoria or related coexisting mental-health issues. Communicating to a parent the social transition of a school student to a new gender — by using preferred pronouns and non-conforming dress — is called discrimination/

harassment by the defendants, despite having little medical or factual connection to actual discrimination or harassment. Plaintiffs Elizabeth Mirabelli and Lori Ann West have represented in their pleadings that they are committed to treating all transgender or gender diverse children with kindness, respect, and love. They are entitled to preliminary injunctive relief from what the defendants are requiring them to do here, which is to subjugate their sincerely-held religious beliefs that parents of schoolchildren have a God-ordained right to know of significant gender identity-related events. There are, no doubt, some teachers that have no disagreement with AR 5145.3. This injunction does no violence to their constitutional rights.

Parental involvement in essential to the healthy maturation of schoolchildren. The Escondido Union School District has adopted a policy without parent input that places a communication barrier between parents and teachers. Some parents who do not want such barriers may have the wherewithal to place their children in private schools or homeschool, or to move to a different public school district. Families in middle or lower socio-economic circumstances have no such options. For these parents, the new policy appears to undermine their own constitutional rights while it conflicts with knowledgeable medical opinion. An order enjoining the new district policy is in the better interests of the entire community, as well as the plaintiff teachers.

The school's policy is a trifecta of harm: it harms the child who needs parental guidance and possibly mental health intervention to determine if the incongruence is organic or whether it is the result of bullying, peer pressure, or a fleeting impulse. It harms the parents by depriving them of the long recognized Fourteenth Amendment right to care, guide, and make health care decisions for their children. And finally, it harms plaintiffs who are compelled to violate the parent's rights by forcing plaintiffs to conceal information they feel is critical for the welfare of their students -- violating plaintiffs' religious beliefs.

THEREFORE, IT IS ORDERED THAT:

1. The Plaintiffs' Motion for Preliminary Injunction is GRANTED. The Escondido Union School District Defendants, the State Defendants, and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them, and those who gain knowledge of this injunction order, or know of the existence of this injunction order, are enjoined from enforcing against Plaintiffs Mirabelli or West, EUSD AR 5145.3 or the associated official policy described in the California Department of Education's FAQs page on gender identity-related disclosures by teachers to parents, and are to restrain any governmental employee or entity from taking any adverse employment actions thereupon against Plaintiffs Mirabelli or West, until further Order of this Court.

***19** 2. The EUSD Defendants' Motion to Dismiss is DENIED (Dkt Nos. 7 & 17).

3. The State-Level Defendants' Motion to Dismiss is DENIED (Dkt No. 25).

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2023 WL 5976992

STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Jane Doe

v.

Manchester School District
and
School Administrative Unit #37

Docket No. 216-2022-CV-00117

ORDER

The plaintiff brought this action alleging that the transgender student policy of the Manchester School District violates the plaintiff's constitutional and statutory parental rights. The defendants now move to dismiss. The plaintiff objects. For the reasons set forth below, the defendants' motion to dismiss is GRANTED.

Factual Background

The Amended Complaint alleges the following facts, which the Court assumes to be true for purposes of this motion. On February 8, 2021, the Manchester School District adopted Policy 100.1, titled Transgender and Gender Non-Conforming Students (hereinafter "the Policy"). (See Am. Compl. ¶ 24; Ex 1.) The Policy provides:

> District policy requires that all programs, activities, and employment practices be free from discrimination based on sex, sexual orientation, or gender identity. This policy is designed in keeping with these mandates to create a safe learning environment for all students and to ensure that every student has equal access to all school programs and activities. . . . In all cases, the goal is to ensure the safety, comfort, and healthy development of the transgender or gender nonconforming

> student while maximizing the student's social integration and minimizing stigmatization of the student.

(Am. Compl., Ex. 1, Section I.) Of particular relevance to the plaintiff's claims, the Policy further provides that:

> The Board recognizes a student's right to keep private one's transgender status or gender nonconforming presentation at school. Information about a student's transgender status, legal name, or gender assigned at birth also may constitute confidential information. School personnel should not disclose information that may reveal a student's transgender status or gender nonconforming presentation to others, including parents and other school personnel, unless legally required to do so or unless the student has authorized such disclosure. Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information.
>
> When contacting the parent or guardian of a transgender or gender nonconforming student, school personnel should use the student's legal name and the pronoun corresponding to the student's gender assigned at birth unless the student, parent, or guardian has specified otherwise. Any student who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative to meet the need for that individual's privacy, regardless of gender identity.

(Id., Section III.A.) The Policy was derived from a model policy that was drafted, circulated, and recommended by the New Hampshire School Boards Association, an organization to which the defendants pay dues with funds provided by taxpayers. (Am. Compl. 25.) On March 14, 2022, the District amended the Policy, making the following changes (deletions in ~~strikethrough~~ format; additions in **[bold and in brackets]**):

> The Board recognizes a student's right to keep private one's transgender status or gender nonconforming presentation at school. Information about a student's transgender status, legal name, or gender assigned at birth also may constitute confidential information. School personnel should not disclose information that may reveal a student's transgender status or gender nonconforming presentation to others~~,~~ ~~including parents and other school personnel,~~ unless legally required to do so or unless the student has authorized such disclosure.

> Transgender and gender nonconforming students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information. **[Nothing herein shall be construed to change the obligation of the school to take action when student safety is concerned.]**
>
> When ~~contacting the parent or guardian of~~ **[referring to]** a transgender or gender nonconforming student, school personnel should use the student's legal name and the pronoun corresponding to the student's gender assigned at birth unless the student, parent, or guardian has specified otherwise. Any student who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative to meet the need for that individual's privacy, regardless of gender identity.

(Am. Compl., Ex. 2, Section III.A.)

The plaintiff's minor child (M.C.) attends a school in the Manchester School District. (Am. Compl. ¶ 48.) In the fall of 2021, the plaintiff learned that M.C. had asked teachers and fellow students to refer to M.C. by a name traditionally associated with a gender different from their gender as assigned at birth. (Id. ¶ 49.) The plaintiff reached out to M.C.'s guidance counselor and informed her that she would like the school to continue to treat M.C. according to M.C.'s birth gender, address M.C. by their given name, and address M.C. using the pronouns traditionally associated with their biological sex. (Id. ¶ 50.)

While some of M.C.'s teachers communicated their willingness to comply with the plaintiff's wishes, (id. ¶¶ 51–52), the school's principal sent the plaintiff an email in which he stated:

> While I respect and understand your concern, we are held by the District policy as a staff. I have quoted our district policy below, which outlines the fact that we cannot disclose a student's choice to parents if asked not to. If [M.C.] insists on being called [M.C.'s desired name] as a staff we have to respect that according to the policy or unfortunately we can be held accountable despite parents' wishes.

(Id. ¶ 53.) Following this exchange, M.C. informed the plaintiff that they had asked school personnel to use their birth name and pronouns. (Id. ¶ 54.) School personnel made similar representations to the plaintiff. (Id. ¶ 55.) Nevertheless, the plaintiff has brought this action claiming that the continued existence of the policy "means that [she] cannot know whether representations by District personnel are factually true, or whether the District personnel are simply following the Policy by misleading and/or lying to [her] about M.C.'s in-school gender expression and the District's response thereto." (Id. ¶ 56.) Count I alleges that by promulgating and enforcing the Policy, the defendants are violating her parental rights under Part I, Article 2 of the New Hampshire Constitution. Count II alleges that the Policy is *ultra vires*. Count III alleges that the Policy violates the Family Educational Rights and Privacy Act (FERPA). Finally, Count IV alleges that the Policy violates the Protection of Pupil Rights Act (PPRA). The plaintiff seeks a declaratory judgment, permanent injunction, nominal damages, and attorneys' fees. (Id. ¶ 1; Prayer for Relief.)

Analysis

In ruling on a motion to dismiss, the Court determines "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court rigorously scrutinizes the facts contained on the face of the complaint to determine whether a cause of action has been asserted. In re Guardianship of Madelyn B., 166 N.H. 453, 457 (2014). The Court "assume[s] the truth of the facts alleged by the plaintiff and construe[s] all reasonable inferences in the light most favorable to the plaintiff." Lamb v. Shaker Reg'l Sch. Dist., 168 N.H. 47, 49 (2015). The Court "may also consider documents attached to the plaintiff's pleadings, or documents the authenticity of which are not disputed by the

parties[,] official public records[,] or documents sufficiently referred to in the complaint." Beane v. Dana S. Beane & Co., P.C., 160 N.H. 708, 711 (2010). "If the facts do not constitute a basis for legal relief, [the Court will grant] the motion to dismiss." Graves v. Estabrook, 149 N.H. 202, 203 (2003).

The defendants first argue that Count I of the Amended Complaint should be dismissed because the Policy does not infringe the plaintiff's right to parent under Part I, Art. 2 of the New Hampshire Constitution. Specifically, while the defendants concede that the plaintiff has a fundamental right to raise her child as she wishes, they assert that the plaintiff's right to parent does not include the ability to direct how the school teaches her child. In response, the plaintiff argues that by preventing the free flow of information between parents and the school concerning a child's preferred name, gender identity, or social transitioning status, the Policy infringes on the fundamental right to parent. She thus asserts that the policy is subject to strict scrutiny, which it cannot survive.

The Plaintiff invokes both the State and Federal Constitutions. (See Am. Compl. ¶ 2.) Accordingly, the Court will address the State Constitutional claim first, citing to federal law to aid in its analysis. See In re Nelson, 149 N.H. 545, 547 (2003) (citing State v. Ball, 124 N.H. 226, 231–33 (1983)).

"The right of parents to raise and care for their children is a fundamental liberty interest protected by Part I, Article 2 of the New Hampshire Constitution." In re R.A., 153 N.H. 82, 90 (2005). "Similarly, the United States Supreme Court has recognized that the 'Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to make decisions concerning the care, custody, and control of their children.'" Id. (quoting Troxel v. Granville, 530 U.S. 57, 66 (2000)). "Parental rights have been found

to operate against the State, against third parties, and against the child." Id. (quotation omitted). However, the right to make decisions about the care, custody, and control of one's children is not absolute. Reardon v. Midland Community Schools, 814 F. Supp. 2d 754, 768 (E.D. Mich. 2011) (citing Prince v. Massachusetts, 321 U.S. 158, 165–66 (1944)); see also Arnold v. Bd. of Education, 880 F.2d 305, 313 (11th Cir. 1989) ("We recognize that parental autonomy to direct the education of one's children is not beyond limitation. When parents enroll their children in public schools they cannot demand that the educational program be tailored to their individual preferences."). For example, "[w]hile parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child." Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005). "Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or . . . a dress code, these issues of public education are generally committed to the control of state and local authorities." Id. at 395–96.

By its plain terms, the Policy encourages respect for student wishes when it comes to when and with whom to share information regarding the student's preferred name and gender identity. Nevertheless, it is not stated in absolute terms. Indeed, the policy specifically contemplates that it shall not prevent school officials from taking action when student safety is concerned. Even crediting the plaintiff's assertion that the policy would allow school officials to affirmatively conceal her child's gender identity preferences from her, the Court rejects the plaintiff's argument that the Policy violates her fundamental right

to parent. See Parents for Privacy v. Barr, 949 F.3d 1210, 1231 (9th Cir. 2020) (affirming district court's conclusion that "Plaintiffs lack a fundamental right to direct Dallas High School's bathroom and locker room policy"); Thomas v. Evansville-Vanderburgh School Corp., 258 Fed.Appx. 50, 52–54 (7th Cir. 2007) (finding no violation of parent's right to direct upbringing of child where the school did not inform mother of school counselor's private conversations with student regarding her problems at school); Doe v. Irwin, 615 F.2d 1162, 1168 (6th Cir. 1980) (finding no deprivation of the liberty interest of parents in the practice of not notifying them of their children's voluntary decisions to participate in the school's voluntary birth control clinic). Indeed, the policy does not encourage or prevent students from sharing information with their parents. Moreover, the Policy does not prevent parents from observing their children's behavior, moods, and activities; talking to their children; providing religious or other education to their children; choosing where their children live and go to school; obtaining medical care and counseling for their children; monitoring their children's communications on social media; choosing with whom their children may socialize; and deciding what their children may do in their free time. In short, the Policy places no limits on the plaintiff's ability to parent her child as she sees fit.

The Court therefore finds that because no fundamental right is infringed, plaintiff's claims do not warrant the application of strict scrutiny. Instead, where a challenged law or regulation does not impinge upon a fundamental right, the Court employs a rational basis review. See Lloyd v. Sch. Bd. of Palm Beach Cty., No. 9:21-cv-81715-KMM, 2021 U.S. Dist. LECIS 210628, at *21–29 (S.D. Fla. Oct. 29, 2021) (finding that because a school mask mandate did not implicate fundamental rights, rational basis review was

appropriate). The rational basis test requires that the Policy only be rationally related to a legitimate governmental interest. State v. Hollenbeck, 164 N.H. 154, 163 (2012). The party challenging the legislation has the burden of proof. Id. This level of review contains no inquiry into whether the Policy unduly restricts individual rights, nor does the Court independently examine the factual basis. Id. Rather, the Court will inquire only as to whether the defendants could reasonably conceive to be true the facts upon which the Policy is based. Id.

Here, the defendants have a legitimate interest in ensuring that "all school district programs, activities, and employment practices be free from discrimination," to "create a safe learning environment for all students," and to "ensure that every student has equal access to all school programs and activities." See (Am. Compl., Ex. 2, Section I); see also RSA 193:38 (prohibiting discrimination in public schools on the basis of gender identity); RSA 193:39 (requiring school districts to develop and implement anti-discrimination plans). The defendants enacted the Policy in furtherance of those interests. As it pertains to student privacy, the Policy notes that a student's transgender status may constitute confidential information and provides that "[s]chool personnel should not disclose information that may reveal a student's transgender status or gender nonconforming presentation to others unless legally required to do so or unless the student has authorized such disclosure." (Am. Compl., Ex. 2, Section III.) The Policy is flexible and acknowledges that the "needs of each transgender or gender nonconforming student must be assessed on a case-by-case basis." (Id. at Section I.) The parties disagree as to whether the Policy properly balances and respects competing rights and adequately protects the interests of transgender students. While competing values and policy

interests may be at stake, "[i]t is not for the court to inquire into the wisdom or unwisdom of such [rulemaking]. Whether the act be wise, reasonable, or expedient, is a legislative and not a judicial question." Cram v. School Bd., 82 N.H. 495, 496 (1927). Here, the School Board considered the various interests involved and specifically acknowledged that differing circumstances may exist for each student. It adopted a policy derived from a model policy recommended by the New Hampshire School Boards Association. (Am. Compl. ¶ 25.) They considered changes and subsequently amended the Policy. (Id. ¶ 43.) The Policy itself sets forth its purpose and is drafted in flexible terms. While the plaintiff may disagree with the Policy, it is rationally related to a legitimate governmental interest and the Court finds, therefore, that it does not offend the constitution.

Accordingly, the defendants' motion to dismiss is GRANTED as to Count I of the Amended Complaint.

The defendants next argue that the school board was authorized to enact the Policy and therefore it is not *ultra vires*. "Administrative rules may not add to, detract from or modify the statute they are intended to implement." Appeal of Mader 2000 Trust, 174 N.H. 520, 525 (2021) (brackets and quotation omitted). "Thus, the determination of whether an administrative rule is *ultra vires* involves statutory interpretation." Id. When interpreting statutes, we ascribe the plain and ordinary meanings to the words used. Id. The interpretation of a statute is a question of law for this Court.

The relevant statutory authority is contained within RSA 193:38–:39, reproduced below:

> **193:38 Discrimination in Public Schools.** – No person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools because of their age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion, or

> national origin, all as defined in RSA 354-A. Any person claiming to be aggrieved by a discriminatory practice prohibited under this section, including the attorney general, may initiate a civil action against a school or school district in superior court for legal or equitable relief, or with the New Hampshire commission for human rights, as provided in RSA 354-A:27-28.
>
> **193:39 Discrimination Prevention Policy Required.** – Each school district and chartered public school shall develop a policy that guides the development and implementation of a coordinated plan to prevent, assess the presence of, intervene in, and respond to incidents of discrimination on the basis of age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion, national origin, or any other classes protected under RSA 354-A.

RSA 193:38 makes discrimination based on sex or gender identity unlawful in public schools. RSA 193:39 requires that each school district develop a discrimination prevention and response plan targeted at, *inter alia*, discrimination based on sex or gender identity. The Policy by its own terms "is designed . . . to create a safe learning environment for all students and to ensure that every student has equal access to all school programs and activities." (Am. Compl., Ex. 2, Section I.) Given the relevant statutory framework, the language of the Policy, and the record before it, the Court finds the plaintiff has failed to set forth a legal or factual basis to support its contention that the policy is *ultra vires*.

As a result, the defendants' motion to dismiss Count II of the Amended Complaint is GRANTED.

Finally, the defendants contend that the plaintiff lacks standing to assert the federal statutes referenced in Counts III and IV of the Amended Complaint, and that even if she did, she has failed to state a claim for relief. In her Amended Complaint, the plaintiff asserts taxpayer standing under Part I, Article 8 of the State Constitution. However, in her objection, the plaintiff fails to address the defendants' arguments as to Counts III and IV.

Part I, Article 8 provides that:

> [A]ny individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer.

Part I, Article 8 confers standing upon a plaintiff who challenges a particular governmental spending action, that is to say, "a plaintiff with standing under Part I, Article 8 can call on the courts to determine whether a specific act or approval of spending conforms with the law." Carrigan v. N.H. Dep't of Health and Human Servs., 174 N.H. 362, 370 (2021). The phrase "has spent, or has approved spending" does not mean "a governmental body's overall management of its operations and functions, including its allocation of appropriations, as opposed to one or more discrete acts or decisions approving certain spending." Id.

The plaintiff first claims that by withholding information regarding a student's preferred name or gender identity, the defendants are violating FERPA, 20 U.S.C. ¶ 1232g(a)(1)(A), by unlawfully withholding "education records." As a threshold matter, it is well settled law that FERPA cannot be enforced through a private cause of action. See Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 69 (1st Cir. 2002) (finding no private cause of action under FERPA and collecting cases holding the same). Nor can FERPA be enforced through an action under 42 U.S.C. § 1983. See Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002). The Court therefore has doubts about whether a plaintiff could use Article 8 taxpayer standing to assert an otherwise unavailable FERPA claim.

In any event, the relevant provision of FERPA requires educational institutions and agencies to make education record available to parents in order to be eligible for federal funding. "Education records" are defined as "those records that are: (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution." 34 CFR § 99.3. Here, contrary to the defendant's assertions, the language of the Policy suggests that some records may be generated about students as a result of the policy. (See Am. Compl., Ex. 2, Section III.B (noting that the permanent pupil record will contain the student's legal name and gender, but that the district is not required to use a student's legal name or gender on other school records or documents).) Nevertheless, as noted above, the Policy does not create an absolute bar to the release of information. Specifically, it states that "[s]chool personnel should not disclose information that may reveal a student's transgender status or gender nonconforming presentation to others unless legally required to do so or unless the student has authorized such disclosure." (Id., Section III.A.) Thus, to the extent any "education records" are actually generated under the Policy, by the Policy's very terms, the defendants are required to treat and handle them in accordance with FERPA. As a result, the Court finds that the Policy does not violate FERPA.

As a result, the defendants' motion to dismiss Count III of the Amended Complaint is GRANTED.

Finally, the plaintiff claims that the Policy violates the PPRA because it requires students to submit to surveys or evaluations concerning their sex behaviors or attitudes without parental consent. The relevant portion of the PPRA provides that:

> No student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information

> concerning . . . sex behavior or attitudes . . . without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

20 U.S.C. § 1232h(b)(3). Likewise, the associated regulations require that

> (a) No student shall be required . . . to submit without prior consent to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning . . . (3) Sex behavior and attitudes.
>
> (b) As used in paragraph (a) of this section, prior consent means . . . (2) Prior written consent of the parent or guardian, if the student is an unemancipated minor.

34 CFR § 98.4

Nothing in the Policy mandates or suggests that school personnel should survey or question students regarding their preferred names or gender identities. Nor does the Policy mandate or suggest students submit to psychiatric examination, testing or treatment without the consent of a parent. Rather, the Policy establishes that should a student discuss with or express to the school a preference for a name or gender identity other than that assigned at birth, then the school would honor that choice and, to the extent allowable by law, protect the confidentiality of that information. As a result, the Court finds that the Policy does not violate the PPRA.

Accordingly, the defendants' motion to dismiss COUNT IV of the Amended Complaint is GRANTED.

Conclusion

Consistent with the foregoing, the defendants' motion to dismiss the Amended Complaint is GRANTED.

SO ORDERED.

September 5, 2022
Date

Amy B. Messer
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 09/06/2022

2023 WL 4848509
Only the Westlaw citation is currently available.
United States District Court, S.D. Ohio, Eastern Division.

PARENTS DEFENDING EDUCATION, Plaintiff,
v.
OLENTANGY LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et al., Defendants.

Case No. 2:23-cv-01595
|
Signed July 28, 2023

Synopsis

Background: Organization of students and parents brought action against public school district board of education and district officials challenging under the First and Fourteenth Amendments board's policies prohibiting students from engaging in harassment or bullying based on the personal characteristics of other students, from using their personal devices to send messages that threaten, humiliate, harass, embarrass, or intimidate other students, and from intentionally misgendering transgender students. Organization moved for preliminary injunction.

Holdings: The District Court, Algenon L. Marbley, Chief Judge, held that:

members of organization had standing to bring preenforcement First Amendment challenge to policies;

policies were permissible regulations of discriminatory student speech;

policies did not impermissibly compel student speech;

policies were not impermissible view-point based restrictions;

policies were not facially overbroad under the First Amendment;

policies did not violate parents' Fourteenth Amendment right to make decisions concerning the care, custody, and control of their children; and

balance of harms and public interest factors did not support issuance of preliminary injunction.

Motion denied.

Procedural Posture(s): Motion for Preliminary Injunction.

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OPINION & ORDER

ALGENON L. MARBLEY, CHIEF UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** The Olentangy Local School District ("OLSD" or "the School District") is the fourth largest school district in Ohio, operating sixteen elementary schools, five middle schools, and four high schools for students in southern Delaware and Franklin Counties. The Board of Education for the School District has issued several policies regarding harassment, bullying, and the use of personal communication devices that are intended to "maintain an education and work environment that is free from all forms of unlawful harassment." To that end, Policy 5517 prohibits students from engaging in discriminatory harassment or bullying based on the personal characteristics of other students, such as their race, national origin, sex, disability, religion, or ancestry. Similarly, Policy 5136 prohibits students from using their personal devices to send messages that threaten, humiliate, harass, embarrass, or intimidate other students. And lastly, the Code of Conduct prohibits speech that involves "discriminatory language," including the intentional misgendering of transgender students—*i.e.*, failing to address a student by their preferred pronouns.

A number of anonymous students and parents take issue with the rule against intentional misgendering and, more broadly, with the prohibitions against discriminatory or harassing language set forth in Policy 5517, Policy 5136, and the Code of Conduct (collectively, "the Policies"). They argue that the Policies require the students to affirm the idea that gender is fluid, contrary to their deeply-held religious beliefs. Plaintiff Parents Defending Education ("PDE"), an organization to which these students and parents belong, has brought suit against Defendants Olentangy Local School District Board of Education ("the Board"); Mark T. Raiff in his official capacity as Superintendent of OLSD; Peter Stern in his official capacity as OLSD's Assistant Director of Equity and Inclusion; Randy Wright in his official capacity as OLSD's Chief of Administrative Services; and Kevin Daberkow, Brandon Lester, Kevin O'Brien, Libby Wallick, and Lakesha Wyse in their official capacities as members of the Board (collectively, "Defendants"). PDE asks this Court to declare OLSD's speech policies unconstitutional in violation of the First and Fourteenth Amendments. (*See generally* Compl., ECF No. 1).

Now before this Court is PDE's Motion for Preliminary Injunction (ECF No. 7). Upon consideration of the parties' briefs and the arguments presented at the Fed. R. Civ. P. 65 hearing held on July 24, 2023, this Court **DENIES** the motion because PDE has failed to establish a substantial likelihood of success on its First Amendment claim.

While schoolchildren do not wholly "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), kindergarten through 12th grade ("K-12") educators nevertheless retain "comprehensive authority ... consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507, 89 S.Ct. 733 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *Meyer v. Nebraska*, 262 U.S. 390, 402, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)). Thus, public schools are permitted to proscribe student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 513, 89 S.Ct. 733 (citing *Blackwell v. Issaquena Cnty. Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966)).

***2** The challenged speech policies fit squarely within this carve-out to schoolchildren's First Amendment rights: they prohibit only speech that gives rise to fears of physical or psychological harm, materially affect student performance, substantially disrupt the operation of the school, or create a hostile educational environment. Ultimately, transgender youth are far too often subject to harassment and bullying in public schools. They are threatened or physically injured in schools at a rate four times higher than other students. They are harassed verbally at extraordinarily high rates. More than one in five attempt suicide. *See* Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017*, 68 MORBIDITY AND MORTALITY WEEKLY REP. 67 (2019). Allowing speech that

creates a hostile environment for transgender students can have devastating consequences—reinforcing feelings of isolation and inferiority, imposing substantial psychological injuries that result in decreased school attendance and performance, and heightening the risk of serious physical harm. *See id.*; L.M. Bogart et al., *Peer victimization in fifth grade and health in tenth grade*, 133 PEDIATRICS 440 (2014). School policies intended to reduce the pervasive harassment of transgender students, in other words, advance public schools' mission of ensuring that all students have an opportunity to learn and grow in an environment "most conducive to speculation, experiment and creation." *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (Frankfurter, J., concurring).

Nor do the likely merits of the Fourteenth Amendment claim favor PDE. The fundamental right of parents to direct the care, upbringing, and education of their children does not encompass a right "generally to direct *how* a public school teaches their child" or how the school disciplines their child. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005) (emphasis in original). This Court, mindful that "[b]y and large, public education in our Nation is committed to the control of state and local authorities," *Goss v. Lopez*, 419 U.S. 565, 578, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (citation omitted), declines PDE's invitation to second-guess Defendants' efforts to combat harassment in the Olentangy Local School District.

II. BACKGROUND

The underlying facts of this case are largely undisputed. *See also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981) ("[F]indings of fact and conclusions of law made by a court granting [or denying] a preliminary injunction are not binding at trial on the merits." (citations omitted)).

A. The Challenged Policies

At issue are three of the School District's policies governing student conduct and speech: Policy 5517; Policy 5136; and the Code of Conduct. This Court sets out the relevant provisions of the Policies in full.

Policy 5517. The "anti-harassment" policy, which was first adopted in May 2011 and most recently revised on April 10, 2023, prohibits harassment "based on race, color, national origin, sex (including sexual orientation and gender identity), disability, age (except as authorized by law), religion, ancestry, or genetic information (collectively, 'Protected Classes') that are protected by Federal civil rights law." (Pl.'s Ex. A at 1, ECF No. 7-1). The policy defines harassment as:

> [A]ny threatening, insulting, or dehumanizing gesture, use of technology, or written, verbal, or physical conduct directed against a student or school employee that:
>
> A. places a student or school employee in reasonable fear of harm to his/her person or damage to his/her property;
>
> B. has the effect of substantially interfering with a student's educational performance, opportunities, or benefits, or an employee's work performance; or
>
> C. has the effect of substantially disrupting the orderly operation of a school.

(*Id.* at 2–3). The purpose of this policy is "to maintain an education and work environment that is free from all forms of unlawful harassment." (*Id.* at 1).

The policy also includes a provision prohibiting bullying. The provision defines bullying as "any unwanted and repeated written, verbal, or physical behavior, including any threatening, insulting, or dehumanizing gesture, by an adult or student, that is severe or pervasive enough to create an intimidating, hostile, or offensive educational or work environment; cause discomfort or humiliation; or unreasonably interfere with the individual's school or work performance or participation." (*Id.* at 2). It then explains that "[b]ullying rises to the level of unlawful harassment when one (1) or more persons systematically and chronically inflict physical or psychological distress on one (1) or more students or employees and that bullying is based upon one (1) or more Protected Classes, that is, characteristics that are protected by Federal civil rights laws." (*Id.*).

***3** Policy 5136. OLSD also maintains a policy on students' use of personal communication devices ("PCDs"), such as cellphones, laptops, and tablets on- and off-campus. Among other requirements, students are prohibited from using a PCD:

> In any way that might reasonably create in the mind of another person an impression of being threatened, humiliated, harassed, embarrassed or intimidated. In particular, students are prohibited from using PCDs to ... transmit material that is threatening, obscene, disruptive, or sexually explicit or that can be construed as harassment or disparagement of others based upon their race, color, national origin, sex (including sexual orientation/transgender identity), disability, age, religion, ancestry, or political beliefs.

(Pl.'s Ex. B at 2, ECF No. 7-1).

Code of Conduct. There are two provisions of the Code of Conduct, set out in the OLSD 2022–23 High School Student Handbook, that are at issue in this case. First, the Code includes a section on "Hazing, Harassment, Intimidation, Bullying, and Sexual Harassment," in which a single definition is set out for harassment, intimidation, and bullying:

> Any intentional written, verbal, electronic, or physical act that a student has exhibited toward another particular student or students more than once and the behavior causes mental or physical harm to the other student(s) and is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for the other student(s).

(*Id.* at 16–17). A separate provision of the Code of Conduct prohibits the use of obscene or discriminatory language, with discriminatory language "defined as verbal or written comments, jokes, and slurs that are derogatory towards an individual or group based on one or more of the following characteristics: race, color, national origin, sex (including sexual orientation and transgender identity), disability, age, religion, ancestry, or genetic information." (*Id.* at 9).

These provisions are "in effect while students are under the authority of school personnel or involved in any school activity"—*i.e.*, not just when they are at school, but also when they are riding school buses or participating in off-campus "interscholastic competitions, extracurricular events, or other school activities or programs." (*Id.* at 8). They extend to "[m]isconduct by a student that occurs off school district property but is connected to activities or incidents that have occurred on school district property" or is "directed at a district official or employee." (*Id.*).

The Policies reflect the School District's efforts to combat discrimination in its schools and are patterned on federal anti-discrimination laws. They were modified in 2013 to include provisions prohibiting discrimination based on gender identity (in addition to other personal identity characteristics already included). Since then, however, the Policies have never been enforced to punish a student for speech directed at or about transgender students. As of May 3, 2023, there were approximately 50 transgender students currently enrolled in Olentangy schools, out of 23,640 total. *See Olentangy Schools Enrollment Report – May 3, 2023*, OLENTANGY LOC. SCH. DIST., https://perma.cc/HJ5Q-4QYA.

B. The Anonymous Parent's Concern

***4** In February 2023, a parent emailed OLSD officials raising a concern that their child could be disciplined pursuant to the Policies for referring to a fellow student using pronouns different from what that student prefers. The parent asked:

> If my devoutly Christian child who believes in two biological genders male/female and that those genders are decided at conception by God, would they be forced to use the pronouns that a transgender child identifies with or be subject to reprimand from the district if they refuse to do so?

(Pl.'s Ex. S, ECF No. 7-2 at 13). The parent was informed by the School District's counsel that "[w]hile [the] children certainly [may] maintain religious rights of freedom at school, those rights do not relieve them of the obligation to comply" with school policies. (*Id.*). As such, "[a] student purposefully referring to another student by using gendered language they know is contrary to the other student's identity would be an example of discrimination under Board Policy." (*Id.*). When the parent sought further clarification on the scope of the policies, asking if their child would be disciplined for expressing the"religious beliefs that marriage is between a man and a woman OR that homosexuality is a sin," the School District noted that students would not be disciplined for their religious beliefs. (*Id.*). Thus, with respect to the parent's initial question about pronouns, a student would be permitted to seek accommodations and "avoid using pronouns where doing so would be contrary to [their] religious beliefs." (*Id.*).

C. Procedural Background

PDE, a nationwide membership organization whose members include students enrolled in the School District and parents whose children attend OLSD schools, filed suit in this Court on May 11, 2023. That same day, PDE requested a preliminary injunction, relying on declarations from four pseudonymous parents, each of whom represents that their child or children is enrolled in an Olentangy school and has sincerely-held religious or scientific beliefs that biological sex is immutable and that individuals cannot transition from one sex to another. (Mot. for PI, ECF No. 7; *see, e.g.*, Decl. of Parent A ¶¶ 4, 8, ECF No. 7-3). The parents further explain that their children "wish[ ] to use pronouns that are consistent with a classmate's biological sex, rather than the classmate's 'preferred pronouns' " as an expression of "their deeply held views," but refrain from doing so out of self-censorship. (*See, e.g.*, Decl. of Parent A ¶¶ 11, 13–14, ECF No. 7-3).

III. STANDARD OF REVIEW

In assessing the need for a preliminary injunction, this Court considers whether the plaintiff has established that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (citations omitted). To establish a strong likelihood of success, the plaintiff need not "establish his right to an injunction wholly without doubt," *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 924 (6th Cir. 1978) (internal quotation marks and citation omitted), nor "prove his case in full." *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (quoting *Camenisch*, 451 U.S. at 395, 101 S.Ct. 1830). The "strong likelihood" standard "requires a showing greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance." *Clark v. A&L Homecare and Training Ctr.*, 68 F.4th 1003, 1011 (6th Cir. 2023).

***5** While a strong likelihood of success on the merits is considered crucial at the preliminary injunction stage, the factors are generally to be balanced rather than treated as prerequisites. *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 459 (6th Cir. 1997); *see also Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 400 (6th Cir. 1997) (noting that "[n]o single factor will be determinative as to the appropriateness of equitable relief" (citation omitted)). But "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.' " *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012)). This is especially true in the First Amendment context. *See Fischer v. Thomas*, 52 F.4th 303, 307 (6th Cir. 2022).

Ultimately, a preliminary injunction is considered an "extraordinary remedy," intended "to maintain the status quo pending determination of an action on its merits." *Blaylock v. Cheker Oil Co.*, 547 F.2d 962, 965 (6th Cir. 1976) (citations omitted).

IV. LAW & ANALYSIS

PDE asserts that it is likely to succeed on the merits because the Policies unconstitutionally compel speech, are impermissible viewpoint- and content-based restrictions on speech, and are overbroad. It suggests that the remaining preliminary injunction factors favor it as well. Defendants, on the other hand, argue that PDE lacks standing to challenge the Policies in the first instance and maintain that the Policies are permissible regulations, which do not compel speech, are not content- or viewpoint-based, are not overbroad, and do not deprive parents of any fundamental rights.

A. Likelihood of Success on the Merits

1. Standing

Article III of the Constitution imposes strict limits on the jurisdiction of federal courts. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The "case-or-controversy" requirement of Article III requires all plaintiffs bringing suit in federal court to first establish standing, *i.e.*, to show that they have suffered "(1) an injury in fact that is (2) fairly traceable to the defendant's conduct and (3) likely to be redressed by a favorable judicial decision." *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 555 (6th Cir. 2021) (citing *Lujan*, 504 U.S. at 560–61, 112 S.Ct. 2130). At the preliminary injunction stage, a plaintiff need not establish standing beyond doubt, but merely a substantial likelihood that she will be able to do so. *See id.* at 557, 112 S.Ct. 2130; *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 256 n.4 (6th Cir. 2018).

When an organization brings suit, it may establish standing on its own or associational standing on behalf of its members. *See Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016). Associational standing exists "when [the] members [of the organization] would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)).

In effect, Defendants assert, for two and a half reasons, that PDE cannot establish associational standing because its members do not have standing to sue in their own right.[1] Defendants first argue that PDE's members have not suffered an injury in fact, because none of the students whose parents have filed declarations has been disciplined for violating any of the Policies. (*See generally* OLSD Resp. in Opp'n at 5–6, ECF No. 13). They also argue that this litigation, even if successful, would not provide a remedy that suitably redresses the alleged harm, because the Policies are compelled by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88. (*See id.* at 6–8). And, in a footnote, Defendants suggest that this Court lacks jurisdiction over anonymous or pseudonymous parties, and thus over this case. (*Id.* at 6 n.1). But for the reasons that follow, this Court rejects Defendants' contentions and finds that PDE has sufficiently established standing at this preliminary stage.

1 Defendants do not suggest that PDE's claims are not germane to its mission or that this action requires the participation of individual members, and nothing in the record suggests that PDE

has not met those requirements of associational standing. *See* *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004).

***6** *First*, Defendants' injury in fact argument appears to ignore the possibility of pre-enforcement challenges. They conclude that, because "students of Parents A-D *self-censor* out of a purported concern of disciplinary action" and thus have not yet been subject to disciplinary action, "there has been no injury to PDE vis-à-vis Parents A-D with respect to their children." (*Id.* at 6) (emphasis in original). But plaintiffs need not wait to be punished or prosecuted to bring a facial challenge, especially where they have refrained from engaging in certain conduct for fear of punishment. *See* *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) ("It is well-settled that a chilling effect on one's constitutional rights constitutes a present injury in fact." (collecting cases)). Instead, in the First Amendment context, plaintiffs can bring a pre-enforcement challenge if: "(1) they intend to engage in expression that the Free Speech Clause arguably protects, (2) their expression is arguably proscribed by the challenged [rules], and (3) they face a credible threat of enforcement from those [r]ules." *Fischer*, 52 F.4th at 307 (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 162, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014)).

All three elements have been established here. As the declarations provided by PDE show,[2] the children of Parents A-D wish to engage in speech that the Free Speech Clause arguably protects. (*See, e.g.*, Decl. of Parent A ¶ 10, ECF No. 7-3). The School District has indicated that, unless the students seek religious accommodations, misgendering students will be considered to have engaged in discriminatory speech in violation of the Policies, which the School District claims to "vigorously enforce." (Pl.'s Ex. A at 1, ECF No. 7-1; *see* Pl.'s Ex. S, ECF No. 7-2 at 13). And, as to a credible threat of enforcement, "the first and most important factor is whether the challenged action chills speech," *Fischer*, 52 F.4th at 307 (citing *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016)), which Defendants do not deny has occurred. (*See* OLSD Resp. in Opp'n at 6, ECF No. 13). Moreover, the School District's refusal to disavow enforcement of the Policies lends further support to the proposition that there is a credible threat of enforcement. *See* *Kiser v. Reitz*, 765 F.3d 601, 608–09 (6th Cir. 2014); *Platt v. Bd. of Comm'rs on Grievances & Discipline of the Ohio Supreme Ct.*, 769 F.3d 447, 452 (6th Cir. 2014).

2 Note also that PDE's "pseudonymity" attack, which argues that "federal courts lack jurisdiction over [ ] unnamed parties," is misplaced. (*See generally* OLSD Resp. in Opp'n at 6 n.1, ECF No. 13) (quoting *Citizens for a Strong Ohio v. Marsh*, 123 F. App'x 630, 637 (6th Cir. 2005)). While PDE has submitted declarations of pseudonymous parents, there is no obfuscation of identity here: PDE itself is the plaintiff.

In short, PDE has sufficiently alleged that its members have suffered an injury in fact—its members have alleged "subjective chill" in addition to "some other indication of imminent enforcement." *McKay*, 823 F.3d at 869 (citation omitted); *cf.* *Morrison v. Bd. of Educ. of Boyd Cnty.*, 521 F.3d 602, 617 (6th Cir. 2008) (Moore, J., dissenting) (noting that other "circuits have held ... that a chill

on an individual's ability to exercise his or her right to free speech is a constitutional injury-in-fact" even without a credible threat of enforcement); *303 Creative LLC v. Elenis*, —— U.S. ——, 143 S. Ct. 2298, —— L.Ed.2d —— (2023) (assuming standing where the threat of enforcement relied on a chain of speculative events).

Second, a plaintiff might lack standing if the injury in fact she has suffered is not redressable. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106–09, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Here, Defendants suggest that the Policies are compelled by federal antidiscrimination laws, in particular Title IX, [3] such that a decision from this Court in favor of PDE would not absolve Defendants of their obligations under Title IX to protect transgender students from discrimination and harassment on the basis of sex.

[3] As Defendants acknowledge, the School District is not currently bound to implement the "Dear Educator" letter issued by the U.S. Department of Education ("DOE"), which advised schools that "Title IX's protection against sex discrimination encompasses discrimination based on sexual orientation and gender identity." *See generally Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807 (E.D. Tenn. 2022); *see also* Enforcement of Title IX of the Educational Amendments of 1972 With Respect to Discrimination on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021).

***7** Title IX holds that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" (subject to certain exceptions). 20 U.S.C. § 1681. Whether this prohibition against discrimination "on the basis of sex" covers discrimination on the basis of "gender identity" has not been squarely addressed by the Sixth Circuit. *See Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (noting only that *Bostock*'s modification to the "but-for causation" test "extends no further than Title VII and does not stretch to the ADEA); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (suggesting that Title IX may prohibit discrimination on the basis of gender non-conforming behavior while denying a school district's motion to stay a preliminary injunction imposed by this Court).

Other circuits have divided on this question following the Supreme Court's 2020 decision in *Bostock v. Clayton County*, which held that discrimination on account of gender identity violates Title VII's prohibition against discrimination "because of" an individual's sex. —— U.S. ——, 140 S. Ct. 1731, 207 L.Ed.2d 218 (2020). Noting that "Congress modeled Title IX after Title VI," the Fourth Circuit has extended the *Bostock* interpretation of "on the basis of sex" to the Title IX context. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) ("Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), it guides our evaluation of claims under Title IX." (citations omitted)). Thus, according to *Grimm*, a policy

allowing for discrimination on the basis of a student's transgender identity would violate Title IX. On the other hand, the Eleventh Circuit arrived at the opposite conclusion when confronted with the same question: in *Adams ex rel. Kasper v. School Board of St. Johns County*, it held that the interpretation of the word "sex" set forth in *Bostock* does not apply to Title IX. *See* 57 F.4th 791, 811–14 (11th Cir. 2022) (en banc).

This Court is persuaded that the interpretation of "on the basis of sex" in *Bostock* does extend to the Title IX context. In the first instance, the fact that Title IX was "patterned after" the Civil Rights Act of 1964 strongly favors interpreting it the same way. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979); *see also Grimm*, 972 F.3d at 616. The Eleventh Circuit's decision in *Adams ex rel. Kasper* leaned heavily on its narrow definition of "sex" as "biological sex, i.e., discrimination between males and females." 57 F.4th at 812 (citations omitted). But, as dissents from Judges Wilson and Pryor pointed out, biological sex is not quite as binary as that definition presumes. Instead, the concept of "biological sex" encompasses a multitude of biological components (including gender identity) that often diverge in the same individual; for any given person, some of their biological markers may align with maleness while other markers align with femaleness. *See id.* at 856–57 (Pryor, J., dissenting); *id.* at 821–23 (Wilson, J., dissenting) (discussing intersex individuals); *see also* Jennifer Levi & Kevin Barry, *"Made to Feel Broken": Ending Conversion Practices and Saving Transgender Lives*, 136 HARV. L. REV. 1112, 1117 (2023) (reviewing FLORENCE ASHLEY, BANNING TRANSGENDER CONVERSION PRACTICES: A LEGAL AND POLICY ANALYSIS (2022)). Sometimes, that divergence manifests in obvious physical ways: for example, in intersex individuals whose "reproductive or sexual anatomy [do not] fit into an exclusively male or female (binary) sex classification." *Intersex*, CLEVELAND CLINIC, https://perma.cc/FZW3-4G8C. In others, the divergence in their biological components is still physical, but in less obvious or outwardly apparent ways. *See, e.g.*, F.P. Kruijver et al., *Male-to-female transsexuals have female neuron numbers in a limbic nucleus*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM 2034 (2000) (finding that the neuron numbers of female-to-male transsexual individuals was found to be in the male range, and vice versa for male-to-female transsexuals). Simply put, it is not so simple to define "biological sex" as just male or female. Similarly, it is not so straightforward to identify sex discrimination by reference only to an individual's reproductive organs at birth. Rather, the full scope of discrimination on the basis of "sex" must encompass discrimination on the basis of all the biological markers that comprise an individual's "biological sex"—including *inter alia* their organs, their chromosomes, their hormones, and their gender identity.

***8** Nevertheless, this Court acknowledges that there is some uncertainty as to that conclusion, especially in the absence of binding precedent from the Sixth Circuit. More fundamentally, PDE has challenged the Policies on First Amendment grounds. If PDE is correct on the merits, then its injury *must* be redressable. Federal statutes must give way to the federal Constitution; an unconstitutional action cannot stand simply because it is authorized by a federal law. *Cf. Hollis v.*

Lynch, 827 F.3d 436, 441–42 (5th Cir. 2016). Thus, if the Policies violate the First or Fourteenth Amendments, then they must be enjoined even if the School District is compelled by Title IX to combat harassment on the basis of gender identity.

This Court therefore concludes that there is a substantial likelihood that PDE can establish Article III standing, as the Policies have had a chilling effect accompanied by a credible threat of enforcement—an injury in fact that can be redressed by a decision from this Court. Next, this Court turns to whether PDE has shown a substantial likelihood of success on the merits of its First and Fourteenth Amendment claims.

2. First Amendment

In *Tinker*, the Supreme Court announced the lofty principle that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506, 89 S.Ct. 733. These rights—established in the First Amendment and made applicable to the states through the Fourteenth Amendment—encompass both "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (citation omitted). But they are not unlimited. For while the First Amendment is not a nullity in public schools, *but see* *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, —— U.S. ——, 141 S. Ct. 2038, 2059–61, 210 L.Ed.2d 403 (2021) (Thomas, J., dissenting) (observing that public schools retained "near plenary" authority to discipline students during the era when the Fourteenth Amendment was ratified), K-12 students enjoy a less robust set of free-speech rights "in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506, 89 S.Ct. 733; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (noting that the First Amendment rights of school children "are not automatically coextensive with the rights of adults in other settings").

As such, "[t]he Supreme Court has outlined four categories of student speech that schools may regulate: (1) indecent, offensively lewd, or vulgar speech uttered during a school assembly on school grounds; (2) speech during school or at a school-sponsored event that schools 'reasonably regard as promoting illegal drug use'; (3) 'speech in school-sponsored expressive activities' if the schools' 'actions are reasonably related to legitimate pedagogical concerns'; and (4) on-campus and some off-campus speech that 'materially disrupts classwork or involves substantial disorder or invasions of the rights of others.' " *Kutchinski ex rel. H.K. v. Freeland Cmty. Sch. Dist.*, 69 F.4th 350, 356–57 (6th Cir. 2023) (internal citations omitted). Because the Policies reach speech that is not lewd, does not involve illegal drug use, and is not school-sponsored, they implicate primarily the fourth category.

This Court briefly reviews the caselaw governing this category of restrictions on a student's right to freedom of expression while in school. In *Tinker*, a group of students were suspended from school for wearing black armbands to protest the Vietnam War. This punishment was deemed unconstitutional because the high school had presented "no evidence whatever of [the students'] interference, actual or nascent, with the school's work or of collision with the rights of other students to be secure and left alone." *Tinker*, 393 U.S. at 508, 89 S.Ct. 733. And because the speech did not disrupt school or clash with the rights of other students, and instead implicated only an "undifferentiated fear or apprehension of disturbance," *id.*, the school could not regulate or punish the speech. Since then, *Tinker* has been understood to allow schools to regulate and punish speech that causes a substantial disruption or invades the rights of others.

***9** The potential for racial tension, even without violence, is a common example of what courts have deemed a "substantial disruption." *See, e.g.*, *Barr v. Lafon*, 538 F.3d 554, 565–66 (6th Cir. 2008). Likewise, speech that would interfere with students' educational performance has also been understood to be a substantial disruption. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3rd Cir. 2001). After all, "[t]he primary function of a public school is to educate its students; conduct that substantially interferes with the mission is, almost by definition, disruptive to the school environment." *Id.* Much less litigated or discussed is the second prong of *Tinker*, which allows for the regulation of speech if it invades the rights of others. Very few courts have analyzed the scope of this language, *see Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1177–83 (9th Cir. 2006), *vacated as moot by*, 549 U.S. 1262, 127 S.Ct. 1484, 167 L.Ed.2d 225 (2007), which is generally still viewed as "unclear." *Saxe*, 240 F.3d at 217.

A school need not wait for evidence of disruption caused by the speech at issue to act. Doing so "would place 'school officials ... between the proverbial rock and hard place: either they allow disruption to occur, or they are guilty of a constitutional violation.' " *Barr*, 538 F.3d at 565 (quoting *Lowery v. Euverard*, 497 F.3d 584, 596 (6th Cir. 2007)); *see also D.B. ex rel. Brogdon v. Lafon*, 217 F. App'x 518, 525 (6th Cir. 2007) (per curiam). Instead, the Sixth Circuit has explained that a school speech restriction may be justified where a school has "reasonably forecast that the [prohibited speech] 'would cause material and substantial disruption to schoolwork and school discipline.' " *Kutchinski*, 69 F.4th at 359 (quoting *Barr*, 538 F.3d at 565).

Tinker applies to speech restrictions both on- and off-campus, though the authority of public schools to restrict students' speech off-campus is far more limited. *See Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, —— U.S. ——, 141 S. Ct. 2038, 210 L.Ed.2d 403 (2021). But the precise scope of schools' off-campus authority has not yet been delineated. *Mahanoy* did "not [ ] set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community." *Id.* at 2045. It did make clear, however, that a school's interest in

regulating off-campus speech is at its nadir when the speech does "not identify the school ... or target any member of the school community with vulgar or abusive language," *id.* at 2047; *see also id.* at 2055 (Alito, J., concurring) (noting that "student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern ... is almost always beyond the regulatory authority of a public school"), or does not "take[ ] place during or as part of what amounts to a temporal or spatial extension of the regular school program." *Id.* at 2054 (Alito, J., concurring).

a. The School District's Policies

Having sketched out the scope of *Tinker* and its progeny, this Court now unpacks what the Policies prohibit, reading them in light of ordinary principles of interpretation. *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 617 n.16, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) ("[A] federal court must determine what a state statute means before it can judge its facial unconstitutionality.").

Viewing the Policies as a whole, it is apparent that they do not prohibit all discriminatory speech (*i.e.*, speech that is based on some personal characteristic), but only a subset. Under the Policies, there are, broadly speaking, five categories of prohibited speech. *First*, the Policies prohibit discriminatory speech that creates a threat of physical harm or violence to another student. (*See, e.g.*, Pl.'s Ex. A at 2, 3, ECF No. 7-1) (defining unlawful harassment as speech that "places a student ... in reasonable fear of harm to his/her person"). *Second*, the Policies prohibit speech that "has the effect of substantially interfering with a student's educational performance, opportunities, or benefits." (*Id.*). *Third*, they prohibit discriminatory speech that "has the effect of substantially disrupting the orderly operation of the school." (*See, e.g.*, *id.*; Pl.'s Ex. B at 2, ECF No. 7-1). *Fourth*, they proscribe repeated and persistent speech that creates a hostile (*i.e.*, "intimidating, threatening or abusive") learning environment for students. (Pl.'s Ex. A at 2, ECF No. 7-1; Pl.'s Ex. D at 16, ECF No. 7-1). And *fifth*, they proscribe the use of derogatory language on the basis of an individual's identity, including the intentional misgendering of transgender students. (Pl.'s Ex. D at 9, ECF No. 7-1; *see* Pl.'s Ex. S, ECF No. 7-2).

***10** The first three of these categories fit neatly within the ambit of the first prong of *Tinker*. They proscribe only speech that creates a threat of physical harm, substantial interference with student performance, or substantial disruption to the operation of the school. This is precisely what *Tinker* allows: restrictions on speech that cause substantial disruption to the school or its mission to educate children and keep them safe from physical harm. *See Saxe*, 240 F.3d at 217; *see also Morse v. Frederick*, 551 U.S. 393, 425, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (Alito, J., concurring) ("But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence.").

The fourth and fifth categories pose a closer call. It is an unsettled question whether a hostile environment—created by harassing language, bullying behavior, or discriminatory comments—is enough to constitute a substantial disruption on its own. *See also* *Harper*, 445 F.3d at 1198 (Kozinski, J., dissenting) (noting that "much of what harassment law seeks to prohibit, the First Amendment seems to protect" (citation omitted)). In *Saxe*, for example, then-Judge Alito found that the school's anti-harassment policy was overbroad because "the Policy's 'hostile environment' prong does not, on its face, require any threshold showing of severity or pervasiveness." *Saxe*, 240 F.3d at 217. But the presumption that a hostile environment provides cause for concern only where it is "severe and pervasive" is unfounded. It appears to draw from the standard established by the Supreme Court for when "a public school student may bring suit against a school under Title IX for so-called 'hostile environment' harassment." *Id.* at 205 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 74–75, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992)). Title IX, according to *Davis*, authorizes private damages actions against public school boards for student-on-student harassment where the board has acted with indifference to known harassment "that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650, 119 S.Ct. 1661.

It does not follow, however, that the same high standard for when a school board can be held liable for failing to prevent student-on-student harassment should also dictate when a school may institute policies to restrict such harassment. Consider the categories of speech that schools can regulate, and the reasons why. The Supreme Court has permitted restrictions on lewd speech, for example, in deference to "the social interest in order and morality," *Fraser*, 478 U.S. at 684, 106 S.Ct. 3159 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 746, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978)), and to the school's vital role in inculcating "fundamental values of 'habits and manners of civility' essential to a democratic society." *Id.* at 681, 106 S.Ct. 3159; *see also* *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 272, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (noting public schools' role "as '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' " (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954))). Speech promoting drug use can also be punished, in light of the " 'important—indeed, perhaps compelling' interest" in protecting students against the "physical, psychological, and addictive effects of drugs." *Morse*, 551 U.S. at 407, 127 S.Ct. 2618 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)). There was no suggestion that the schools in these cases would have been exposed to liability for failing to promote the habits and manners of civility, to awaken students to cultural values, or to protect students from addiction, yet each restriction on speech was nevertheless permitted.

***11** From these examples, it becomes clear that, in many circumstances, schools are allowed to restrict student speech even where a failure to do so would not expose the school to liability. It

follows, therefore, that a school's restriction on speech that creates a hostile environment need not be tied to the *Davis* standard for Title IX liability—*i.e.*, "so severe, pervasive, and objectively offensive"—to meet the substantial disruption requirement of *Tinker*.

In fact, this Court concludes that a hostile environment created by discriminatory speech is enough to cause a substantial disruption on its own. A core component of a public school's mission is to educate children; its mission is also to safeguard the wellbeing of its students. This, of course, does not mean that a public school must prevent every "simple act[ ] of teasing and name-calling among school children." *Davis*, 526 U.S. at 652, 119 S.Ct. 1661. But a hostile environment is more than just teasing and name-calling, and the negative effects of a hostile environment extend beyond merely taking offense. This is especially true where the hostile environment is created by comments, slurs, and jokes rooted in an individual's identity and in their personal characteristics, like their race, ethnicity, gender, sexual orientation, or religious or political beliefs. Identity-based comments cut to the core of who we are as individuals and belittle our sense of place in society —especially, though not exclusively, for individuals who are members of minority groups that have been historically oppressed. Such language serves to reinforce and re-emphasize "a feeling of inferiority as to [an individual's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown*, 347 U.S. at 494, 74 S.Ct. 686; *Obergefell v. Hodges*, 576 U.S. 644, 675, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015); *cf.* Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 792–94 (1992).

Discriminatory language has been shown to have significant effects on schoolchildren, including, as relevant to this case, transgender students. The status hierarchies and sense of inferiority reinforced by these comments can severely hamper students' ability to learn effectively and even inhibit their willingness to attend school in the first place, *see Harper*, 445 F.3d at 1179 (discussing literature on the negative effects of "violence and verbal and physical abuse at school" on the school performance, including academic achievement and attendance, of LGBTQ youth), especially in light of the long history of stigmatization and erasure of transgender individuals. *See* Levy & Barry, *supra*, at 1129 (noting that the history of conversion practices reflects a long-standing depiction of "transgender identity as pathological and something to be eradicated"); *cf.* Andrew R. Flores et al., *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017–2018*, 111 AM. J. PUB. HEALTH 726, 727 & fig.1 (2021) (finding that transgender adults suffer substantially higher rates of violent victimization and property crime than cisgender adults did). Oftentimes, they also serve as a pathway towards physical harms. Transgender youth are subject to violence in school at a far higher rate than other students: 23.8% are threated or injured with a weapon at school, compared to 6.4% of cisgender males and 4.1% of cisgender females. Johns et al., *supra*, at 69 tbl.2. Similarly, transgender youth consider suicide, make suicide plans, and attempt suicide at far higher rates than other students. *Id.*; *see also* Kirsty A. Clark et al., *Prevalence of Bullying Among Youth Classified as LGBTQ Who Died by Suicide as Reported in*

the National Violent Death Reporting System, 2003-2017, 174 JAMA PEDIATRICS 1211 (2020) (finding that suicides of LGBTQ youth were over four times more likely to be associated with prior bullying than suicides of non-LBTQ decedents).

***12** Moreover, students cannot escape such comments. They are, in effect, a captive audience, *see* *Tinker*, 393 U.S. at 515, 89 S.Ct. 733 (Stewart, J., concurring) (citing *Ginsberg v. New York*, 390 U.S. 629, 649–50, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)); *see* *Fraser*, 478 U.S. at 684, 106 S.Ct. 3159, who do not have a choice as to whether they hear harmful speech. *See* *Ginsberg*, 390 U.S. at 650, 88 S.Ct. 1274 (Stewart, J., concurring) (suggesting that someone in a captive audience lacks the "full capacity for individual choice which is the presupposition of First Amendment guarantees"); *cf.* *Rowan v. U.S. Post Off. Dep't*, 397 U.S. 728, 736, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970).

And the consequences that such comments can have on students are not abstract, faraway concerns. They affect students in central Ohio and the surrounding areas. Presently before this Court, for example, is a case involving a middle school student who suffered such severe bullying and harassment, which then escalated to a physical attack, that she was forced to move to a different school. (*See* Declaration of Anne Roe ¶¶ 18–20, ECF No. 13-1 [No. 3:22-cv-00337]). Two years ago, a fourteen year-old student in Washington Court House, an hour south of Columbus, committed suicide after experiencing repeated bullying from other students. *See Transgender teen commits suicide in rural Ohio after bullying*, SCIOTO VALLEY GUARDIAN (June 2, 2021), https://perma.cc/239G-YMDX.

All told, discriminatory speech that arises to the level of creating a hostile environment can have severely negative effects on students' attendance and performance in school and their physical and psychological wellbeing—in other words, on the orderly operation of the school and its mission. *See* *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 674 (7th Cir. 2008) ("From *Morse* and *Fraser* we infer that if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech."); *see also* *Morse*, 551 U.S. at 407, 127 S.Ct. 2618.

Returning to the particulars of this case, this Court considers whether the provisions of the Policies banning certain speech that may create a hostile environment go too far. PDE has provided, through its declarations and briefs, some examples of speech that its members believe are proscribed by the Policies. These can be categorized into two groups: (1) the use of pronouns differing from those preferred by transgender students; and (2) speech questioning the prevalence of gender dysphoria and discussing issues of gender identity.

It is important to note a key distinction here. Students do not enjoy a right to be free from mere offense or from the exchange of ideas. The former would be too broad, the latter contrary to the goals of education. But, as Professor Jeremy Waldron has noted, there exists a "basic distinction between an attack on a body of beliefs and an attack on the basic social standing and reputation of a group of people." JEREMY WALDRON, THE HARM IN HATE SPEECH 120 (2012). In short, it is vital to "distinguish between the respect accorded to a citizen and the disagreement we might have" with how they conduct themselves or the convictions they hold. *Id.*

Thus, speech that directly targets individual students on account of their identity—what Professor Emily Gold Waldman calls "verbal bullying"—must be separated from speech that discusses a political, social, or religious perspective in a non-derogatory manner. *See* Emily Gold Waldman, *A Post-Morse Framework For Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 492–96 (2008); *cf.* Eugene Volokh, *Comment: Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1871–72 (1992) (suggesting that "[d]irected speech can be suppressed with minimum impact on First Amendment interests" because the political viewpoint of an *ad hominem* attack is often separable from the attack itself). Allowing the latter while prohibiting the former ensures that students still have an opportunity to express their social, political, and religious views and to engage in intellectual and civil discussions with other students.

***13** While both types of speech express disagreement with the behavior and beliefs of the students targeted by the speech, only the latter does so in a manner that demonstrates civility and recognizes the dignity of the listener, of their "entitl[ement] to be treated as equals in the ordinary operations of society." WALDRON, *supra*, at 5; *see also Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002) (noting that "[t]here is no constitutional right to be a bully"). By contrast, "verbal bullying," targeted as it is towards individuals, does more than just express a social viewpoint. It also sends a message of disrespect toward the listener; it is an attack on their social standing, their place in society. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 432, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (Stevens, J. concurring) (noting that while the cross burning at issue in the case was considered "expressive conduct," the act "directed as it was to a single African-American family trapped in their home[ ] was nothing more than a crude form of physical intimidation"). It creates, in other words, a hostile environment. The harms caused by the two are the same. A hostile environment for students, as discussed earlier, is associated with more frequent physical attacks on the targeted students, lower school performance, and increased rates of self-harm, just as "there is a clear and direct causal link between verbal bullying and subsequent student harm" such as psychological and physical distress. Waldman, *supra*, at 493. So, even as schools must allow for civil discussion of sensitive issues, they need not allow for "verbal bullying"—*i.e.*, attacks on the social standing of individual students on account of their identity, rather than pure disagreements with their choices or beliefs.

The intentional misgendering of students constitutes "verbal bullying." Of course, sincere questions about an individual's preferred pronouns, civil discussions about transgender issues, and accidental misgendering are considered neither harassment nor derogatory. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 958 (2019); *see also* Waldman, *supra*, at 497. But using pronouns contrary to an individual's preferences intentionally (or repeatedly) poses a different issue. It evinces disrespect for the individual. It plays into stereotypes. It lacks basis in scientific reality. And it is deeply harmful, "inflict[ing] measurable psychological and physiological harms." Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40, 43 (2020) (collecting literature on the harms caused by misgendering transgender individuals). Intentional misgendering has the effect of creating a hostile environment for transgender students on account of their gender identity and thereby causes a substantial disruption.

On the other hand, much of the speech discussed by PDE consists of neutral, respectful, and generalized discussions of gender identity issues. (*See, e.g.*, Decl. of Parent D ¶ 21, ECF No. 7-6) (noting their children's desire to "express[ ] an opinion about the nature of biological sex (whether based on science or religion)"). Such speech should be permitted, as it neither targets nor expresses disrespect for particular individuals or groups. And, in fact, there is nothing to suggest that such speech is prohibited under the Policies, except for the parents' subjective beliefs that it is. No email, communication, or past enforcement of the Policies provides any indication that they cover speech expressing disagreement with transgender students' identity or beliefs in a respectful, non-derogatory manner.

Instead, a plain reading of the Policies indicates that they prohibit only that subset of discriminatory speech that creates a threat of physical harm, interferes with students' educational opportunities, substantially disrupts the operation of schools, or causes or contributes to a hostile environment. Each of these reasons for regulating school speech is permitted by the First Amendment. It also appears that the Policies allow students to continue engaging in well-intentioned, respectful discussions about gender identity, as the First Amendment contemplates.

b. Parents Defending Education's Objections

There remains the possibility that, though the Policies pass muster under *Tinker*, they violate the First Amendment in some other fashion. *See Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324, 336 (6th Cir. 2010). PDE suggests that that may be the case, for three reasons. It alleges that the Policies are unconstitutional because they: (1) compel speech; (2) restrict speech based on viewpoint and content, but fail strict scrutiny; and (3) are overbroad. (*See generally* Mot. for PI at 10–17, ECF No. 7). This Court, however, finds that each of the objections is unavailing "in light of the special characteristics of the school environment." *Tinker*, 393 U.S. at 506, 89 S.Ct. 733.

***14** *First*, "[u]nder the compelled-speech doctrine, 'the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees.' " *New Doe Child #1 v. Cong. of U.S.*, 891 F.3d 578, 593 (6th Cir. 2018) (quoting *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219, 135 S.Ct. 2239, 192 L.Ed.2d 274 (2015)). This is because "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.' " *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, —— U.S. ——, 138 S. Ct. 2448, 2463, 201 L.Ed.2d 924 (2018) (citation omitted). Thus, "in most contexts any such efforts [to compel individuals to express support for a view they find objectionable] would be universally condemned." *Id.* At issue here, according to PDE, is that the Policies—which, by Defendants' own admission, effectively require students to use the preferred pronouns of other students—impermissibly compel speech.

Of course, public schools fall outside the usual First Amendment "context." *See Fraser*, 478 U.S. at 682, 106 S.Ct. 3159. The prohibition against compelling speech clearly does not extend with full force within the schoolhouse gate. Instead, "it is clearly established that a school may compel some speech. Otherwise, a student who refuses to respond in class or do homework would not suffer any consequences. Students, moreover, generally do not have a right to reject curricular choices as these decisions are left to the sound discretion of instructors." *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338, 350 (5th Cir. 2017); *see also C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 178 (3d Cir. 2005) ("[I]t seems clear that a school may compel some speech.").

The compelled speech doctrine in the public school context focuses on the rationale behind the policy. *See* James Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1423 (2000) (differentiating between a school's academic functions and its role in inculcating general values). The question before this Court is not whether the Policies compel speech, but whether they do so for an impermissible reason. On the one hand, courts have disapproved of schools' attempts to promote social values or goals through compelled speech. In the seminal case on this topic, the Supreme Court struck down a requirement that all schoolchildren salute the American flag, which was "not adopt[ed] ... because it was claimed to have educational value ... [but out of] concern[ ] with promotion of national unity." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 n.12, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). A school cannot dictate speech so as "to compel the speaker's affirmative belief" in a political, religious, or social viewpoint, like national unity; to do so would be "to force orthodoxy." *Brinsdon*, 863 F.3d at 350.

On the other hand, "[p]ublic educators may limit 'student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns,' " *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (citation omitted), and courts have presumed that the corollary of that rule—*i.e.*, compelling student speech if reasonably related to legitimate pedagogical concerns—is likewise permitted. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 & n.9

(10th Cir. 2004). Consequently, courts have frequently permitted schools to compel speech in the classroom when it is tied to academic goals, rather than to the promotion of social values. *See Wood v. Arnold*, 915 F.3d 308, 318–19 (4th Cir. 2019), *cert denied*, —— U.S. ——, 140 S. Ct. 399, 205 L.Ed.2d 214 (2019); *see also Brinsdon*, 863 F.3d at 350–51; *Mahanoy*, 141 S. Ct. at 2050 (Alito, J., concurring) ("In a math class, for example, the teacher can insist that students talk about math, not some other subject." (citation omitted)).

***15** Requiring students to use preferred gender pronouns may simply reflect a school's desire to maintain a safe and civil learning environment, which has long been considered a legitimate pedagogical concern. *Poling v. Murphy*, 872 F.2d 757, 758, 762 (6th Cir. 1989); *see also Bonnell v. Lorenzo*, 241 F.3d 800, 822 (6th Cir. 2001) ("A college's or university's interest in maintaining a hostile-free learning environment ... is well recognized."); *Nuxoll*, 523 F.3d at 674; *Harper*, 445 F.3d at 1189 & n.39; *cf.* Ryan, *supra*, at 1354 n.78. By creating an environment in which each individual feels respected, acknowledged, and heard by their classmates, the use of preferred pronouns in schools allows all students to feel comfortable participating in discussion and sharing their perspectives—and thus promotes learning. *See also Kutchinski*, 69 F.4th at 360 ("Courts thus provide educators a high degree of deference in the exercise of their professional judgment lest they substitute their own notions of sound educational policy for those of the school authorities which they review." (internal quotation marks and citation omitted)).

Recently, the Sixth Circuit has held that a professor's use of pronouns in the classroom implicates the prohibition against compelled speech, because the pronouns were understood to express a viewpoint, to affirm a belief held by the professor. *See Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). But it is not so evident that the Policies here do so in the same manner. *Meriwether* involved a university professor who taught a political philosophy course where discussions about gender identity " 'often' come[ ] up." *Id.* at 506. By prohibiting him from using the pronouns that he preferred when addressing students, the university "silenced a viewpoint that could have catalyzed a robust and insightful in-class discussion." *Id.*

But while the use of pronouns by the professor in the classroom setting in *Meriwether* implicated his personal beliefs on gender identity, given the context of the course he was teaching, the use of pronouns when talking to others in everyday situations is not so inherently fraught. As Professors Amar and Brownstein suggested, "it may not make sense to construe salutations to be pure, content-based speech rather than essentially conduct-infused interactions in which speech plays the same relevant but non-substantive role that 'speech acts' do in so many social interactions." Vikram David Amar & Alan E. Brownstein, *Analyzing the Recent Sixth Circuit's Extension of 'Academic Freedom' Protection to a College Teacher Who Refused to Respect Student Gender-Pronoun Preferences*, UC DAVIS SCH. L., FAC. BLOG (Apr. 26, 2021), https://perma.cc/E7EK-CHVX?type=image. Consider the example they provide: a teacher taking roll-call. The teacher will use students' pronouns in doing so, but "that seems more like a mechanical exercise than

the expression of substantive content." *Id.* Similarly, a student walking down a middle school hallway uses pronouns not to wade into the gender identity debate or to express a personal belief about gender identity, but simply to carry out the standard back-and-forth ritual of greeting and acknowledging friends. Participating in this "exercise" requires nothing more than respect for others' right to choose a path for themselves—not agreement with the choices, or with their underlying beliefs. *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

This Court therefore concludes that, while the Policies may compel speech, PDE has failed to show a substantial likelihood that they do so outside the bounds of what is permissible for public schools; requiring the use of preferred pronouns promotes "legitimate pedagogical concerns," without "compel[ling] the speaker's affirmative belief." *Brinsdon*, 863 F.3d at 350.

Second, the traditional First Amendment prohibitions against content- and viewpoint-based speech regulation must also be viewed against the backdrop of *Tinker* and other public school speech cases. While content-based speech restrictions—*i.e.*, restrictions that "appl[y] to particular speech because of the topic discussed or the idea or message expressed"—typically must satisfy strict scrutiny, *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015), such restrictions have been repeatedly permitted in the public school setting as long as they are reasonable. *See, e.g.*, *Kutchinski*, 69 F.4th at 359 (allowing school to regulate sexual and violent speech based on a "reasonable forecast" of substantial disruption); *Morse*, 551 U.S. at 401, 127 S.Ct. 2618 (noting that the principal's interpretation of the banned banner as promoting drug use was "reasonable"); *Fraser*, 478 U.S. at 689 n.2, 106 S.Ct. 3159 (Brennan, J., concurring) ("[I]t was not unreasonable for school officials to conclude that respondent's remarks were inappropriate for a school-sponsored assembly.").

***16** The application of the more lenient "reasonableness" standard to content-based speech in schools makes sense. For otherwise, "it is impossible to see how a school could function if administrators and teachers could not regulate on-premises student speech, including by imposing content-based restrictions in the classroom." *Mahanoy*, 141 S. Ct. at 2050 (Alito, J., concurring); *see also* *Barr*, 538 F.3d at 573. The fact that the Policies are content-based therefore presents little concern, especially as Defendants reasonably believe that the Policies would reduce discrimination against transgender students—undoubtedly, a compelling interest. *Saxe*, 240 F.3d at 209 ("Certainly, preventing discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest." (citation omitted)); *cf.* *Spiva*, 625 F.3d at 339 (Rogers, J., concurring) ("Just as the Supreme Court went on to recognize an 'important, perhaps compelling' interest in deterring drug use in the schools, there is of course a comparably 'important, perhaps compelling' interest in reducing racial tension in the public schools.").

While the Policies are certainly content-based restrictions, it is not so clear that they are viewpoint-based restrictions. PDE focuses on the fact that the Policies bar harassment based on certain classes,

like sex, race, or age. (*See* Mot. for PI at 13, ECF No. 7). But the Sixth Circuit has repeatedly upheld public school bans on racially discriminatory expression, rejecting arguments that such bans constituted viewpoint-based restrictions. *See, e.g.*, *Defoe ex rel. Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010); *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008). The crux is whether the ban applies equally to individuals on either side of a given debate. *See* *Barr*, 538 F.3d at 572 (noting that "there [was] no evidence that the ban on disruptive symbols would not have been applied equally to a student displaying a Confederate flag in solidarity with hate groups, and another who displayed a Confederate flag in a circle with a line drawn through it").

The Policies do so. They prohibit all derogatory speech that targets individuals on the basis of gender identity (or race, age, religion, etc.); they apply with equal force to students who identify as transgender as to those who identify as cisgender, to those who seek to denigrate students on account of their transgender identity and to those who seek to harass students who believe that gender at birth is immutable. *Cf.* Clarke, *supra*, at 959 & n.398 (observing that misgendering is problematic when referring to both cisgender and transgender individuals). The Policies allow for an individual who believes "that sex is binary and that someone's internal perceptions about themselves cannot change biology" to express that viewpoint; they allow for an individual who disagrees to express the opposing viewpoint as well. (Decl. of Parent D ¶ 8, ECF No. 7-6). The only prohibitions are against discriminatory and harassing speech based on gender identity, including the use of gender pronouns contrary to a cisgender or transgender individual's preferences.

But, as discussed previously, a student's use of pronouns in a public school hallway or classroom is not viewpoint-based in the same way that the use of pronouns by a political philosophy professor in his classroom is. *See* *Meriwether*, 992 F.3d at 508–09. The professor is engaged in an act of teaching, of explaining and provoking debate about different belief systems, about morality and ethics, and about the role of nature versus nurture. The student in a school hallway, on the other hand, uses pronouns because it is required by the English language when engaging in the mechanical exercise of greeting classmates, exchanging pleasantries, and joking with friends—*i.e.*, contexts that are not intrinsically laden with affirmative beliefs about gender identity. The use of pronouns in daily conversation is ever-present, but rarely is it preceded by a reflection on and re-commitment to an underlying belief about the (im)mutability of sex and gender. Moreover, on this Court's read, nothing in the Policies prohibits a student who has a firmly-held belief that sex and gender are binary and set in stone from expressing that belief while also using a transgender classmate's preferred pronouns. Pronouns, in such a case, cannot be construed as affirming the speaker's agreement with the classmate's beliefs on gender identity, given that the speaker has already plainly expressed her disagreement. *Cf.* *id.* at 510 (noting that the university "refused to permit Meriwether to comply with its pronoun mandate while expressing his personal convictions in a syllabus disclaimer").

***17** As such, the Policies are viewpoint-neutral.

Third, a facial challenge alleging that a speech restriction is overbroad "must establish that no set of circumstances exists under which the [law] would be valid or show that the law lacks a plainly legitimate sweep ... or a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity Found. v. Bonta*, —— U.S. ——, 141 S. Ct. 2373, 2387, 210 L.Ed.2d 716 (2021) (internal quotation marks and citations omitted) (alteration in original). As discussed previously, PDE proposes various statements or types of statements that it suggests would violate the Policies, but should be protected by the First Amendment. (*See* Mot. for PI at 15–16, ECF No. 7). It argues, in other words, that a substantial number of applications of the Policies are unconstitutional. These examples include statements that the children of Parents A-D want to express about their beliefs that there are only two genders at birth and that gender is immutable. (*See, e.g.*, *id.*). In suggesting that these sample statements "unquestionably" violate the Policies, PDE relies on nothing more than speculation. It has presented no evidence suggesting that the School District will interpret or enforce the Policies so broadly, and no argument suggesting that the statements are contemplated by a natural reading of the Policies.

In fact, the Policies are clearly limited in scope. They prohibit discriminatory speech that rises to a certain severity level, such as speech that causes a reasonable threat of harm or interferes with student performance. They prohibit speech that is "systematic[ ] and chronic[ ]" and "severe or pervasive." (Pl.'s Ex. A at 2, 3, ECF No. 7-1). They do not prohibit, by contrast, genuine efforts to discuss issues of gender identity or to express beliefs on the topic. Distinguishing between derogatory or harassing speech that targets individuals and speech that espouses and discusses ideas respectfully—prohibiting the former and allowing the latter—is not overbroad.

PDE also argues that Policy 5136 (on the use of PCDs) and the Code of Conduct are overbroad because they purportedly "prohibit the political and religious speech that the Students wish to express off schoolgrounds through their cell phones." (Mot. for PI at 18, ECF No. 7). While *Mahanoy* limited the authorities of schools to police student speech off-campus, it did not do so for off-campus speech that targeted other students. *See* *Mahanoy*, 141 S. Ct. at 2047; *id.* at 2055 (Alito, J., concurring). And that alone is what Policy 5136 prohibits. It does not bar students from expressing a political or religious viewpoint on gender identity or engaging in debate on such topics through their cell phones; it only prohibits such expression where it "can be construed as harassment ... of others,"[4] *i.e.*, speech targeted towards other students in a manner that creates a threat of physical harm, interferes with student performance, or causes substantial disorder. (Pl.'s Ex. B at 2, ECF No. 7-1; *see also* Pl.'s Ex. A at 3, ECF No. 7-1).

[4] Although PDE focuses on the broad introductory statement—that students may not "use a PCD in any way that might reasonably create in the mind of another person an impression of being threatened, humiliated, harassed, embarrassed or intimidated"—Policy 5136 goes on

to explain two specific categories of actions students cannot do. The first is the transmission of materials that can be construed as harassment or disparagement of others, defined in reference to Policy 5517. (*See* Pl.'s Ex. B at 2, ECF No. 7-1). This Court presumes that the more specific sub-provision governs the general introductory language. *See* Bloate v. United States, 559 U.S. 196, 207–08, 130 S.Ct. 1345, 176 L.Ed.2d 54 (2010) ("A specific provision controls over one of more general application." (citation omitted)).

***18** Nor did *Mahanoy* strip schools of the authority to police student speech off-campus where it is related to school activities. The Code of Conduct does not punish every off-campus use of discriminatory language; it applies "while students are under the authority of school personnel or involved in any school activity" and to off-campus "[m]isconduct ... connected to activities or incidents that have occurred on school district property." (Pl.'s Ex. D at 8, ECF No. 7-1). The former category falls within "a temporal or spatial extension of the regular school program," *Mahanoy*, 141 S. Ct. at 2054 (Alito, J., concurring), during which schools can regulate student speech even off-campus, while the latter falls just outside that boundary line. But regulation of such speech can be justified for the same reason as the regulation of speech uttered during off-campus school activities: "the need for orderly and effective instruction and student protection." *Id.* (Alito, J., concurring); *see also id.* at 2045. Statements "connected to" school events are, at bottom, statements about the school, its students and teachers, and their actions during the "times when the school is responsible for the student"—in other words, statements closely linked with the school's *in loco parentis* role. *Id.* at 2045. Regulation of these statements is permissible under *Mahanoy*.

3. Fourteenth Amendment

Closely related to the overbreadth issue is PDE's contention that Policy 5136 and the Code of Conduct also violate the Fourteenth Amendment by infringing on "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (plurality). This right, at least with respect to public school education, is somewhat more limited than it would first seem. As the Sixth Circuit has explained, "[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child." *Blau*, 401 F.3d at 395 (emphasis in original). Instead, "school discipline ... [is] generally 'committed to the control of state and local authorities.' " *Id.* (quoting *Goss*, 419 U.S. at 578, 95 S.Ct. 729); *see also Gruenke v. Seip*, 225 F.3d 290, 304 (3d Cir. 2000) (noting that there are "circumstances in which school authorities, in order to maintain order and a proper educational atmosphere ... may impose standards of conduct on students that differ from those approved by some parents" (collecting cases)).

Although regulations burdening fundamental rights are typically subject to strict scrutiny, the Supreme Court has set forth "almost eighty years of precedent analyzing parental rights in the context of public education under a rational-basis standard" because the parental right does not extend into schools. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 289 (5th Cir. 2001) (discussing *Meyer v. Nebraska*, 262 U.S. 390, 396–97, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 530–31, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205, 207, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)). Little has changed since then. *See id.* at 291 ("*Troxel* does not change the above reasoning in the context of parental rights concerning public education."); *Blau*, 401 F.3d at 396 (applying rational-basis review). *But see Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 419 (6th Cir. 2019) (applying strict scrutiny with respect to a parent's right to control his child's medical care).

While PDE suggests that Policy 5136 and the Code of Conduct "exceed[ ] [the District's] authority" by reaching "well beyond the confines of the school day and into the privacy of families' homes," this Court rejects this contention for the same reason it rejects the overbreadth claim: PDE's reading of the Policies reach far beyond their actual scope. (*See* Mot. for PI at 18, 19, ECF No. 7-1). There is nothing in the Policies that suggests that they prohibit parents from discussing gender identity issues with their children, or reach in some other way into the privacy of families' homes. (*See, e.g.*, Pl.'s Ex. D at 8, ECF No. 7-1). Nor is there any suggestion that the Policies extend to speech unrelated to school, school activities, or fellow students.

***19** Policy 5136 and the Code of Conduct impose disciplinary rules for only that subset of off-campus speech associated with the "regular school program": how students conduct themselves in relation to each other during school, school-sponsored activities, or in connection with events at school. *See Mahanoy*, 141 S. Ct. at 2054 (Alito, J., concurring). The parent-members of PDE do not have enjoy a fundamental right to exempt their kids from these policies, *Blau*, 401 F.3d at 396, and have not shown that the Policies fail to satisfy rational-basis review.

B. Remaining Criteria

Having established that PDE has failed to establish a strong likelihood of success on the merits of its constitutional claims, this Court touches briefly upon the remaining preliminary injunction criteria. *See Fischer*, 52 F.4th at 307 ("[I]n First Amendment cases, only one question generally matters to the outcome: Have the plaintiffs shown a likelihood of success on the merits of their First Amendment claim?"); *Schimmel*, 751 F.3d at 430 (en banc).

Irreparable Harm. Were PDE likely to succeed on the merits, this factor would favor PDE as " '[t]he loss of First Amendment freedoms, for even minimal periods of time,' amounts to irreparable injury." *Sisters for Life, Inc. v. Louisville-Jefferson Cnty.*, 56 F.4th 400, 408 (6th Cir. 2022) (quoting

Roman Catholic Diocese v. Cuomo, —— U.S. ——, 141 S. Ct. 63, 67, 208 L.Ed.2d 206 (2020) (per curiam)). But PDE is unlikely to succeed on the merits and it has not alleged any other basis for suffering an irreparable injury. This factor favors Defendants.

Balance of Harms and the Public Interest. The third and fourth preliminary injunction requirements "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009). These factors, like the second, turn on whether PDE is likely to succeed. If the answer is in the affirmative, "it is always in the public interest to prevent violation of a party's constitutional rights." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001) (quoting *G & V Lounge*, 23 F.3d at 1079). But if the answer is in the negative, as this Court finds, then the public interest disfavors an injunction; enjoining the Policies in their entirety would lift all restrictions against harassing and discriminatory speech within the School District, without sufficient time to draft a new policy before the start of the school year. *Cf. Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006).

Consider, also, which individuals or groups of individuals can most easily bear or adjust to the burdens of any injuries caused by the Policies. Although the children of Parents A-D may not utter the pronouns they wish to under the Policies, PDE does not suggest that this hardship imposes physical harms on them, threatens their ability to learn in school, or stamps a badge of inferiority upon them. It is easy to work around this obstacle. They can seek accommodations from the School District.[5] They can refer to transgender students by their first names, instead of using pronouns, or employ gender-neutral pronouns with the other student's consent. *See, e.g.*, *Meriwether*, 992 F.3d at 510–11 (noting that a professor, when confronted with a university policy mandating the use of preferred pronouns, proposed and employed without issue an accommodation whereby he referred to a transgender student by the student's last name alone). By contrast, if the Policies are enjoined, transgender students enrolled in the School District cannot escape the harms of being subject to misgendering, to harassment, to systematic and chronic bullying. They are a captive audience. *See Fraser*, 478 U.S. at 684, 106 S.Ct. 3159. They are individuals who, having been told repeatedly by society that they do not belong, that they are inferior, that they are an aberration, simply seek "to be secure and to be let alone" at school. *Tinker*, 393 U.S. at 508, 89 S.Ct. 733.

5 There is nothing in the record that explains what such accommodations would look like, as no member of PDE has sought accommodations.

***20** The Sixth Circuit in *Meriwether* suggested that our nation's future depends on the classroom being a "marketplace of ideas." *Meriwether*, 992 F.3d at 504–05 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967)). For that to be the case, it is important that all students enjoy a sense of safety and dignity in the classroom, such that they are willing and able to contribute to classroom discussion—*i.e.*, for the school to "provide that atmosphere which is most conducive to speculation, experiment and creation." *Sweezy*, 354

U.S. at 263, 77 S.Ct. 1203 (Frankfurter, J., concurring). It is important, then, to consider the ways in which allowing for discriminatory or harassing speech in the name of vindicating First Amendment rights too often causes a new set of First Amendment injuries, by silencing the voices of already-marginalized listeners, by "den[ying] [them] the humanizing experience of self-expression." Lawrence III, *supra*, at 803; *see* *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (noting that policies that "expose[ ] transgender students to a substantial risk of stigma, discrimination, intimidation, and danger ... hurt[ ] society as a whole by depriving all from the voices of the transgender community"). Giving full effect to the right to free speech in a pluralistic democratic society requires acknowledging and addressing the ways in which those who are members of "discrete and insular minorities," *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), are systematically silenced by discrimination. Their right to speak must also be acknowledged and defended.

In short, the second, third, and fourth factors for a preliminary injunction cut against PDE's request for a preliminary injunction.

V. CONCLUSION

For the reasons stated more fully above, the Court **DENIES** Plaintiff Parents Defending Education's Motion for Preliminary Injunction (ECF No. 7).

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2023 WL 4848509

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Only the Westlaw citation is currently available.
United States District Court, W.D. Pennsylvania.

Carmilla TATEL, Stacy Dunn and Gretchen Melton, individually and as parents and natural guardians of their children, Plaintiffs,
v.
MT. LEBANON SCHOOL DISTRICT, et al., Defendants.

CIVIL ACTION NO. 22-837
|
Signed May 31, 2023

Synopsis

Background: Parents of first grade children brought § 1983 action against teacher, principal, school district, and members of school board, alleging that teacher taught children about gender dysphoria and transgender transitioning and that school district had de facto policy of not giving parents opportunity to opt children out of instruction in violation of their constitutional rights. Following district court's denial of defendants' motion to dismiss for failure to state a claim, 2022 WL 15523185, defendants moved for reconsideration and to amend judgment.

Holdings: The District Court, Joy Flowers Conti, Senior District Judge, held that:

finding that parents stated substantive due process claim was not clear error of law;

finding that parents stated First Amendment free exercise claim was not clear error of law;

finding that parents stated Fourteenth Amendment familial privacy claim was not clear error of law;

finding that parents stated Fourteenth Amendment equal protection "class of one" claim was not clear error of law;

district officials were not entitled to qualified immunity from substantive and procedural due process claims and First Amendment free exercise claims at motion to dismiss stage;

teacher was not entitled to qualified immunity from Fourteenth Amendment familial privacy claim at motion to dismiss stage; and

district officials were not entitled to qualified immunity from equal protection claim at motion to dismiss stage.

Motions denied.

Procedural Posture(s): Motion for Reconsideration; Motion to Alter or Amend Judgment.

Attorneys and Law Firms

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OPINION

Joy Flowers Conti, Senior United States District Judge

I. Introduction

***1** This case involves the extent of parents' constitutional rights when a public school permits a teacher to inculcate the teacher's beliefs about transgender topics in first-grade students over the objections of their parents. As noted in this court's October 27, 2022 opinion (the "first motion to dismiss opinion") (ECF No. 38), this case is not about treating all students with kindness, tolerance and respect. Here, the parents allege that their children's first-grade teacher pursued her own transgender agenda outside the curriculum, which included: (1) instructing the children in her first-grade class that their parents might be wrong about their children's gender; (2) telling a student that the child could dress like a different gender and be like the teacher's transgender child (who was also in first grade in a different school); (3) telling a student that she, the teacher, would never lie (implying that the parents may lie about their child's gender identity); and (4) instructing students not to tell their parents about the transgender discussions. The teacher allegedly targeted the children's own gender identity and their parents' beliefs about the gender identity of their own children. When the parents complained, the school district supported the teacher and allegedly adopted a policy (the "de facto policy") that the teacher's conduct could continue in the future without notice to the parents or the opportunity to opt their children out of that kind of agenda (despite providing broad parental notice and opt out rights for other topics). At this stage of the case, these averments must be accepted as true and construed in the light most favorable to Plaintiffs. *Lasche v. New Jersey*, No. 20-2325, 2022 WL 604025, at *3–4 (3d Cir. Mar. 1, 2022)

(discussing applicable standard for resolving a motion to dismiss in vacating dismissal of foster parents' First Amendment claim that the state retaliated against them for sharing their religious beliefs about same-sex marriage with their foster child).

The defendants do not challenge the averments about the existence of the de facto policy. Instead, citing *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), a decision from the First Circuit Court of Appeals, they argue that in a public school, parents have **no** constitutional right to notice or to opt their children out of any kind of instruction, regardless of the content of that instruction, the age of the children, or whether the instruction is part of the published school curriculum. *See* ECF No. 42 at 8 ("Parents have no constitutional right to exempt their children from classroom lessons, including those on transgender issues"). In other words, the defendants argue that parents simply have no constitutional right to notice or to object to any information a public school may present to their children.

The defendants' argument is contrary to Third Circuit Court of Appeals precedent, which recognizes that a public school's actions may conflict with parents' fundamental constitutional rights and when conflicts occur on matters of the greatest importance, the parents' rights prevail unless the public school can demonstrate a compelling interest for its actions. *C.N. v. Ridgewood Bd. Of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005) ("*C.N.*")[1]; *Gruenke v. Seip*, 225 F.3d 290, 305 (3d Cir. 2000). The court adheres to its original decision that the parents' constitutional rights at issue here (forming the identity of their young children) are matters of the greatest importance and takes this opportunity to further explain and clarify its analysis.[2]

1 In the initial motion to dismiss opinion, this decision was referred to as "*Ridgewood,*" but in this opinion and hereafter, it will be referred to as "*C.N.*"

2 The analysis in the court's initial motion to dismiss opinion (ECF No. 38) must be read in full in conjunction with this opinion.

II. Procedural History

***2** On October 27, 2022, the court issued the initial motion to dismiss opinion, which after a thorough analysis of each claim and each defendant, granted in part and denied in part defendants' motions to dismiss the complaint (the "Complaint") and the individual defendants' motion for qualified immunity. As the court explained, the alleged conduct went far beyond instructing students that someone who differs from that student must be treated with kindness, tolerance and respect. Here, the school district allegedly supports the teacher's ability to pursue her own agenda, outside the curriculum, to inculcate the teacher's beliefs about transgender topics in first-grade students over the objections of their parents and contrary to the beliefs of their parents.

A motion for reconsideration pursuant to Rule 54(b) (ECF No. 41) and a motion to amend judgment pursuant to Rule 59(e) (ECF No. 44), with briefs in support, were filed by the remaining defendants: Mt. Lebanon School District (the "District"), Megan Williams ("Williams"), Dr. Timothy Steinhauer ("Steinhauer"), Dr. Marybeth Irvin ("Irvin"), Brett Bielewicz ("Bielewicz"), and Jacob W. Wyland ("Wyland") (collectively, "Defendants"). Plaintiffs Carmilla Tatel, Stacy Dunn and Gretchen Melton (collectively, "Plaintiffs" or the "Parents") filed a response in opposition to the motions (ECF No. 51) and the motions are ripe for disposition.

III. Standard for reconsideration

A. Interlocutory orders – Rule 54(b)

District courts possess discretion to reconsider interlocutory orders under Rule 54(b). *Gay v. A.O. Smith Corp.*, No. 2:19-CV-1311, 2022 WL 2829887, at *1 (W.D. Pa. Apr. 21, 2022) (citing *Foster v. Westchester Fire Ins. Co.*, 2012 WL 2402895, at *4 n.1 (W.D. Pa. June 26, 2012)). A court may reconsider an interlocutory order even if the movant cannot show one of the particular grounds permitting reconsideration of final orders. *Id.* The movant, however, must establish good cause for the court to revisit its prior decision. Pursuant to the law of the case doctrine, courts should only grant motions for reconsideration in extraordinary circumstances. *Id.* "The extraordinary circumstances permitting reconsideration of prior decisions [under Rule 54(b)] align neatly with the three grounds justifying reconsideration under Rule 59(e)." *Id.*

B. Qualified immunity – Rule 59(e)

A district court's denial of qualified immunity at the motion to dismiss stage is considered to be a "final decision" within the meaning of 28 U.S.C. § 1291. *Ashcroft v. Iqbal*, 556 U.S. 662, 672-75, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The scope of a motion for reconsideration of a final decision under Rule 59(e) is extremely limited. *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011). The purpose of a motion for reconsideration is "to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). A motion for reconsideration must rely on one of three grounds: (1) an intervening change in the law; (2) the availability of new evidence; or (3) the need to correct clear error of law or fact or prevent manifest injustice. *N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). A motion for reconsideration should not be used to ask a district court to rethink a decision it has already rightly or wrongly made. *Williams v. Pittsburgh*, 32 F. Supp.2d 236, 238 (W.D. Pa. 1998). Motions for reconsideration should not be used to relitigate issues already resolved by the court and should not be used to advance additional arguments which could have been made by the movant before judgment. *Reich v. Compton*, 834 F. Supp. 753, 755 (E.D. Pa. 1993), *aff'd in part, rev'd in part*, 57 F.3d 270 (3d Cir. 1995).

The pending motions will be addressed together and each remaining claim will be discussed.

IV. Discussion

A. Summary of the parties' arguments

***3** Defendants' motions are intertwined. Defendants do not point to new evidence or an intervening change of law. Instead, they posit clear errors of law. Defendants argue that Plaintiffs did not assert cognizable constitutional rights and the Complaint should be dismissed as a matter of law for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The individual Defendants argue, in the alternative, they are entitled to qualified immunity. The first step of a qualified immunity analysis, i.e., whether Plaintiffs articulated cognizable constitutional rights, is similar to the motion to dismiss analysis. The individual Defendants assert at the second step of the qualified immunity analysis that because the constitutional rights at issue are not clearly established, they are entitled to qualified immunity. Plaintiffs maintain that the court's analysis of their constitutional rights and its denial of qualified immunity to the remaining individual Defendants in the initial motion to dismiss opinion were correct.

Defendants seek dismissal of the entire Complaint with prejudice as a matter of law. In other words, Defendants contend that parents have no constitutional rights with respect to any of the conduct alleged in the Complaint. Plaintiffs vigorously disagree.

B. Factual allegations in the Complaint

In their arguments, Defendants minimize the factual allegations in the Complaint and failed to consider all those allegations (and the reasonable inferences therefrom) in the light most favorable to Plaintiffs, as required at this stage of the case. *Lasche*, 2022 WL 604025 at *3–4. Defendants do not address the full scope of the factual allegations in the Complaint, but narrowly construe Plaintiffs' claims as "premised on Williams' classroom instruction on gender identity issues." (ECF No. 42 at 8-9). Defendants assert the Complaint contains "extraneous allegations" about Williams' repeated approaches to one child about becoming like her transgender child. Defendants argue that conduct may be ill-advised or offensive, but does not strike at the heart of parental decision-making. (ECF No. 42 at 8-9).

As this court explained in its initial motion to dismiss opinion, Williams' alleged conduct went far beyond instructing students that someone who differs from that student must be treated with kindness, tolerance and respect. Transgender topics were not part of the published first-grade curriculum. Plaintiffs allege that Williams pursued her own non-curricular agenda in which Williams attempted to inculcate in the first-grade children in her class the teacher's beliefs about a child's gender identity and to initiate and engage in discussions with the first-graders in her class about the children's own gender identity without the permission of their parents and in contravention of the parents' beliefs. Williams' alleged conduct included "teaching these young

children that 'sometimes parents make mistakes' about a child's gender and encouraging children not to tell parents about her instruction." Complaint ¶ 6.[3] Williams brought transgender topics into her classroom teachings "throughout the school year." Complaint ¶ 75. Williams told all her students that sometimes "parents are wrong" and parents and doctors "make mistakes" when they bring a child home from the hospital. Complaint ¶ 83.

[3] Contrary to Defendants' argument (ECF No. 42 at 11 n.12), the Complaint alleges that Williams encouraged multiple children not to tell their parents about the transgender discussions. Complaint ¶ 6.

The Complaint alleges that Williams engaged in "grooming" conduct toward one Plaintiff's child despite (or because of) that Plaintiff's objections, as follows:

> 78. The child of one of the Plaintiffs explained to his mother that Williams had told him, "I can wear a dress and have hair like my mom." **When Plaintiff raised this with Williams** at a parent-teacher conference, Williams deflected, contending that it must have been a misunderstanding and indicating that maybe it was confusion about Halloween. Plaintiff refuted this assertion, letting Williams know that what her son had told her was "very clear" and **expressing her displeasure with what Williams had said to her son**.[4]
>
> ***4** 79. **Despite knowing this Plaintiff's objections, or upon information and belief because of them**, Williams appears to have **targeted this child for repeated approaches about gender dysphoria**. Although Plaintiff did not discover Williams' invasion of her parental and family rights until the spring, **throughout the school year**, Williams had private conversations with this young boy, discussing with him the similarities between the boy and her transgender child again suggesting that the boy might want to wear a dress, at other times commenting to him how the boy and her transgender child had similar interest[s] and the same favorite color, and telling the child that he could be like her transgender child. Williams explained to this young boy that "doctors can get it wrong sometimes." In the course of these private discussions, Williams also told this young boy that "she would never lie to him" and, if the subjects they were discussing came up at home, to say that "I heard it from a little birdie." In other words, upon information and belief, **while having private discussions with this young boy about topics related to gender dysphoria, she told the child not to tell his parents about the discussions**. Williams' "grooming" of this young student is unconscionable. It is a gross breach of trust and an abuse of her position as a public school teacher.

Complaint ¶¶ 78, 79 (emphasis added).[5]

[4] In their Answer, Defendants disclaimed knowledge about what the child told his parent. (ECF No. 49 ¶ 78). Defendants (which include Williams), however, did not specifically deny that Williams made these comments to the child.

[5] The court denied Defendants' motion to strike these averments and Defendants do not seek reconsideration of that decision. Due to the sensitivity of the "grooming" allegations, the court did not quote these portions of the Complaint in its earlier opinion. Defendants put them at issue because they argue in their motion for reconsideration that these allegations are "extraneous" and that the court's reference that Defendants provided the instruction over the objection of the Plaintiffs was a clear error of fact (ECF No. 42 at 3 n. 1). As reflected in the Complaint, Williams allegedly targeted this child despite, or perhaps because of, a Plaintiff's objections. Complaint ¶ 79. There was no clear error of fact.

Contrary to Defendants' contention, Plaintiffs' Due Process claims are not solely premised on Williams' "classroom instruction." (ECF No. 42 at 8). The averments about Williams' broader agenda and conduct are not "extraneous allegations," but must be accepted as true and construed in the light most favorable to Plaintiffs at this stage of the case. *Mack v. Yost*, 63 F.4th 211, 234 (3d Cir. 2023) (denying qualified immunity and commenting that defendants are not entitled to "their preferred framing of the facts").

In addition, Plaintiffs' claims are premised on the de facto policy, which eliminated Plaintiffs' rights to notice and opt out of Williams' agenda. Transgender topics were not part of the first-grade curriculum and no notice was given to the Parents that transgender topics would be presented to their children. Plaintiffs allege that when they objected to Williams' agenda, Defendants adopted a de facto policy that the teacher's conduct could continue in the future without notice or opt out rights for the Parents on transgender topics. The de facto policy was in derogation of the District's published parental rights policy, District Policy I(F), which provides parents with broad access to instructional materials and the District's practices to permit opt out rights for many other topics, such as the Holocaust, slavery, the 9/11 terrorist attacks, reproductive education, sex education, Black Lives Matter and Planned Parenthood. Complaint ¶¶ 8, 37-40. To repeat, at this stage of the case all factual allegations in the Complaint must be accepted as true and construed together with all reasonable inferences in the light most favorable to Plaintiffs in evaluating the constitutional rights asserted. *Lasche*, 2022 WL 604025 at *3–4.

C. Sufficiency of allegations of violations of constitutional rights

***5** The court turns now to Defendants' contentions about the remaining claims.

1. Due Process claims

a. The parties' arguments

Defendants contend that parents have **no** Substantive or Procedural Due Process rights to notice of instruction or to exempt (i.e., opt out) their children from any or all school instruction. Defendants argue: (1) "the parental rights to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment" (ECF No. 42 at 3) (emphasis in original); (2) "constitutional violations do not occur when parents are able to discuss the objected to topics with their children and to place them in the family's moral or religious context" (ECF No. 42 at 5); and (3) there is no circuit split on the issues facing this court because the holding in *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), is consistent with Third Circuit Court of Appeals precedent. [6] Plaintiffs contend that parents, not public schools, have the primary right to control the education of their children and that their constitutional rights were violated by Williams' agenda and the de facto policy.

6 Defendants argue in their motion for reconsideration, for the first time, that certain Plaintiffs may not have provided proper notice to the school about their opposition to Williams' agenda. The court will not address this argument because it should have been raised in the initial motion to dismiss. *Reich*, 834 F. Supp. at 755 (reconsideration is not a forum to raise arguments that could have been raised in the initial motion). In any event, that argument implicates a defense and the merits of the claims, which must be resolved on a fully developed record. *See Lasche*, 2022 WL 604025 at *3–4 (at motion to dismiss stage, allegations must be construed in the light most favorable to the plaintiffs). The court recognizes that the parental objections pled in paragraphs 87 and 88 of the Complaint were not made by a named Plaintiff. (ECF No. 51 at 10 & n.6). To the extent those parents want relief, the Complaint will need to be amended to include them as plaintiffs. What the allegations taken as true show, however, is that Defendants were on notice that there were parental objections being made.

b. No parental notice or opt out rights argument

Defendants' primary argument is that "parents have **no** constitutional right to remove their child from instruction." (ECF No. 42 at 3) (emphasis added); (ECF No. 42 at 8) ("Parents have **no** constitutional right to exempt their children from classroom lessons, including those on transgender issues") (emphasis added). According to Defendants, the age of the child, the topic and whether the information is part of the official curriculum are irrelevant – parents simply have no constitutional right to notice or to object to any information a public school may present to their children.

Defendants' refusal to recognize any parental rights in a public school setting is contrary to clear, binding Supreme Court and Third Circuit Court of Appeals authority. The court's initial motion to dismiss opinion quoted numerous Supreme Court decisions which emphasized the fundamental nature of the parental rights at issue. (ECF No. 38 at 20-23). In *Gruenke*, the court cautioned: "Public schools must not forget that 'in loco parentis'[7] does not mean 'displace parents.' " *Gruenke*, 225 F.3d at 307. In *C.N.*, the Third Circuit Court of Appeals reaffirmed that "**parents, not schools, have the primary responsibility** to inculcate moral standards, religious beliefs, and elements of good citizenship." *C.N.*, 430 F.3d at 185 (emphasis added). In *C.N.*, the court recognized that "introducing a child to sensitive topics before a parent might have done so herself can complicate and even undermine parental authority." *Id.*

[7] *See Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, —— U.S. ——, 141 S. Ct. 2038, 2052, 210 L.Ed.2d 403 (2021) (Alito, J., concurring) (explaining that under in loco parentis doctrine, "parents are treated as having relinquished the measure of authority that the schools must be able to exercise in order to carry out their state-mandated educational mission").

***6** Parents' fundamental constitutional rights have been recognized as superior to the interests of a public school. *Mahanoy*, 141 S. Ct. at 2053 (Alito, J., concurring) ("In our society, parents, not the State, have the primary authority and duty to raise, educate, and form the character of their children."); *C.N.*, 430 F.3d at 185. The institution of the family predates the Constitution and was recognized as fundamental from the beginning of the nation. *See Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531, (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition").[8]

[8] Compulsory public education, by comparison, only became prevalent in the early 1900s. The first compulsory education law was enacted in 1852 in Massachusetts. Amanda McNelly, Truancy, Secure Detention, and the Right to Liberty, 24 Suffolk J. Trial & App. Advoc. 112, 113 (2019). It was not until the late 1800s that public elementary schools were available to children in nearly all parts of the country. History and Evolution of Public Education in the US, Center on Education Policy (2020), available at https://files.eric.ed.gov/fulltext/ED606970.pdf, last visited April 21, 2023. In 1910, just 14% of Americans aged 25 and older had completed high school. *Id.*

Public schools must perform their duties within the bounds of the Constitution. *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982) ("the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment"). In *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628

(1943), the Supreme Court held a board of education could not compel a student to salute the flag or recite the pledge of allegiance. Justice Jackson, writing for the majority, noted:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Id. at 637, 63 S.Ct. 1178.

Defendants' argument that parental rights must always yield to public school preferences is directly contrary to binding Third Circuit Court of Appeals precedent. In *Gruenke*, the court held exactly the opposite: "when such collisions occur, the **primacy of the parents' authority must be recognized** and should yield only where the school's action is tied to a compelling interest." *Gruenke*, 225 F.3d at 305 (emphasis added).[9] In *Gruenke*, the court explained:

> 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. State deference to parental control over children is underscored by the Court's admonitions that "[t]he child is not the mere creature of the State," *Pierce [v. Society of the Sisters of the Holy Names of Jesus and Mary],* 268 U.S. [510] at 535, 45 S.Ct. 571 [69 L.Ed. 1070 (1925)], and that it is the parents' responsibility to inculcate "moral standards, religious beliefs, and elements of good citizenship." *Yoder*, 406 U.S. at 233, 92 S.Ct. 1526.

Id.

9 Defendants made no effort to identify a compelling interest in this case. There are no inferences from the Complaint that a failure to include transgender topics in the classroom placed any child at risk of physical or emotional harm.

***7** As the court explained in its initial motion to dismiss opinion, Defendants' position follows the approach taken in *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), amended on denial of rehearing, 447 F.3d 1187 (9th Cir. 2006), in which the Ninth Circuit Court of Appeals held that parents forfeit any right to control their child's education if they choose to send their

children to public school. In *C.N.*, the Third Circuit Court of Appeals specifically rejected the reasoning in *Fields* and explained:

> In reaching this conclusion, we do not hold, as did the panel in *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), that the right of parents under the *Meyer [v. State of Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)]–*Pierce* rubric "does not extend beyond the threshold of the school door." *Id.* at 1207. Nor do we endorse the categorical approach to this right taken by the *Fields* court, wherein it appears that a claim grounded in *Meyer*–*Pierce* will now trigger only an inquiry into whether or not the parent chose to send their child to public school and if so, then the claim will fail. Instead, guided by *Gruenke*, wherein this Court stressed that it is primarily the parents' right "to inculcate moral standards, religious beliefs and elements of good citizenship," 225 F.3d at 307, we have determined only that, on the facts presented, the parental decisions alleged to have been usurped by the School Defendants are not of comparable gravity to those protected under existing Supreme Court precedent.

C.N., 430 F.3d at 185 n.26.

Defendants distort decisions holding that parental rights are not absolute to argue that parents have no rights at all. The quotation from *C.N.* in Defendants' brief (ECF No. 42 at 3) illustrates the flaw in their reasoning. The court explained in *C.N.* that "**in certain circumstances** the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." *Id.* at 182 (emphasis added). In the Third Circuit, unlike in *Fields*, parental rights **do** extend beyond the school door "in certain circumstances," although – as this court has already recognized -- the parental rights are not unlimited (ECF No. 38 at 28-30). In *Mahanoy* (involving a school's regulation of off-campus speech), Justice Alito explained that the decision to enroll a student in a public school confers some authority to the school, but "cannot be treated as a complete transfer of parental authority." 141 S. Ct. at 2053. Plaintiffs do not lose, as Defendants suggest, simply because their claims implicate a public school.

In the Third Circuit, courts (and school officials) must distinguish "between actions that strike at the heart of parental decision-making authority on matters of the greatest importance and other actions that, although perhaps unwise and offensive, are not of constitutional dimension." *C.N.*, 430 F.3d at 184. In *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011), the court explained that "the threshold for finding a conflict will not be as high when the school district's actions "strike at the heart of parental decision-making authority on matters of the greatest importance." *Id.* at 933-34. Under *Gruenke*, if a conflict occurs on a matter of greatest importance, the primacy of the parental rights must be respected.

The court, therefore, must determine whether the claims in this case implicate a matter of great importance with respect to parental authority. Defendants argue, conclusorily, that Williams' alleged conduct may be ill-advised and offensive, but does not strike at the heart of parental

decision-making. (ECF No. 42 at 9). The court adheres to its conclusions in its initial opinion that the issues in this case plausibly rise to constitutional importance:

> ***8** Teaching a child how to determine one's gender identity at least plausibly is a matter of great importance that goes to the heart of parenting. *See, e.g.,* *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018) (gender identity implicates a person's "deep-core sense of self").

Opinion, ECF No. 38 at 30; and

> [i]ntroducing and teaching a child about complex and sensitive gender identity topics before the parent would have done so can undermine parental authority. [*C.N.*], 430 F.3d at 185. A teacher instructing first graders that the child's parents' beliefs about gender identity may be wrong and the teacher's beliefs are correct directly repudiates parental authority.

Id. at 31-32; *see* *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 522CV04015, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022) ("It is difficult to envision why a school would even claim —much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns."). Defendants, allegedly, are interfering with the Parents' right to form their young children's identities. In this case, allegedly, young children are being instructed by their first-grade teacher that their parents may be wrong about the children's gender; one boy was secretly groomed to change his identity to be like the teacher's transgender child; and (in response to the parents' complaints) Defendants adopted a de facto policy that such conduct could continue in the future without parental notice or opt out rights. That kind of conduct implicates the heart of parental decision-making on matters of the greatest importance, i.e., rises to constitutional importance.

c. *Parker*

Defendants rely heavily on the decision in *Parker*, 514 F.3d at 87, in which the First Circuit Court of Appeals addressed a challenge to a statewide curriculum teaching tolerance of gay marriage, which had recently been legalized in Massachusetts. This court agrees with the discussion in *Parker* about the impressionability of young children. In *Parker, id.* at 100, the court quoted *Lee v.*

Weisman, 505 U.S. 577, 592, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), to identify concerns about the "subtle coercive pressure [of state endorsement of religion] in the elementary and secondary public schools"; and noted the concurrence in *School District of Abington Township v. Schempp*, 374 U.S. 203, 307, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (Goldberg, J., concurring), for expressing concern about the impact of school prayer and Bible reading on "young impressionable children." *Lee*, 505 U.S. at 592, 112 S.Ct. 2649. Concerns about sensitive subjects are heightened when the children are in first grade and the person trying to influence them is their teacher. *See Edwards v. Aguillard*, 482 U.S. 578, 584, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (public schools wield great power "because of the students' emulation of teachers as role models").

***9** Defendants rely on *Parker* to support their argument that no constitutional rights are implicated in this case and criticize this court's prior discussion of *Parker* (ECF No. 42 at 6-8). *Parker*, however, did not endorse the constitutionality of the kind of conduct alleged in this case and this court must be mindful of the precedential decisions of the Third Circuit Court of Appeals. In addition, *Parker* did not specifically evaluate the limited relief of notice and opt out rights for a parent's own children against the school's interest. *See Fulton v. City of Phila.*, —— U.S. ——, 141 S. Ct. 1868, 1881, 210 L.Ed.2d 137 (2021) (involving a First Amendment challenge to foster care regulations) ("Rather than rely on 'broadly formulated interests,' courts must scrutinize [ ] the asserted harm of granting specific exemptions to particular religious claimants.").

1. The factual situation in *Parker* was different

The parents in *Parker* objected to a public school's refusal to provide notice and opt out rights with respect to certain reading assignments, including: two books in kindergarten and first-grade about diverse families, including same gender parents; and a second-grade book that depicted and celebrated a gay marriage. *Id.* at 90. The parents were concerned that the books were an effort to indoctrinate their children.[10] The court in *Parker* commented: "The fact that a school **promotes tolerance** of different sexual orientations and gay marriage when such tolerance is anathema to some religious groups does not constitute targeting." *Id.* at 96 (emphasis added). The court explained that "[t]he school was not singling out plaintiffs' particular religious beliefs or targeting its tolerance lessons to only those children from families with religious objections to gay marriage." *Id.*

10 Defendants argue that this court made two errors about the factual background in *Parker*, when this court noted that: (1) the parents in *Parker* had notice about the books; and (2) the books did not endorse gay marriage or homosexuality (ECF No. 42 at 7). This court's statements were supported by quotations from the *Parker* opinion. *See Parker, id.* at 106 ("The parents here did in fact have notice, if not prior notice, of the books and of the school's

overall intent to promote toleration of same-sex marriage."); *id.* (concerning one student, the pertinent "books do not endorse gay marriage or homosexuality" and with respect to the other student, one book "was precisely intended to influence the listening child toward tolerance of gay marriage."). In other words, in *Parker* two of the three books did not endorse gay marriage and one book was intended to promote tolerance (not endorsement) of gay marriage.

The curriculum at issue in *Parker* was designed to increase children's tolerance of families that may not be like a child's own family. *See id.* at 106 ("these books do not endorse gay marriage or homosexuality, or even address these topics explicitly, but merely describe how **other** children might come from families that look different from one's own.") (emphasis added).[11] In *Parker*, the court recognized "a continuum along which an intent to influence could become an attempt to indoctrinate, however, [the *Parker*] case is firmly on the influence-toward-tolerance end."[12] *Id.* The lengthy discussion in *Parker* about indoctrination shows the court's concern that conduct beyond encouraging tolerance may intrude into the family relationship and be actionable. The court in *Parker* did not reach the issue whether indoctrination could violate parental constitutional rights, because it concluded that indoctrination was not factually alleged, i.e., there was no constant stream of like materials or required reading of many like books.

11 The court recognized in *Parker* that Massachusetts has a statute requiring notice and opt out rights for parents to exempt their children from curriculum that primarily involves human sexuality issues. *Id.* at 90. The school district refused to provide parental notice and opt out rights to the plaintiffs under that statute because it determined that the materials at issue did not fall within that category. *Id.*

12 The court in *Parker* assumed that one book was intended to influence the children toward tolerance of gay marriage, but found "no **evidence** of systemic indoctrination." *Parker*, 514 F.3d at 106 (emphasis added). A court, however, may not require a party to produce "evidence" at the motion to dismiss stage. *See, e.g. Grondin v. Fanatics, Inc.*, No. CV 22-1946, 2023 WL 2957474, at *5 (E.D. Pa. Apr. 14, 2023) (an allegation suffices at the motion to dismiss stage; "whether a plaintiff will be able to adduce valid evidence [ ] is a matter reserved for discovery.").

***10** This case, by stark contrast, involves not merely instruction to influence tolerance of other children or families, but efforts to inculcate a teacher's beliefs about transgender topics in Plaintiffs' own children. Unlike in *Parker*, the allegations in this case go beyond mere reading of a few books. Here, the teacher allegedly pursued her agenda throughout the school year, including teaching first-graders that their parents may be wrong about their gender, telling one boy could dress like his mother, and telling the children to keep the teacher's discussions about gender topics secret from their parents. Williams allegedly encouraged her first-grade students that they might be a different gender than their own parents told them. In other words, it was the children's own family

and their own gender identity that Williams targeted. Plaintiffs allege that Williams targeted one child for repeated approaches about gender dysphoria despite, or because of, the parents' beliefs. Complaint ¶ 79. It is reasonable to infer that Williams intended to influence the children's own gender identity and to have at least one child become like the teacher's transgender child.

Construed in the light most favorable to Plaintiffs, the Complaint sufficiently alleges that, on the continuum, Williams' conduct went beyond influencing children toward tolerance and she attempted to indoctrinate first-grade students about how to form the students' own gender identity, contrary to the values or beliefs of their Parents. These allegations, in contrast to the situation in *Parker*, support a reasonable inference of an attempt to indoctrinate young children on matters that strike at the heart of parental decision-making. *C.N.*, 430 F.3d at 184.

2. Discussion of *Parker* in *Combs*

Defendants argue that *Parker* is consistent with Third Circuit Court of Appeals precedent and point to *Combs v. Homer-Center School District*, 540 F.3d 231 (3d Cir. 2008), in which the Third Circuit Court of Appeals cited *Parker* for three matters. This court discussed *Combs* in its initial motion to dismiss opinion and adheres to that discussion. *Combs* was decided at the summary judgment stage on a full evidentiary record. The specific citations to *Parker* in *Combs* do not impact this court's analysis in this case at the motion to dismiss stage.

First, in *Combs* the court of appeals recognized that the court in *Parker* (a) interdependently analyzed the Due Process and Free Exercise rights; (b) ultimately found that the plaintiffs did not state "a constitutional burden on their rights"; and (c) chose not to enter the fray about a hybrid-rights situation. *Combs*, 540 F.3d at 245 n. 21 (citing *Parker*, 514 F.3d at 98-99). *Combs,* likewise, concluded that the hybrid-rights theory is dicta. *id.* at 245 & n.21. This court followed *Combs* in concluding the hybrid rights theory would not be followed. (ECF No. 38 at 47 n.22).

Second, in *Combs* the appellate court cited *Parker* in a footnote for a proposition "that parents have no right to exempt their child from certain subjects, reading assignments, community-service requirements or assembly programs they find objectionable. *See, e.g., Parker*, 514 F.3d at 107 (reading assignment) ...." *Combs*, 540 F.3d at 248 n.24. Here, this court concluded the Complaint's factual allegations go far beyond mere reading assignments.

Third, in *Combs* the court was concerned with homeschooling parents' request to completely opt out of all state reporting requirements and noted *Parker's* interpretation that the "mode of life" reference in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), refers to a distinct community and way of life, not the centrality of one's belief to his or her faith. *Combs*, 540 F.3d at 250 n. 27. The parents in *Combs* challenged home schooling regulations requiring reporting

that implicated core educational topics, not the kind of non-curricular transgender agenda at issue here.[13] This case does not present a parental request to opt out of all educational instruction and is not like *Combs* where a complete opt out would require a "mode of life" analysis. Here, the parents seek relief from a teacher's noncurricular transgender agenda, not the published curriculum.

13 The state regulations required reporting for home schools students at the elementary school level about a minimum of 900 hours of instruction per year and the following courses: "English, to include spelling, reading and writing; arithmetic; science; geography; history of the United States and Pennsylvania; civics; safety education, including regular and continuous instruction in the dangers and prevention of fires; health and physiology; physical education; music; and art. *Id.* at 237 & n.11; 24 Pa. Stat. §§ 13.1327(a), (b) and 13-1327.1. The Pennsylvania regulations do not require instruction on transgender topics in elementary school.

***11** *Combs* does not support Defendants' argument that parents have no constitutional rights at all. Instead, the court in *Combs* explained that parents "do not have a constitutional right to control each and every aspect of their children's education," *id.* at 248 (emphasis added), which this court recognized in its initial opinion (ECF No. 38 at 29). *Combs* quoted the discussion in *C.N.* about the "distinction between actions that strike at the heart of parental decision-making authority on matters of the greatest importance and other actions that ... are not of constitutional dimension," *Combs*, 540 F.3d at 249 (quoting *C.N.*, 430 F.3d at 184). Notably, *Combs* did not overrule *C.N.* or *Gruenke*.[14] Nothing in *Combs*' discussion of *Parker* justifies reconsideration of the court's decision in this case.

14 Indeed, only an en banc decision could do so. *United States v. Hoover*, 857 F. App'x 721, 722 (3d Cir. 2021) ("we are bound by previous precedential panel decisions absent en banc review. 3d Cir. I.O.P. 9.1.").

3. Consideration of the relief sought by the parents

The Supreme Court has explained that courts must consider the specific opt out request in balancing the competing interests. In *Fulton*, the unanimous Supreme Court stated: "Rather than rely on 'broadly formulated interests,' courts must scrutinize [ ] the asserted harm of granting specific exemptions to particular religious claimants." *Fulton*, 141 S. Ct. at 1881 (involving a First Amendment challenge to foster care regulations).

In *Combs*, the home schooling parents asserted that they should be entirely exempt from the review and reporting requirements in the state's compulsory education law. *Combs*, 540 F.3d at

234. Similarly, in *Yoder*, the Amish parents sought a complete exemption from compulsory public education after eighth grade. 406 U.S. at 207, 92 S.Ct. 1526.

Plaintiffs in this case, unlike the plaintiffs in *Combs* and *Yoder*, do not seek such sweeping relief, but instead seek to protect only their own young children from being subject to Williams' non-curricular agenda about transgender topics. Plaintiffs do not challenge the official curriculum and do not seek to limit the information provided to other students. *See Kennedy v. Bremerton Sch. Dist.*, ––– U.S. ––––, 142 S. Ct. 2407, 2431, 213 L.Ed.2d 755 (2022) ("permitting private speech is not the same thing as coercing others to participate in it"). Williams' alleged agenda about transgender topics goes far beyond merely reading one or three books in an objective manner, is not part of the school curriculum, and Defendants did not assert a compelling interest for that conduct. Plaintiffs assert they are not trying to impose their religious or moral views on others, but want to prevent Williams from abusing her position as a role model to impose the teacher's views upon the Parents' children that contradict the Parents' religious or moral views.

In *Parker*, the court recognized that the parents sought similarly limited relief. The court noted the parents "specifically disclaim[ed] any intent to seek control of the school's curriculum or to impose their will on others" and sought only notice and opt out rights for their own children. *Id.* at 102. In *Parker*, the court did not attempt to balance the competing interests in light of this limited relief, as now required by *Fulton*. The court did not address the theory that where a school has a system for exemptions, "it may not refuse to extend that system to cases of 'religious hardship' without compelling reason" because the plaintiffs did not raise that argument. *Id.* at 96 & n.8 (noting that the school did not put on evidence that exemptions would impose a burden). [15]

15 It is unknown whether the Massachusetts school district provided broad parental notice and opt out rights on other topics, similar to those available under the District's Policy I(F) and the District's practices.

***12** The court in *Parker* concluded that the parents' only remedy was to engage in political action to change the curriculum for all students. *Id.* at 107 ("If the school system has been insufficiently sensitive to such religious beliefs, the plaintiffs may seek recourse to the normal political processes for change in the town and state."). The suggestion that parents must engage in politics to protect their constitutional rights is contrary to law. As Justice Jackson stated in *Barnette*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of

> worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. at 638, 63 S.Ct. 1178.

4. Circuit split

The court adheres to its conclusion that there is a fundamental circuit split between decisions like *Parker* and *Fields* and Third Circuit Court of Appeals' precedents like *Gruenke, C.N.* and *Combs*. *Parker's* narrow interpretation of the Supreme Court precedents about parental rights is problematic. In the initial motion to dismiss opinion, this court quoted numerous decisions in which the Supreme Court repeatedly emphasized the fundamental nature of the parental rights to custody, control and nurture of their children. *Parker* acknowledged those decisions, but narrowly construed "the schooling cases cited in *Troxel* [*v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)][to] evince the principle that the state cannot prevent parents from choosing a specific educational program." *Id.* at 101 (citation omitted). *Parker* distinguished *Yoder* on the basis that "plaintiffs have chosen to place their children in public schools and do not live, as the Amish do, in a largely separate culture." *Id.* at 100. *Parker* described the proposition 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' " as "well recognized." *Id.* at 102 (emphasis in original, citation omitted). *Parker* cited *Fields* with approval. *Id. Parker* quoted *C.N.'s* distinction between school actions that strike at the heart of parental decision-making and lesser actions that are not constitutionally protected, *id.*, but did not apply that standard. *Parker* did not address *C.N.'s* rejection of *Fields* (as discussed *supra* at ——— – ———). In *Parker,* the court concluded (consistent with *Fields*) that parents do not have a fundamental right to tell a public school what a child will, or will not, be taught. *Id.* (citation omitted).

Parker and *Fields* represent a "school-primacy" view, under which parents whose children attend a public school have no constitutional rights. *See Foote v. Town of Ludlow*, No. CV 22-30041-MGM, 2022 WL 18356421, at *9 (D. Mass. Dec. 14, 2022) (involving transgender middle school students) ("Plaintiffs' right to direct the upbringing of their children allows them to 'choose between public and private schools,' but does not give them a right 'to interfere with the general power of the state to regulate education.' ") (quoting *Parker*, 514 F.3d at 102). In *Foote*, the parents notified school officials that they were getting their child professional mental health help and requested that school officials not have private conversations with the student. *Id.* at *2. The parents alleged that their parental rights were violated when school officials disregarded that request, supported the child's request to use alternate names and pronouns, and failed to notify the parents about that request. *Id.* The court – bound by *Parker* -- dismissed the parental rights claims even

though the court found it "disconcerting that school administrators or a school committee adopted and implemented a policy requiring school staff to actively hide information from parents about something of importance regarding their child." *Id.* at * 7.

***13** The Third Circuit Court of Appeals, by contrast, adopts a "parent-primacy" approach. In *Gruenke*, the court explained: "It is not educators, but parents who have primary rights in the upbringing of children." *Gruenke*, 225 F.3d at 305. Under the Third Circuit Court of Appeals' approach, when conflicts on matters of greatest importance implicating parental rights occur, "the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest." *Id.* In *C.N.*, the Third Circuit Court of Appeals specifically rejected the "school-primacy" approach in *Parker* and *Fields* in favor of the "parent-primacy" approach in *Gruenke.* *C.N.*, 430 F.3d at 185 n.26.

In sum, the decision in *Parker* and the limited references to *Parker* by the Third Circuit Court of Appeals in *Combs* (which, as discussed, is factually different from this case and cited *C.N.* as precedent) cannot be read to endorse Defendants' position that parents have no constitutional rights after their children cross the threshold of the schoolhouse door. Defendants' position is contrary to Supreme Court and Third Circuit Court of Appeals precedent.

d. Conclusion about Due Process claims

The court adheres to its determination that Plaintiffs pled plausible Due Process claims against all remaining Defendants. The parental rights raised by Plaintiffs are plausibly fundamental, as explained in numerous Supreme Court and Third Circuit Court of Appeals decisions. Defendants' alleged conduct implicates the violation of parental interests of the greatest importance about forming the gender identity of their children. Plaintiffs plausibly alleged that throughout the school year Bielewicz was on notice that Williams' transgender agenda violated parental rights. Complaint ¶ 88. Steinhauer, Irvin and Wyland adopted a de facto policy that violated the District's own parental rights policy, District Policy I(F), and District practices, by eliminating parental notice and opt out rights with respect to Williams' transgender agenda. *See* *Hope v. Pelzer*, 536 U.S. 730, 743-44, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (policy showed that officials had fair warning that their conduct violated the Constitution).

1. Free Exercise claims

Defendants argue that Plaintiffs' rights to free exercise of their religion were not burdened. Defendants contend there were no allegations that any Defendant coerced any student into violating their religious beliefs or that any student was punished for exercising their religious

freedom and that Williams' "instruction does not amount to indoctrination." (ECF No. 42 at 12.) Defendants also argue that the parents' Free Exercise claims should be dismissed as duplicative of their Due Process claims. Plaintiffs respond that Defendants did not raise the "burden" argument in their original motion and point out that recent Supreme Court cases establish that a non-neutral policy to the detriment of a religious belief is a per se burden on Free Exercise rights. Plaintiffs also contend they are being coerced to submit to Williams' transgender agenda and the de facto policy contrary to their religious beliefs. *See* Complaint ¶¶ 53, 121, 143.

The court explained in its initial opinion that Plaintiffs' Free Exercise claims[16] are intertwined with their Due Process claims because the alleged conduct intrudes on the parents' ability to inculcate their children about their religious beliefs concerning gender identity.[17] Plaintiffs allege that Williams' agenda about gender dysphoria and transgender transitioning conflicts with their sincerely held religious and moral beliefs that "human beings are created male or female and that the natural created order regarding human sexuality cannot be changed regardless of individual feelings, beliefs, or discomfort with one's identity, and biological reality, as either male or female." *Id.* ¶ 140. Plaintiffs contend that Defendants deliberately supplanted the parents' role to control the instruction of their young children about their gender identity in accordance with their religious values, *Id.* ¶ 143, and adopted a de facto policy that Williams could continue to advocate her agenda to first-graders in the future without notice or opt out rights for the parents. *Id.* ¶ 8. As noted, this case is not about teaching kindness or tolerance, but about a teacher's agenda to instruct first-graders that their parents' religious beliefs about their own children's gender are or may be wrong. The Complaint's factual allegations and the reasonable inferences therefrom about Williams' attempt to indoctrinate the Plaintiffs' children concerning the children's gender identity must be construed in the light most favorable to Plaintiffs at this stage of the case.

16 In *Barnette*, the Supreme Court noted the importance of distinguishing between the Due Process clause of the Fourteenth Amendment when "it is applied for its own sake" and when it serves as "an instrument for the First Amendment." *Barnette*, 319 U.S. at 639, 63 S.Ct. 1178. States may restrict First Amendment rights raised by way of the Fourteenth Amendment "only to prevent grave and immediate danger to interests which the state may lawfully protect." *Id.* Defendants did not articulate any such interests in this case.

17 Pursuant to Federal Rule of Civil Procedure 8(d), a party may plead duplicative claims in the alternative. *Gaines v. Krawczyk*, 354 F. Supp. 2d 573, 580 (W.D. Pa. 2004).

***14** Defendants argue that Plaintiffs failed to plead coercion. In *Kennedy*, the Supreme Court did not require coercion.[18] The Supreme Court explained "a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not neutral or generally applicable." *Kennedy*, 142 S. Ct. at 2421-22.

18 To the extent that coercion is necessary, it is fairly pled. Under the de facto policy, Plaintiffs must either withdraw their children from the public school or submit to Williams' advocacy. *See* *Edwards*, 482 U.S. at 584, 107 S.Ct. 2573 (recognizing that for many, public school is effectively mandatory); *see* initial motion to dismiss pinion (ECF No. 38 at 38) (not all parents can afford private school or provide adequate home schooling).

In *Fulton*, the Supreme Court explained that a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; *accord* *Ricard*, 2022 WL 1471372 at *5 (school district policy not generally applicable where it exempts conduct for secular reasons, but is unwilling to exempt plaintiff for religious reasons). In this case, Defendants allegedly adopted a de facto policy that prohibits Plaintiffs from notice and the ability to opt their children out of Williams' transgender agenda based on their religious beliefs, while allowing parental notice and opt out for numerous other secular or religious reasons, such as the Holocaust, slavery, the 9/11 terrorist attacks, reproductive education, sex education, Black Lives Matter and Planned Parenthood. Complaint ¶ 3.[19] The court adheres to its conclusion that Plaintiffs pled plausible Free Exercise claims against all remaining Defendants.[20]

19 The court did not apply the "hybrid rights" doctrine. (ECF No. 38 at 47 n. 22).

20 Defendants seek qualified immunity only for Williams on the Free Exercise claim (ECF No. 42 at 13).

2. Familial Privacy claims

Defendants seek to characterize the familial privacy claims against the District and Williams as "based on the Defendants teaching lessons on transgender issues without providing notice and opt out rights." (ECF No. 42 at 10). Defendants argue that the Complaint does not "plausibly allege a scenario where Plaintiffs were deprived of their ability to discuss this matter with their children." *Id.* Defendants contend that Williams (the lone remaining individual Defendant with respect to the familial privacy claim) is entitled to qualified immunity because the court acknowledged that the contours of this claim are not well-defined. Plaintiffs respond that the court properly recognized a familial privacy claim based on Williams' intrusion into the values being conveyed within the family and the instruction that children not tell their parents about the gender identity discussions.

The court dismissed Plaintiffs' familial privacy claims against all Defendants except Williams and the District. The familial privacy claim recognized by the court is not based on Williams "teaching lessons," as Defendants argue (ECF No. 42 at 10). This court explained that the cognizable familial

privacy claim is based on the factual allegations that Williams had "an agenda to encourage young children to believe their parents could be wrong about their gender and an intrusion by Williams, with the permission of the District, into the values being conveyed within the family (particularly with respect to the "grooming" allegations and the instruction that children not tell their parents about the gender identity discussions)." (ECF No. 38 at 44-46). The court adheres to its conclusion that the right to familial privacy may be implicated by a teacher's agenda to inculcate her values in young children, as opposed to the parents' values, and a teacher's instruction to first-grade children that their parents may be wrong about their gender. *See* *Gruenke,* 225 F.3d at 303-04 (discussing "right of parents to raise their children without undue state interference"); *id.* at 307 ("School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution."). The court dismissed the familial privacy claim against all other individual Defendants.

***15** Defendants argue, citing *C.N.*, that a parent whose "child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials." *C.N.*, 430 F.3d at 185. This case in not about mere exposure to sensitive topics or information. It is about a teacher's attempts to inculcate her beliefs in the first grade students contrary to the beliefs or values of their parents. Defendants' argument also rings hollow (or, at a minimum, is premature) in the context of this case. Transgender topics were not part of the published first-grade curriculum and Plaintiffs allege that Williams told the children not to discuss her transgender agenda with their parents. Complaint ¶¶ 6, 79. Plaintiffs allege they did not learn about the grooming behavior until the spring. Complaint ¶ 79. The alleged de facto policy would allow Williams' conduct to continue in the future without notice to the parents. Without notice to parents about the sensitive information provided to their children, that information could not be placed by parents in the family's moral or religious context.

The court adheres to its determination that Plaintiffs stated plausible familial privacy claims against Williams and the District.

3. Equal Protection claims

Defendants argue that Plaintiffs failed to allege intentional discrimination to support an Equal Protection "class of one" claim. Defendants also contend that Plaintiffs were treated exactly the same as other parents with respect to transgender topics. The individual Defendants assert they are entitled to qualified immunity because the court recognized there are no decisions with similar facts. Plaintiffs respond that Defendants failed to raise the "intentional discrimination" argument

in their initial motion and, in any event, they sufficiently pled intent, particularly with respect to the de facto policy.

The court dismissed the Equal Protection claims against all individual Defendants except Steinhauer, Irvin and Wyland (ECF No. 38 at 53-54 & n.23). It is not a defense to the Equal Protection claims to argue that Defendants violated the constitutional rights of all parents by not providing notice or opt out rights for transgender issues (ECF No. 42 at 14-15). The proper comparators for the Equal Protection analysis plausibly are the parents who are given notice and opt out rights under District Policy I(F) or by practice on numerous other sensitive secular or religious topics. Defendants did not articulate any basis (let alone a compelling basis) for adopting a de facto policy that eliminates notice and opt out rights for parents affected by Williams' transgender agenda while permitting notice and opt out rights for other secular or religious topics.

Plaintiffs allege, plausibly, that the disparate treatment was intentional (i.e., the de facto policy was adopted in response to their complaints) and was done to prevent the exercise of their fundamental rights. *See* *Harvard v. Cesnalis*, 973 F.3d 190, 205 (3d Cir. 2020) (to establish a selective enforcement claim, plaintiffs must demonstrate that they were (1) treated differently from other, similarly situated persons and (2) this selective treatment was based on an unjustifiable standard, such as race, or religion, or some other arbitrary factor or to prevent the exercise of a fundamental right). Plaintiffs must be similarly situated in all relevant respects, but need not be identically situated. *Id.* The court adheres to its determination that Plaintiffs asserted cognizable Equal Protection claims against the District, Steinhauer, Irvin and Wyland.

4. Declaratory Judgment

With respect to the Declaratory Judgment claim in count VI, Defendants argue (for the first time) that if the federal claims are dismissed, count VI does not provide a standalone basis for jurisdiction. Because the federal constitutional claims are not being dismissed, the court need not resolve this issue.

D. Qualified Immunity

1. Consideration of qualified immunity at the motion to dismiss stage

A district court's denial of a motion to dismiss on qualified immunity grounds is a pure question of law, which is subject to de novo review. *Dennis v. City of Phila.*, 19 F.4th 279, 284 (3d Cir. 2021). At the motion to dismiss stage, the court must accept Plaintiffs' factual allegations as true and draw all reasonable inferences in their favor. *Id.* Qualified immunity involves two questions:

(1) whether the plaintiff sufficiently alleged the violation of a constitutional right, and (2) whether the right was clearly established at the time of the official's conduct. *Id.* at 286.

***16** In *Clark v. Coupe*, 55 F.4th 167 (3d Cir. 2022) (involving an inmate's Eighth Amendment claims against prison officials), the United States Court of Appeals for the Third Circuit reversed a district court's grant of qualified immunity at the motion to dismiss stage. The court of appeals reiterated that "[i]n assessing the claims, we must construe the complaint liberally and assume the veracity of all 'well-pleaded factual allegations.' " *Id.* at 178. The district court in *Clark* granted qualified immunity on the basis that no established law was violated, and therefore, the inmate's right was not clearly established. The Third Circuit Court of Appeals reversed and held that this decision "was premature given the nature of his allegations." *Id.* As applicable to this case, the court must consider the specific facts set forth in the Complaint, construed in the light most favorable to Plaintiffs, in considering whether qualified immunity should be granted at the motion to dismiss stage.

In any event, Plaintiffs' claims would not be denied in their entirety on the basis of qualified immunity. Plaintiffs seek injunctive relief in this case, in addition to compensatory damages. *See* Complaint (ECF No. 1 at 44). Qualified immunity is not a defense to injunctive relief. *See Hill v. Borough of Kutztown*, 455 F.3d 225, 244 (3d Cir. 2006) ("[T]he defense of qualified immunity is available only for damages claims – not for claims requesting prospective injunctive relief."). In addition, municipal entities, such as the District, "do not enjoy qualified immunity from suit for damages under § 1983." *Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.*, 877 F.3d 136, 145 (3d Cir. 2017).[21]

21 In *Barna*, the court explained:

> Although not subject to respondeat superior liability, municipalities may be held directly liable under *Monell* if they adopt a custom or policy that is unconstitutional or that is the "moving force" behind any constitutional violation. *See Monell*, 436 U.S. at 694, 98 S.Ct. 2018; *Thomas v. Cumberland Cty.*, 749 F.3d 217, 222 (3d Cir. 2014). Municipalities can be held liable regardless of whether it was clear at the time of the policy's adoption that such conduct would violate a plaintiff's constitutional rights. *Owen [v. City of Independence, Mo.]*, 445 U.S. [622] at 656–57, 100 S.Ct. 1398 [63 L.Ed.2d 673 (1980)]. Because liability may be imposed on a municipality separate and apart from the liability imposed on an individual officer, "[t]he precedent in our circuit requires the district court to review the plaintiffs' municipal liability claims independently of the section 1983 claims against the individual ... officers." *Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996); *see also Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994) ("A finding of municipal liability does not depend automatically or necessarily on the liability of a police officer.").
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> *Barna*, 877 F.3d at 145 n.6.

2. First prong – violation of constitutional rights

For the reasons set forth in its prior discussion, the court adheres to its determination that Plaintiffs articulated plausible constitutional claims.

3. Second prong - clearly established

The court now turns to the second prong of the qualified immunity analysis. The court must decide whether the claims asserted by Plaintiffs were clearly established. In determining whether a right is clearly established, the "ultimate question is whether the state of the law when the offense occurred gave the [ ] officials 'fair warning' that their conduct violated [plaintiffs' constitutional right[s]." *Clark*, 55 F.4th at 181. In this case, the conduct occurred during the 2021-2022 school year.

The court must first define the rights at the appropriate level of specificity "in light of the specific context of the case, not as a broad general proposition" based on the specific facts set forth in the Complaint. *Id.* at 181-82. The court in *Clark* reiterated: "The dispositive question is whether the violative nature of the *particular* conduct is clearly established." *Id.* at 182 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015)) (emphasis in original). In *Clark*, the court explained that the right at issue was not "housing a mentally ill inmate in solitary confinement for long periods of time," but "keeping Clark in solitary confinement for seven months despite knowing of his serious mental illness." *Id.* [22]

22 The court of appeals redefined the right as: "the right of a prisoner known to be seriously mentally ill to not be placed in solitary confinement for an extended period of time by prison officials who were aware of, but disregarded, the risk of lasting harm posed by such conditions." *Id.* at 182. In this case, as discussed above, the rights at issue must be defined to reflect the full scope of Williams' transgender agenda and the District's de facto policy, as alleged in the Complaint.

***17** The Third Circuit Court of Appeals takes a "broad view of what constitutes an established right of which a reasonable person would have known." *Id.* State officials can "receive fair warning that their conduct is violative even in 'novel factual circumstances' never previously addressed in caselaw." *Id.* In *Clark*, the court held that even if the inmate's initial placement in solitary confinement was justified, the allegations in the complaint gave rise to a reasonable inference that his continued isolation, despite the worsening of his mental health symptoms, resulted in the gratuitous infliction of suffering in violation of the Eighth Amendment. *Id.* at 183. The court of appeals concluded in *Clark* that the grant of qualified immunity was premature in light of the

plausible constitutional violation alleged, while recognizing that the allegations may be disproved in discovery. *Id.* at 188.

In *Mack* (which reversed a grant of qualified immunity at the summary judgment stage), the court explained that the "clearly established" prong involves two steps: (1) defining the right allegedly violated at the appropriate level of specificity; and (2) considering whether that right was clearly established at the time of the alleged violation. *Mack*, 63 F.4th at 228. The court reiterated that in defining the right at issue, all reasonable inferences must be drawn in favor of the nonmovant. *Id.* In *Mack*, the court held that the proper definition, reflecting the context of the case viewed in the light most favorable to the inmate, was a violation of his right to "engage in prayer free of substantial, deliberate, repeated, and unjustified disruption by prison officials." *Id.* at 230.

The court in *Mack* explained that a right can be "clearly established" in two ways: (1) there is closely analogous caselaw establishing that a defendant's conduct was unlawful; or (2) the violation is obvious, i.e., the conduct is "so patently violative of the ... right that reasonable officials would know [it to be a violation] without guidance from a court." *Id.* at 232 (citation omitted). The court explained that broad principles of law may "suffice to give fair warning to a reasonable officer that the conduct at issue is illegal." *Id.* at 233 (citation omitted). The court observed: "A public official, after all, does not get the benefit of 'one liability-free violation' simply because the circumstance of his case is not identical to that of a prior case." *Id.* (citation omitted).

In *Mack*, the court concluded there was no closely analogous caselaw, but denied qualified immunity because the violation was obvious. The court commented: "it should be clear to any reasonable correctional officer that, in the absence of some legitimate penological interest, he may not seek to prevent an inmate from praying in accordance with his faith." *Id.* The court noted that the long-standing history and force of the general principles protecting the practice of religion made the right at issue clearly established. *Id.* at 234. The court also noted the defendants offered no justification for their actions and "their argument [was] based on the erroneous presumption that their preferred framing of the facts and inferences must be accepted." *Id.* [23]

23 In this case, as in *Mack*, long-standing principles about the importance of the rights at issue are implicated, Plaintiffs allege purposeful interference with their rights, Defendants did not try to justify their actions and Defendants' argument is based on their preferred framing of the events.

The District's policies are relevant to whether the individual Defendants had fair warning that their conduct violated the Constitution. *Hope*, 536 U.S. at 743-44, 122 S.Ct. 2508. In *Clark*, the court explained that allegations that the officials disregarded regulations "provided sufficient grounds for the denial of qualified immunity at the complaint stage." *Clark*, 55 F.4th at 185. In this case,

the District had a published policy, District Policy I(F), which recognized broad parental notice and opt out rights. The Complaint quotes portions of District Policy I(F):

> ***18** 37. District Policy I(F) is titled "Curriculum and Parental Rights." It expressly recognizes that parents "have a stake in the learning programs of the District." It expressly acknowledges that "parents and guardians of students have the right to access and review **information** concerning the instruction, assessment and academic progress of their children." (emphasis added). A stated "Objective" of the Policy is "to assure that parents and guardians of students can **access and review information** concerning the instruction, assessment, and academic progress of their children."
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> 38. Policy I(F) further provides that the parental rights from the Pennsylvania School Code should be adhered to by, inter alia, providing "access to **information** about the curriculum, including academic standards to be achieved, **instructional materials**, and assessment techniques[,]" "a process for the review of **instructional materials**[,]" and opt out rights related to instruction that conflicts with First Amendment beliefs. (emphasis added). The Policy also guarantees that "Parents and guardians of students enrolled in the District have the **right to access and review instructional materials** for courses in which their children are enrolled and all assessment materials that have been administered to their children." (emphasis added).

Complaint ¶¶ 38-39 (emphasis in original). Plaintiffs allege that Defendants adopted a de facto policy that violated District Policy I(F) by eliminating parental rights to notice and opt out of Williams' transgender agenda, even though Williams' agenda conflicted with the parents' fundamental rights and religious beliefs. The District's practice of permitting opt out rights for other sensitive matters, such as the Holocaust, slavery, the 9/11 terrorist attacks, reproductive education, sex education, Black Lives Matter and Planned Parenthood, shows the District's awareness of protecting important parental rights.

In its initial motion to dismiss opinion, the court concluded that Supreme Court and Third Circuit Court of Appeals precedent put a reasonable defendant on notice that the conduct alleged in this case would – absent a compelling interest – plausibly infringe the Parents' Substantive and Procedural Due Process and Free Exercise rights and denied qualified immunity without prejudice with respect to those claims. The parental rights at issue are fundamental, long-recognized and clearly established. Defendants had fair warning from numerous Supreme Court and Third Circuit Court of Appeals decisions and District Policy I(F) and practices that their alleged conduct violated parental interests of the greatest importance, i.e., forming the identity of their children. Bielewicz was on notice that Williams' transgender agenda violated parental rights throughout the school year and the remaining individual Defendants adopted a de facto policy that violated the District's own parental rights policy and practices. *See* *Clark*, 55 F.4th at 185 (alleged disregard of policies is sufficient to deny qualified immunity at the motion to dismiss stage). The Free Exercise claims

are intertwined with the parental rights claims and were also clearly established such that qualified immunity should not be granted at this stage of the case.

The court noted in its initial motion to dismiss opinion that the familial privacy claim was less clearly established (and to clarify that comment, the court recognized there were no decisions directly on point, *see* *Mack*, 63 F.4th at 234). There were, however, sufficient allegations to reasonably infer that Williams had fair warning that her alleged conduct (the intrusion of her transgender agenda into the values being taught by the family) violated familial privacy rights such that she is not entitled to qualified immunity at the motion to dismiss stage. *See, e.g.,* *Gruenke*, 225 F.3d at 303-04, 307. Williams' conduct in trying to keep her agenda a secret from the parents must be construed in the light most favorable to Plaintiffs to show she knew her conduct violated the familial privacy claims, i.e., she was trying to influence the child's gender identity and values contrary to those of the child's family. In 1977, Supreme Court stated: "It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore*, 431 U.S. at 503–04, 97 S.Ct. 1932. A reasonable teacher in Williams' position would have known that where no notice or opt out rights are given, the alleged conduct would violate the Parents' right to inculcate in their children their values about their own children's gender and identity. The court adheres to its conclusion.

***19** With respect to the Equal Protection claim, this court recognized it was less clearly established because (as noted in the initial motion to dismiss opinion) the court did not find any published decisions recognizing an Equal Protection claim under similar facts. That recognition, though, is not determinative. *See* *Mack*, 63 F.4th at 234; *Clark*, 55 F.4th at 182 (officials can receive fair warning that their conduct is violative even in novel factual circumstances). Accepting the facts pled as true, the Complaint states a plausible claim that the disparate treatment in the de facto policy is based on the Parents' fundamental rights and religious beliefs and the de facto policy was adopted in response to the Parents' assertion of their fundamental rights. Steinhauer, Irvin and Wyland[24] are not entitled to qualified immunity at the motion to dismiss stage because there were plausible allegations they had fair warning that their alleged conduct (adoption of a de facto policy to eliminate parental notice and opt out rights for Williams' transgender agenda in violation of District Policy I(F) and the District's practices of providing notice and opt out rights for sensitive secular topics) would violate Equal Protection. *See* *Danielson v. Chester Twp.*, No. CIV.A. 13-5427, 2014 WL 3362435, at *10 (D.N.J. July 9, 2014) (denying qualified immunity because it was "clearly established on the date in question that an individual's rights under the Equal Protection clause are violated when 'he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.' ") (quoting *Hill*, 455 F.3d at 239).

24 The Equal Protection claims against Williams and Bielewicz were dismissed.

V. Conclusion

In summary, for the reasons set forth above, the court adheres to its conclusion that the Plaintiffs, based upon the factual allegations in the Complaint and the reasonable inferences drawn from them, assert plausible claims against all remaining Defendants that the Parents' fundamental constitutional rights pursuant to Substantive and Procedural Due Process and the First Amendment Free Exercise clause were violated. The court adheres to its conclusions that Plaintiffs pled plausible familial privacy claims against Williams and the District and plausible Equal Protection claims against Steinhauer, Irvin and Wyland and the District. The rights allegedly violated were clearly established such that the remaining individual Defendants are not entitled to qualified immunity at this stage of the case.

In accordance with the foregoing analysis, the motion for reconsideration pursuant to Rule 54(b) (ECF No. 41) and the motion to amend judgment pursuant to Rule 59(e) (ECF No. 44) will be DENIED.

An appropriate Order follows.

All Citations

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United States District Court, D. Massachusetts.

Stephen FOOTE., et al., Plaintiffs,
v.
TOWN OF LUDLOW, Ludlow School Committee, et al., Defendants.

Civil Action No. 22-30041-MGM
|
Signed December 14, 2022

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ORDER ON DEFENDANTS' MOTION TO DISMISS

(Dkt. No. 25)

MASTROIANNI, United States District Judge

I. INTRODUCTION

***1** Stephen Foote and Marissa Silvestri ("Plaintiffs") have alleged that during the 2020-2021 school year, staff employed by Ludlow Public Schools (1) spoke about gender identity with two of their children, who were then eleven and twelve years old and students at Baird Middle School; (2) complied with the children's requests to use alternative names and pronouns; and (3) did not share information with Plaintiffs about the children's expressed preferences regarding their names and pronouns. Plaintiffs allege these actions, and inactions, violated their fundamental, parental

rights protected by the Fourteenth Amendment to the United States Constitution. They filed this action pursuant to 42 U.S.C. § 1983 to seek redress for their alleged injuries.

Plaintiffs assert three claims against the Town of Ludlow; the Ludlow School Committee; Lisa Nemeth, Interim Superintendent; Todd Gazda, former Superintendent; Stacy Monette, Principal of Baird Middle School; Marie-Claire Foley, school counselor at Baird Middle School; and Jordan Funke, former librarian at Baird Middle School (collectively "Defendants"). First, they allege Defendants violated their fundamental parental right to direct the education and upbringing of their children. Second, they allege Defendants violated their fundamental parental right to direct the medical and mental health decision-making for their children. Finally, they assert Defendants violated their fundamental right to familial privacy.

Defendants have moved for dismissal of Plaintiffs' claims.[1] The court grants Defendants' motion for the reasons that follow.

[1] The court has also received and reviewed amici curiae memoranda submitted by GLBTQ Legal Advocates and Defenders and the Massachusetts Association of School Superintendents in support of Defendants and the Family Institute of Connecticut in support of Plaintiffs.

II. MOTION TO DISMISS STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); Fed. R. Civ. P. 12(b)(6). "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. The court accepts all well-pleaded factual allegations and draws all reasonable inferences in Plaintiffs' favor, but "do[es] not credit legal labels or conclusory statements." *Cheng v. Neumann*, 51 F.4th 438, 443 (1st Cir. 2022). Dismissal is appropriate if the complaint fails to establish at least one "material element necessary to sustain recovery under some actionable legal theory." *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 6 (1st Cir. 2005) (internal citation omitted).

III. FACTUAL ALLEGATIONS[2]

2 Plaintiffs' Amended Complaint included a section entitled "Factual Allegations" that contained a mix of "non-conclusory, non-speculative factual allegations" together with conclusory statements about the legal significance of various factual allegations. *Cheng*, 51 F.4th at 443. The court summarizes the factual allegations, which the court must credit at this stage, but omits the legal conclusions promoted by Plaintiffs. *Id.*

***2** During the 2020-2021 school year, Plaintiffs' children B.F. and G.F. were eleven and twelve years old and were students at Baird Middle School in Ludlow, Massachusetts. Early in the school year, school librarian Jordan Funke gave students in B.F.'s sixth grade class an assignment to make biographical videos. Funke invited students to include their gender identity and preferred pronouns in their videos. The students also received instruction about language that is inclusive of students with different gender identities.

In December 2020, B.F. spoke with a teacher and asked for help talking to Plaintiffs about concerns about depression, low self-esteem, poor self-image, and possible same-sex attraction. The teacher spoke with Silvestri, B.F.'s mother, and shared B.F.'s concerns with her. Shortly after that conversation, Silvestri sent an email to B.F.'s other teachers, Stacy Monette, Todd Gazda, and several members of the Ludlow School Committee. In her email, she stated that Plaintiffs were aware of the teacher's concerns about B.F.'s mental health, they would be getting B.F. professional help, and requested that no one receiving the email "have any private conversations with B.[F.] in regards to this matter." (Dkt. No. 22, Am. Compl. ¶ 70.)

On February 28, 2021, B.F. sent an email to Gazda, Marie-Claire Foley, and several teachers. In that email, B.F. identified as genderqueer and announced a new preferred name, one typically used by members of the opposite sex, and a list of preferred pronouns. Foley met with B.F. and, after their meeting, sent an email stating that B.F. was "still in the process of telling" Plaintiffs about B.F.'s gender identity and instructed school staff that they should not use B.F.'s new preferred name and pronouns when communicating with B.F.'s parents. Foley's position was consistent with a policy sanctioned by the School Committee, pursuant to which school personnel would only share information about a student's expressed gender identity with the student's parents if the student consented to such communication. After Foley sent her email, teachers at Baird Middle School began using B.F.'s new preferred name and pronouns.

In early March, the same teacher who had spoken with Silvestri in December informed Plaintiffs about B.F.'s email, despite the policy and B.F.'s request that Plaintiffs not be told. On March 8, 2021, Foley sent another email to school staff in which she reiterated that B.F. had expressly requested that Plaintiffs not be told about B.F.'s new first name. Several days later, Foley gave B.F. permission to use boys' bathrooms, girls' bathrooms, or gender-neutral bathrooms. Around this same time, G.F. also began using a different preferred name and school staff did not inform Plaintiffs.

On March 18, 2021, Monette met with Plaintiffs. During their meeting, Plaintiffs asserted that Defendants had disregarded their parental rights by not complying with Silvestri's December 2020 request that staff not engage with B.F. regarding mental health issues and by failing to notify them about their children's use of alternate names and pronouns. Plaintiffs also conveyed to Monette their belief that school staff were acting improperly by affirming B.F.'s and G.F.'s self-asserted gender identities. Monette refused to discuss the issues raised by Plaintiffs and ended the meeting abruptly.

Plaintiffs met with Gazda on March 21, 2021. During that meeting, they expressed concerns about negative consequences their children might experience as a result of being able to use names and pronouns associated with the opposite sex. They objected to the way school staff had disregarded their instructions and supported the children's use of different names and pronouns at school. Plaintiffs also told Gazda that they believed school staff violated their rights with respect to their children's student records by concealing information about their children from them.

***3** In response, Gazda told Plaintiffs that school staff acted appropriately and consistently with policies approved by the School Committee when they began using the children's new names and pronouns without consulting with or notifying Plaintiffs. Gazda also asserted that school staff had not violated the Massachusetts regulation protecting parents' "rights of confidentiality, inspection, amendment, and destruction of student records" for students under the age of fourteen and not yet in ninth grade. 603 C.M.R. § 23.01. Gazda took the same positions when he met with Plaintiffs again on March 26, 2021.

Foley met with B.F. weekly throughout the spring of 2021. They discussed B.F.'s gender identity and mental health issues. During their conversations, Foley consistently affirmed B.F.'s gender identity. On some occasions, Foley expressed concern about whether Plaintiffs were providing appropriate care for B.F. and whether B.F. had sufficient support to stay safe. She asked whether B.F. was as comfortable discussing issues with the counselor chosen by Plaintiffs as with her and encouraged B.F. to speak with another counselor to increase sources of support. Foley did not communicate with Plaintiffs about B.F.'s gender identity or any other issues they discussed. B.F. also talked about gender identity with Funke. Funke was affiliated with an organization that shares resources related to gender and gender identity and Funke encouraged B.F. to visit the organization's website.

Later in the spring, Gazda publicly defended the Ludlow Public Schools policy. During School Committee meetings on May 25, 2021 and June 8, 2021, Gazda expressed support for the policy that instructed school staff to respect students' expressed gender identities and follow a student's preferences about whether to share information about the student's gender identity with the student's parents. He described the types of "parental rights" concerns raised by Plaintiffs

as thinly-veiled intolerance and asserted that for some students who are transgender or gender nonconforming, school is the only safe place to express who they are.

IV. STATE LAWS, REGULATIONS, AND GUIDANCE REGARDING GENDER IDENTITY

States enjoy a general power to regulate the schools they support. *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008). This includes the power to prescribe a curriculum designed to promote tolerance and provide a safe learning environment for all students. *Id.* While parents do not have to send their children to public school, those who make that choice "do not have a constitutional right to direct *how* a public school teaches their child." *Id.* (internal quotation marks omitted) (emphasis in original).

The Commonwealth of Massachusetts recognizes gender identity as a personal characteristic deserving of protection from discrimination. Since July 1, 2012, Massachusetts law has provided that "[n]o person shall be excluded from or discriminated against ... in obtaining the advantages, privileges and courses of study of [a] public school on account of ... gender identity." Mass. Gen. Laws ch. 76, § 5. As defined under Massachusetts law, "gender identity" means "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." Mass. Gen. Laws ch. 4, § 7.

A person's "gender-related identity may be shown by providing ... any ... evidence that the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose." *Id.*; *see also* 603 C.M.R. § 26.01. Neither the statute defining gender identity, nor the statute prohibiting schools from discriminating based on gender identity, limit the age at which a person can assert a gender identity that "is different from that traditionally associated with the person's physiology or assigned sex at birth." *Id.* Similarly, a separate provision of Massachusetts law related to minors and gender identity does not distinguish between children of different ages and, instead, provides a blanket prohibition against health care providers engaging in any practice, with any patient under the age of eighteen, "that attempts or purports to impose change of an individual's ... gender identity." Gen. Laws ch. 112, § 275.

***4** The regulations implementing the anti-discrimination statute applicable to schools state that "[a]ll public school systems shall, through their curricula, encourage respect for the human and civil rights of all individuals regardless of ... gender identity." 603 C.M.R. § 26.05. School committees are also required to "establish policies and procedures ... that insure that all obstacles to equal access to school programs for all students regardless of ... gender identity, are removed."

603 C.M.R. § 26.07(1). Although these laws and regulations were adopted before there was universal support for the values they protect, none were written to provide exceptions to permit parents to override a school's decision to support students who identify as transgender or gender nonconforming.

Additional, non-binding guidance for schools has been provided by the Massachusetts Department of Elementary and Secondary Education (DESE). The DESE Guidance provides that "[t]he responsibility for determining a student's gender identity rests with the student, or in the case of young students not yet able to advocate for themselves, with the parent." DESE, GUIDANCE FOR MASSACHUSETTS PUBLIC SCHOOLS CREATING A SAFE AND SUPPORTIVE SCHOOL ENVIRONMENT (hereafter "DESE Guidance"), https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html#5. Schools are advised that "[t]here is no threshold medical or mental health diagnosis or treatment requirement that any student must meet in order to have his or her gender identity recognized and respected by a school." *Id.* The DESE Guidance also encourages schools to "engage the student, and in the case of a younger student, the parent, with respect to name and pronoun use." *Id.* Other than describing younger students as unable to advocate for themselves, the DESE Guidance does not advise schools to treat students of certain ages or grades differently from older students.

The DESE Guidance advises that not all transgender and gender nonconforming students are open about their gender identities with their families for reasons that can include safety concerns and lack of acceptance. *Id.* When students self-identify to a school as transgender or gender nonconforming, the DESE Guidance advises that "[s]chool personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent or guardian" and "discuss with the student how the school should refer to the student, e.g., appropriate pronoun use, in written communication to the student's parent or guardian." *Id.* The provisions of the DESE Guidance related to communications with a student's family do not distinguish between older and younger students.

V. DISCUSSION

Plaintiffs have alleged Defendants' conduct violated three different fundamental parental rights protected under the substantive due process clause of the Fourteenth Amendment: (1) the right to direct the education and upbringing of their children (Count I), (2) the right to make medical and mental health decisions for their children (Count II), and (3) the right to family integrity (Count III). Defendants have moved for dismissal, pursuant to Fed. R. Civ. P. 12(b)(6), of all three of Plaintiffs' claims, as to all Defendants. They assert that even when the court credits the well-pleaded factual allegations, Plaintiffs' Amended Complaint fails to identify a substantive due process claim cognizable under 42 U.S.C. § 1983. Defendants also argue that any claims

asserted against the individual defendants should be dismissed pursuant to the doctrine of qualified immunity.

The court begins its analysis by assuming the truth of Plaintiffs' factual allegations and identifying any statements in the complaint that merely offer legal conclusions couched as fact, since such conclusory statements are not entitled to the presumption of truth. *See Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 12 (1st Cir. 2011). Many factual allegations set forth in Plaintiffs' Amended Complaint are followed by statements that draw a conclusion about the nature or significance of the alleged fact. For example, the Amended Complaint contains factual allegations about Defendants' responses to B.F.'s and G.F.'s requests to use their preferred names and pronouns followed by brief descriptors identifying the actions as "social transitioning," "mental health treatment" and, in one instance, as "psychosocial treatment." (*See e.g.* Dkt. No. 22, Am. Compl. ¶¶ 42, 43, 45, 46, 56, 74, 78, 84.) At the hearing on Defendants' Motion to Dismiss, Plaintiffs were equivocal as to whether Defendants' actions constituted actual mental health treatment or if either of their children had an actual existing mental health condition related to gender identity. While Plaintiffs maintained that Defendants were providing mental health treatment when they "permit[ted] [B.F. and G.F.] to be identified as either nonbinary or the opposite sex of what their bodies are," the Amended Complaint alleges insufficient facts for the court to conclude that the conduct at issue constituted mental health treatment. (Dkt. No. 48, Tr. Oct. 17, 2022 Hr'g, 14.) Although "social transitioning," "mental health treatment," and "psychosocial treatment" all appear to be terms of art, Plaintiffs have not provided the context necessary for the court to infer the alleged conduct had clinical significance, as the Amended Complaint describes the terms in a conclusory manner and contains no allegations that either minor had a diagnosed mental health condition related to gender identity.

***5** "Being transgender is ... not a psychiatric condition, and implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020), as amended (Aug. 28, 2020) (internal quotation marks omitted). Gender dysphoria is a recognized mental health disorder, but Plaintiffs have not alleged either child has been diagnosed with gender dysphoria, or even that Defendants erroneously believed the children suffered from gender dysphoria. *Id.* at 594-95. Plaintiffs have not alleged Defendants' actions were undertaken as part of a treatment plan for gender dysphoria or explained how referring to a person by their preferred name and pronouns, which requires no special training or skill, has clinical significance when there is no treatment plan or diagnosis in place. Similarly, there are no non-conclusory allegations that social transitioning was actually occurring or includes supportive actions taken by third parties, as opposed to actions a person takes to understand or align their external gender presentation with their gender identity. Addressing a person using their preferred name and pronouns simply accords the person the basic level of respect expected in a civil society generally, and, more specifically, in Massachusetts public schools where discrimination on the basis of gender identity is not permitted. *See* Mass. Gen. Laws ch. 76, § 5. This is true

regardless of an individual's age, provided the individual does not have a fraudulent purpose for using a new preferred name or pronouns. *Id.*

In the absence of supporting factual allegations, such as a relevant medically-recognized diagnosis and treatment plan, the court disregards Plaintiffs' conclusory statements describing the use of preferred names and pronouns as mental health treatment. Plaintiffs have failed to adequately allege that Defendants provided medical or mental health treatment to B.F. and G.F. simply by honoring their requests to use preferred names and pronouns at school. Accordingly, Plaintiffs have not adequately stated a claim that Defendants usurped their right to make medical and mental health treatment decisions for their children. Count II is, therefore, dismissed.

The court next considers whether the factual allegations are sufficient to state the substantive due process claims asserted in Counts I and III. The substantive due process guarantees of the Fourteenth Amendment protect individuals from arbitrary government actions that interfere with "those fundamental rights ... which are ... deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks omitted). The Due Process Clause protects against egregious abuses by government actors, but does not "impos[e] liability whenever someone cloaked with state authority causes harm" or guarantee that officials will use care when acting on behalf of the state. *County of Sacramento v. Lewis*, 523 U.S. 833, 848-49 (1998). The vehicle for enforcing the substantive rights guaranteed under the Fourteenth Amendment is 42 U.S.C. § 1983, which "affords a private right of action in favor of persons whose federally assured rights are abridged by state actors." *Kando v. Rhode Island State Bd. of Elections*, 880 F.3d 53, 58 (1st Cir. 2018).

"To be cognizable, a substantive due process claim under 42 U.S.C. § 1983 must allege facts so extreme and egregious as to shock the contemporary conscience." *Abdisamad v. City of Lewiston*, 960 F.3d 56, 59-60 (1st Cir. 2020) (internal quotation marks omitted); *see also Martinez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010) ("[T]he shocks-the-conscience test ... governs *all* substantive due process claims based on executive, as opposed to legislative, action."). "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Lewis*, 523 U.S. at 849.

At the motion to dismiss phase, substantive due process claims "must be carefully scrutinized to determine if the alleged facts support the conclusion that the state has violated an individual's constitutional rights." *Rivera v. Rhode Island*, 402 F.3d 27, 33 (1st Cir. 2005). Courts in the First Circuit take a "two-tiered approach" to substantive due process claims based on the behavior of state actors. *Martinez*, 608 F.3d at 64. Under this approach, a plaintiff must establish both conscience-shocking behavior by the defendant and "that a protected right was offended" by the defendant's conduct. *Id.* at 65. Generally, courts first determine whether the alleged conduct was sufficiently egregious because it is "[o]nly after 'show[ing] a constitutionally significant level of

culpability' [that] a plaintiff [may] 'turn to establishing that a protected right was offended.' "[3] *Abdisamad*, 960 F.3d at 60 (quoting *Martinez*, 608 F.3d at 65).

[3] Prior to *Abdisamad*, the First Circuit stated that while courts have "typically looked first to whether the acts alleged were conscience-shocking," the two-tiered process need not be applied rigidly. *Harron v. Town of Franklin*, 660 F.3d 531, 536 (1st Cir. 2011). However, as the Supreme Court explained in *Lewis*, courts do not need to determine whether "to recogniz[e] a substantive due process right to be free of [the alleged] executive action" unless they first determine the "necessary condition of egregious behavior" has been satisfied. *Lewis*, 523 U.S. at 847 n.8. There is no reason to depart from the typical analytical framework in this case given the relatively vague manner in which Plaintiffs have described the asserted fundamental liberty interests allegedly violated by Defendants and connected those interests to historically-established fundamental rights and liberties. *See Glucksberg*, 521 U.S. at 721 (1997); *see also Martinez*, 608 F.3d at 65 n.9 (describing the two-tiered approach as beginning with the level of culpability, while also observing "some tension between how *Lewis* and *Glucksberg* described the order in which courts should proceed to identify whether a plaintiff has identified a protected right").

***6** During the hearing on Defendants' Motion to Dismiss, the court asked Plaintiffs to identify the specific allegations of conscience-shocking conduct supporting their claims. Plaintiffs argued generally that Defendants' adoption and implementation of a policy of withholding information about a student's gender identity deprived Plaintiffs of their rights to make decisions about the upbringing of their children and intentionally undermined the parent/child relationship in a manner that shocks the conscience. The court understands this conduct, as alleged, to be offered in support of Plaintiffs' claims in Counts I and III.

There is no precise definition for conscience-shocking behavior that can be applied mechanistically to Plaintiffs' allegations. *See DePoutot v. Raffaelly*, 424 F.3d 112, 118 (1st Cir. 2005). However, a "stunning" level of arbitrariness that goes beyond "[m]ere violations of state law" is required. *Pagán v. Calderón*, 448 F.3d 16, 32 (1st Cir. 2006) (internal quotation marks omitted). Bad faith may help tip the scale, but "the contemporary conscience is much more likely" to be shocked by conduct that was "intended to injure in some way unjustifiable by any government interest." *DePoutot*, 424 F.3d at 119 (internal quotation marks omitted). The nature of the right violated and the government's competing interests, if any, may inform the determination of whether particular behavior shocks the conscience. *See Martinez*, 608 F.3d at 66. "Indeed, '[a] hallmark of successful challenges is an extreme lack of proportionality, as the test is primarily concerned with violations of personal rights so severe[,] so disproportionate to the need presented, and so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.' " *Harron v. Town of*

Franklin, 660 F.3d 531, 536 (1st Cir. 2011) (quoting *González-Fuentes v. Molina*, 607 F.3d 864, 881 (1st Cir. 2010)) (alterations in original).

Often, "an exact analysis of circumstances" is needed "before any abuse of power [can be] condemned as conscience shocking." *Lewis*, 523 U.S. at 850. Here, the circumstances certainly include the facts Plaintiffs have alleged about the conduct of various defendants. These include: inviting students to provide their preferred pronouns as part of a personal biography project; sharing information about gender identity with B.F.; failing to respond to Silvestri's December 2020 email; engaging in supportive discussions with B.F. about gender identity; facilitating B.F.'s and G.F.'s use of their preferred names and pronouns while at school; deciding not to notify Plaintiffs when B.F. and G.F. began using different preferred names and pronouns; and publicly describing the views of individuals, including parents, who oppose Ludlow Public School policies for supporting transgender and gender nonconforming students, as intolerant and hateful. The relevant circumstances also include Massachusetts laws and regulations regarding gender identity, which establish a significant government interest in providing students with a school environment in which they may safely express their gender identities,[4] regardless of their ages or the preferences of their parents. Plaintiffs have not challenged the constitutionality of these laws.

[4] Provided, of course, that there was no evidence that a student had asserted a particular gender identity for an improper purpose. *See* Mass. Gen. Laws ch. 4, § 7.

Plaintiffs have framed their claims in the context of their rights as parents to make decisions for their children without state interference. Defendants have framed their actions in the context of obligations under Massachusetts law to provide a nondiscriminatory environment to all their students. At the hearing on Defendants' motion, Plaintiffs acknowledged that Defendants were not permitted to discriminate on the basis of gender identity, but asserted that Defendants' adoption and implementation of a policy of withholding information about their children's gender identity from parents went beyond what the law required and intentionally undermined the parent/child relationship in a manner that shocks the conscience.

***7** On its face, the Massachusetts non-discrimination statute does not require such a policy and it is disconcerting that school administrators or a school committee adopted and implemented a policy requiring school staff to actively hide information from parents about something of importance regarding their child. Indeed, in an earlier case, this court recognized that deception by school officials could shock the conscience where the conduct obscured risks to a person's bodily integrity and was not justified by any government interest. *See Hootstein v. Amherst-Pelham Reg. Sch. Comm.*, 361 F. Supp. 3d 94, 112 (D. Mass. 2019). In that case, the plaintiff alleged school officials made deceptive statements about the safety of school drinking water that obscured the risks he faced when he drank water at the school and the deception violated his right to bodily integrity.[5] *Id.* Here, the court must consider the specific facts of this case—including the

government interest, if any, served by Defendants' conduct—to determine whether Plaintiffs have met their burden of identifying conscience-shocking conduct.

5 The plaintiff in *Hootstein* was a grandparent proceeding pro se and only his own bodily integrity claim survived the motion to dismiss because, as a pro se litigant, he could not bring claims on behalf of others.

In December 2020, B.F. talked with a teacher about mental health concerns and possible same-sex attraction and expressed relief and gratitude when the teacher offered to talk with Plaintiffs about those concerns. The teacher then contacted B.F.'s mother (Silvestri), who responded by sending an email to B.F.'s teachers, Monette, Gazda, and members of the School Committee, in which she stated that Plaintiffs were getting B.F. professional help and requested that school staff not have any further private conversations with B.F. related to the concerns the teacher and B.F. had discussed. Two months later, B.F. identified as genderqueer, announced a new preferred name and list of preferred pronouns and, in contrast to December, did not ask for help talking with Plaintiffs. Instead, B.F. asked school staff to wait to use the new name and pronouns with Plaintiffs until after B.F. told Plaintiffs about them. Despite B.F.'s request and the alleged policy, the same teacher who talked with Silvestri in December 2020 informed Silvestri about Plaintiff's gender identity. This contact with B.F.'s parents was made in violation of school policy and without administrative approval. Upon learning that B.F. was using a new name and pronouns at school, Plaintiffs met with Monette. They asserted school staff were acting illegally by allowing their children to use preferred names and pronouns without parental permission. Following that meeting, Defendants deferred to the preferences of B.F. and G.F. and did not share any information about their gender identities with Plaintiffs.

Massachusetts has identified a strong government interest in providing all students, regardless of age, with a school environment safe from discrimination based on gender identity. Under Massachusetts law, a person may establish their gender identity with "any ... evidence that the gender-related identity is sincerely held as part of [the] person's core identity," except that "gender-related identity shall not be asserted for any improper purpose." Mass. Gen. Laws ch. 4, § 7; *see also* 603 C.M.R. § 26.01. There is no statutory limitation on the age at which an individual may assert a gender identity "different from that traditionally associated with the person's physiology or assigned sex at birth," and no exception that would allow a parent's beliefs to supersede a minor's sincerely held beliefs. *Id.*; *see also* Mass. Gen. Laws ch. 112, § 275 (barring gender conversion therapy for all minors).

Though non-binding, the DESE Guidance related to gender identity also provides relevant context for Defendants' actions. The DESE Guidance emphasizes the importance of creating a safe and supportive environment for students and encourages schools to work with students to develop plans for use of preferred names and pronouns. "[I]n the case of a younger student," DESE advises schools to create a plan with input from parents, but DESE has not defined younger students,

other than by describing them as "not yet able to advocate for themselves." DESE Guidance, https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html#5. The DESE Guidance also encourages schools to consult with students who assert a different gender identity at school before disclosing information about a student's gender identity to the student's family.

***8** Plaintiffs assert the Ludlow Public Schools adopted and implemented a policy that went beyond the DESE Guidance and rigidly prohibited any communication with parents about a student's gender identity unless the student consented and this policy shocked the conscience, at least when applied to students in middle school. The court agrees that the policy, as described by Plaintiffs, was based on a flawed interpretation of the DESE Guidance and ignored the plain language advising that parents be informed after the student is advised that such communication will occur. *See id.* ("School personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent or guardian."). Students and parents would almost certainly be better served by a more thoughtful policy that facilitated a supportive and safe disclosure by the student, with support and education available for students and parents, as needed and when accepted. Such a policy should also consider the many complicated and emotional issues and scenarios that may arise when this type of information is shared. Beliefs, understanding, and opinions surrounding this subject may evolve in a positive way with the benefit of information and honest dialogue. But, currently, the topic may also evoke negative or harmful reactions, which also must be considered. This is especially true when, as in this case, the students are old enough to independently assert their transgender or gender nonconforming identity, but still many years away from adulthood. Unlike the alleged Ludlow Public Schools policy, a policy that facilitates communication between students and parents would be consistent with the DESE Guidance and its recommendation to avoid surprising students when informing parents about the matter.

However, even if Defendants' policy was imperfect and contrary to the non-binding DESE Guidance, the alleged policy was consistent with Massachusetts law and the goal of providing transgender and gender nonconforming students with a safe school environment. This case involves a difficult and developing issue; schools, and society as a whole, are currently grappling with this issue, especially as it relates to children and parents. *See* *Martinez*, 608 F.3d at 66 ("[W]hether behavior is conscience-shocking may be informed ... by the nature of the right violated."). While the court is apprehensive about the alleged policy and actions of the Ludlow Public Schools with regard to parental notification, it cannot conclude the decision to withhold information about B.F. and G.F. from Plaintiffs was "so extreme, egregious, or outrageously offensive as to shock the contemporary conscience," given the difficulties this issue presents and the competing interests involved. *DePoutot*, 424 F.3d at 119. As conscience-shocking conduct is a necessary element for a substantive due process claim, the court ends its analysis here, without assessing whether Plaintiffs have adequately identified their protected rights and established they were offended under these facts. *See* *Abdisamad*, 960 F.3d at 60.

Finally, having determined that Plaintiffs' Amended Complaint should be dismissed on substantive grounds, it is not necessary for the court to address Defendants' arguments regarding qualified immunity. However, the court briefly notes that had Plaintiffs' Amended Complaint survived the substantive analysis, qualified immunity would warrant dismissal of the claims asserted against all individual defendants. *See id.* ("Individual government officials may be sued 'for federal constitutional or statutory violations under § 1983,' though 'they are generally shielded from civil damages liability under the principle of qualified immunity.' "). Qualified immunity shields individual government actors from liability unless the plaintiff can demonstrate both that the "the defendant violated the plaintiff's constitutional rights" and that "the right at issue was 'clearly established' at the time of the alleged violation." *Est. of Rahim by Rahim v. Doe*, 51 F.4th 402, 410 (1st Cir. 2022).

To satisfy the "clearly established" prong, a "plaintiff must 'identify either controlling authority or a consensus of persuasive authority sufficient to put [a state actor] on notice that his conduct fell short of the constitutional norm.' " *Id.* (quoting *Conlogue v. Hamilton*, 906 F.3d 150, 155 (1st Cir. 2018)). While "there need not be a case directly on point," a plaintiff must be able to identify "precedents existing at the time of the incident [that] establish[ed] the applicable legal rule with sufficient clarity and specificity" that the defendant was on notice that their conduct would violate the rule. *McKenney v. Mangino*, 873 F.3d 75, 82-83 (1st Cir. 2017) (internal quotation marks omitted). Here, Plaintiffs would have to identify authority addressing sufficiently similar facts occurring where similar state laws applied. That authority would either need to be binding in Massachusetts or demonstrate a consensus among persuasive authorities such that the individual defendants should have known their actions violated Plaintiffs' parental rights protected by substantive due process.

***9** Having reviewed all the cases cited by Plaintiffs, the court finds they do not meet this burden. First, the court observes that legal protections for gender identity are a recent development and a broad awareness of issues surrounding the topic of gender identity is still growing. Second, as discussed above, Defendants did not provide mental healthcare to Plaintiffs' children when supporting their use of preferred names and pronouns. Finally, consistent with principles established in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), Plaintiffs' right to direct the upbringing of their children allows them to "choose between public and private schools," but does not give them a right "to interfere with the general power of the state to regulate education." *Parker*, 514 F.3d at 102. Here, the individual defendants' respective decisions not to share information with Plaintiffs about their children's gender identities complied with a Ludlow Public Schools policy which, though not required by, was consistent with Massachusetts laws that have not been challenged by Plaintiffs.

VI. CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss (Dkt. No. 25) is ALLOWED. Plaintiffs' Amended Complaint (Dkt. No. 22) is dismissed and this case may now be closed.

It is so Ordered.

All Citations

Not Reported in Fed. Supp., 2022 WL 18356421

2023 WL 6544917 (Wis.Cir.) (Trial Order)
Circuit Court of Wisconsin,
Branch 8.
Waukesha County

T.F., et. al., Plaintiffs,
v.
KETTLE MORAINE SCHOOL DISTRICT, Defendant.

No. 2021CV1650.
October 3, 2023.

Decision and Order

Michael P. Maxwell, Judge.

***1 BY THE COURT:**

DATE SIGNED: October 2, 2023

Electronically signed by Michael P. Maxwell

Circuit Court Judge

The Complaint alleges that the Kettle Moraine School District (hereinafter "Kettle Moraine") violated parental rights by adopting a policy to allow, facilitate, and affirm a minor student's request to transition to a different gender identity at school without parental consent and even over the parents' objection. *(See Doc. #2, ¶1)* Kettle Moraine responds that there is no justiciable controversy as one set of plaintiffs (T.F. and B.F.) are no longer in the district and the other set of plaintiffs (P.W. and S.W.) do not currently have a child for which the policy would have a current application and therefore they do not have standing or a claim which is ripe for determination. *(See Doc. #19, p. 3)* The matter is before the Court on cross Motions for Summary Judgment.

FINDINGS OF FACT

1. T.F. and B.F. had a daughter ("A.F.") that attended Kettle Moraine Middle School ("KMMS") in the Kettle Moraine School District. (T.F. Affidavit, Dkt. 79, ¶1).

2. A.F. began questioning her gender identity and T.F. and B.F. moved her to a mental health center and that center focused on "affirming" this new gender identity. (*Id.*, at ¶2-3).

3. A.F. then returned to the school with some parental support for the identity, but T.F. and B.F. ultimately changed course and went to the school informing them they wished to refer to A.F. by her legal name and female pronouns. (*Id*., at ¶7-11).

4. The District replied by saying they will follow the guidance of A.F. in what pronouns to use, even over parental objections. (*Id.*, at ¶13).

5. In response T.F. and B.F. withdrew A.F. from the District and shortly thereafter A.F. concluded that she did not want to transition genders. (*Id.*, at ¶15-20).

6. S.W. and P.W. are parents who have two children within the district and are concerned that the District would handle this process in the same way for their children as well if their children were to seek a gender transition. (S.W. Affidavit, Dkt. 80).

7. Social transitioning is separate from medical transitioning and consists of individuals who adopt their transgender identity in ways such as hairstyle/clothing, use of opposite-sex facilities, and adopting name and pronoun changes. (Expert Affidavit of Dr. Erica Anderson, Dkt. 77, ¶8).

8. Gender dysphoria is where one feels that their natal sex does not match their perceived gender identity and this gender incongruence usually causes clinically significant distress or impairment. (*Id*., at ¶9).

9. The World Professional Association for Transgender Health (WPATH) publishes Standards of Care (SOC) that provide guidelines for transgender care with WPATH SOC7 remaining the most current document until September 6, 2022 when WPATH SOC8 was released. (*Id*., at ¶10).

10. There has been an increasing rise in gender dysphoria in children who have not experienced this before and can even come as a surprise to parents and others when it eventually manifests. (*Id*., at ¶12); (Expert Affidavit of Dr. Stephen Levine, Dkt. 78, ¶196) ("For many parents, a trans identity may appear to arise "out of the blue" around puberty.").

***2** 11. Among those who express gender dysphoria there are individuals who eventually conclude that they no longer wish to transition. (Anderson Aff., Dkt. 77 at ¶19-20).

12. Social transitioning of one's gender is a decision that should usually be preceded by a mental health professional ("MHP") conducting a psychological assessment in order to see the benefits and challenges of such a transition. (*Id.*, at ¶55).

13. Social transitioning represents "one of the most difficult psychological changes a person can experience." (*Id*., at ¶41).

14. According to Dr. Levine, it is appropriate for parents to say no to a social transition because it is their job to help children avoid making bad decisions. (*Id*., at ¶57).

15. Social transitioning is a "powerful psychotherapeutic intervention" that likely reduces the number of children desisting from their transgender identity and can lead them to using puberty blockers and cross-sex hormones, which carry known risks. Thus, informed consent from the parents must be obtained before socially transitioning a child. (Levine Aff., Dkt. 78, ¶202).

16. Social transitioning without full support of one's parents can result in the child living a double life which can be "psychologically harmful." (*Id.*, at ¶200-201).

17. There is also no evidence to suggest that socially and/or medically transitioning reduces risk of suicide among individuals experiencing gender dysphoria. (*Id.*, at ¶142).

18. Trained psychotherapists should not drive a wedge between a parent and their child as social transition can only occur with "the support and acceptance of parents/caregivers." (Anderson Aff., Dkt. 77, ¶74-75).

19. Further, "[c]ircumventing, bypassing, or excluding parents from decisions about a social transition undermines the main support structure for a child or adolescent who desperately needs support." (*Id*., at ¶76).

20. A school facilitated transition without parental consent/buy-in infringes on parents' ability to take a more cautious approach to their child as well as a treatment approach that does not involve immediate transitioning. (*Id*., at ¶71-72).

21. The District acknowledges that they affirmed A.F.'s social transition because of advice from A.F.'s therapist and worry over a potential Title IX violation. (Michael Comiskey Affidavit. Dkt. 67, ¶12-13).

22. Multiple individuals from the District provided input on whether or not to allow A.F. to socially transition including (1) Mike Comiskey, the principal of KMMS; (2) Allison Beyerl, the school psychologist; (3) Charles Wiza, the director of student services; (4) Pat Deklotz, the

superintendent; and (5) Gary Vose, the board of education president. (Kettle Moraine Response to Interrogatories, Ex. 1, Dkt. 73, p.4, ¶1-2).

23. Pat Deklotz was the individual ultimately responsible for deciding to affirm A.F.'s preferred gender identity over the objection of her parents. (*Id*., at p.5, ¶5).

DISCUSSION

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2015 WI 65, ¶31, 363 Wis. 2d 699, 866 N.W.2d 679. The only facts that are of relevant in this consideration are "material facts" which are facts "that [are] 'of consequence to the merits of the litigation.'" *Haase-Hardie v. Wis. Dep't of Natural Res.*, 2014 WI App 103, ¶13, 357 Wis. 2d 442, 855 N.W.2d 443 (quoting *Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294)). Those material facts cannot have a "genuine issue" between the parties and such issue "is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Strasser v. Transtech Mobile Fleet Serv.*, 236 Wis. 2d 435, ¶32, 613 N.W.2d 142 (2000) (citing *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991)). If a jury could go either way, then summary judgment would not be appropriate because the purpose of summary judgment is to "eliminate unnecessary trials." *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 562, 297 N.W.2d 500 (1980). Just because the question of law may be novel or particularly difficult does not make summary judgment any less appropriate of a remedy provided that the requirements, i.e., no dispute of material facts, are still met. *See id.*, 98 Wis. 2d at 569.

***3** In summary judgment "[s]upporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." Wis. Stat. § 802.08(3) (2007). An adverse party may respond with their own affidavits in order to show that there is an issue of material fact, "[i]f the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party." *Id*. This is because "evidentiary facts set forth in the affidavits or other proof are taken as true by a court if not contradicted by opposing affidavits or other proof." *L.L.N. v. Clauder*, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997) (citing *Leszczynski v. Surges*, 30 Wis. 2d 534, 539, 141 N.W.2d 261 (1966)).

Plaintiffs contend they are entitled to summary judgment because the record reflects that there are undisputed facts that the District has put forth a policy that violates parental rights as well as the District specifically violating B.F. and T.F.'s rights as parents relating to how the District utilized this policy in effect towards their daughter. (Dkt. 74, pp. 34-35).

Defendants on the other hand contend that they are entitled to summary judgment due to the fact that plaintiffs B.F. and T.F. have not identified a fundamental right that the District may have

violated. (Dkt. 69, p. 2). As to plaintiffs P.W. and S.W., defendants say summary judgment is appropriate because plaintiffs have failed to identify a policy at issue nor have they been negatively impacted by the District so there is no justiciable controversy. (Dkt. 69, p. 3).

I. What Standard Should Be Applied, Further What Right Has Been Identified?

The first question that must be addressed is what standard this Court should apply in determining who summary judgment should be resolved in favor of. Two interconnected pieces that this Court must determine is what right is at stake and in turn what level of protection is required for that right. As "a court's task in a challenge based on substantive due process 'involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it." *Blake v. Jossart*, 2016 WI 57, ¶47, 370 Wis. 2d 1, 884 N.W.2d 484 (quoting *State v. Wood*, 2010 WI 17, ¶18, 323 Wis. 2d 321, 780 N.W.2d 63) (alteration in original). Substantive due process is a right separate from procedural due process, which focuses on ensuring fair procedures are in place, and instead substantive due process "protects individuals from 'certain arbitrary, wrongful actions regardless of the fairness of procedures used to implement them.'" *Black v. City of Milwaukee*, 2016 WI 47, ¶43, 369 N.W.2d 272, 882 N.W.2d 333 (quoting *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997)).

a. The Right at Issue is not the Right to Control Education of One's Child but the Right to Make Medical and Healthcare Decisions for a Child.

Defendants have suggested that plaintiffs have not identified a carefully defined fundamental right that defendants may have violated. (Dkt. 69, p. 12). In support of this they reference the Supreme Court which has said that cases involving substantive due process require a "'careful description' of the asserted fundamental liberty interest." *Wash. v. Glucksberg*, 521 U.S. 701, 721 (1997) (internal citations omitted). Defendants say that this Court cannot consider the broad generalized right to raise one's children and instead must identify what specific right is at issue. (Dkt. 69, p. 13). Defendants heavily focus on claiming the plaintiffs have asserted a right to direct their children's education. (*Id.*). In part they refer to plaintiff's Summons & Complaint (Dkt. 2), which refers to the right of parents to direct the education of their children. (Dkt. 69, p. 12). However, this is just one of the rights that plaintiffs make reference to in their Complaint. (*See* Dkt. 2, ¶¶52-60, pp. 13-15). Defendants say plaintiffs cannot make "sweeping references to constitutional doctrines." (*Id.*); *Larson v. Burmaster*, 2006 WI App 142, ¶39, 295 Wis. 2d 333, 720 N.W.2d 134. However, that case does not say that such broad references are inherently impermissible, rather there the plaintiffs "[did] not apply [those] concepts to their case in the form of a reasoned argument." *Larson*, 2006 WI App 142 at ¶39. Defendants then cite a plethora of federal case law laying down their argument on why the right to control education is a limited one. (*See* Dkt. 69 pp.13-17).

***4** One of these cases, *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), explained that parents do have a recognized liberty interest in the "custody, care, and nurture of their children" and that right resides firstly with the parents, however "[it] does not reside their exclusively, nor is it 'beyond regulation [by the state] in the public interest.'" *Id*., 949 F.3d at 1231 (internal citations omitted) (alterations in original). This case focused on whether there was a fundamental right to determine if a parent could have to the right to limit the risk their children would be exposed to nude members of the opposite sex in places like locker rooms. *Id*. That is not what is at issue in this case. This case involves a question of whether or not there is a right associated with getting the District to comply with the parents request to not use A.F.'s preferred pronouns and male name while she is at school.

Defendants also refer to parents limited rights on whether or not they can control how the school teaches their child from the First, Second, and Sixth Circuits with *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003), and *Blau v. Fort Thomas Pub. Sch. Dis.*, 401 F.3d 381 (6th Cir. 2005), respectively. (Dkt. 69, pp. 16-17). All these cases focus on the recognized right that parents can control where their kids go to school, but parents cannot control the particularized content that their kids learn. (*See id*.). Further, Defendants second heading from their argument section within their Reply Brief to their Motion for Summary Judgment reads: PLAINTIFFS DO NOT HAVE A FUNDAMENTAL RIGHT TO CONTROL HOW A SCHOOL EDUCATES THEIR CHILD. (Dkt. 90, p. 6). When presenting oral argument before this Court, Defendants said that this is not a fundamental rights issue and "this isn't a medical issue. It is not a medical issue. It's a constitutional issue." (Dkt. 91, pp. 23:20-24:5).

Plaintiffs rebut this point raised by defendants by saying they "do not seek to 'control every aspect of a child's education' or 'direct how a public school teaches their child.'" (Dkt. 87, p. 4). Plaintiffs rightly point out that the case law the Defendants rely on deal with "a school district making a significant and controversial health-related decision for a particular child over the parents' objection." (Dkt. 87, p. 5). They also reference one of the cases cited by Defendants that mentions the distinction that having a child take an anonymous survey does not carry with it the same weight as other protected familial rights such as visitation or sending a kid to a private school over a public one. *C. N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 (3rd Cir. 2005). In their oral argument they reinforced this point of not suggesting there is a right to control education by saying "[w]e don't disagree. That is not and has never been our argument in this case." (Dkt. 91, p. 5:20-21).

This case is not about parents controlling how a school specifically educates its students. This is also not a case about the broader societal debate or implications of transgenderism in our youth or the political movement that supports it.

One of the main rights plaintiffs have suggested this case implicates is the parental decision-making authority, such as making healthcare decisions, which they argue is a fundamental liberty interest

that requires passing of strict scrutiny. (Dkt. 74, p. 20 and 26). Defendants seemingly ignore this argument from the Plaintiffs, instead focusing on arguing against a position that the Plaintiffs never took up - which is the right to control how a school educates one's child. Though they do address the parental rights position they say that "no court has expanded the scope of [parental right's] so broadly as to include a right of parents to control what nickname and pronoun school personnel use during the day." (Dkt. 88, p. 12).

***5** Under *Michels v. Lyons*, 2019 WI 57, 387 Wis. 2d 1, 927 N.W.2d 486, parents have fundamental liberty interest in the decisions regarding "care, custody, and control of their children." *Id.*, at ¶24. The state only has an interest when the child's physical and mental health or welfare is in jeopardy. *Id*. However, the state's interest if violating a parent's right, must still be narrowly tailored. *Id*., at ¶21 (explaining that infringements on the right of parental autonomy are subject to strict scrutiny and this must be narrowly tailored).

Further, "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham v. J.R.*, 442 U.S. 584, 603 (1979). A child is not granted the same autonomous rights as adults because "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Id*.

Plaintiffs have introduced uncontested expert affidavits explaining that this is a medical issue as they offer insight into transgenderism and how both medical and social conditioning can impact a child's mental health. (Dkt. 74, pp. 3-13). Of particular importance to note is that both doctors agree that living a "double life" where a child's gender roles are different at home and school, is "inherently psychologically unhealthy" and can undermine existing support structures for that child. (Dkt. 74, p. 12); *see also* (Dkt. 78, ¶¶ 200-201); (Dkt. 77, ¶¶ 74-76). Both doctors do note that all professional organizations that have handled these types of scenarios suggest a child receives professional evaluation, but none have said that a school district should continue the process of treating or addressing that child's alternative gender identity without "parental consent and buy-in." (Dkt. 74 p. 12); *see also* (Dkt. 77, ¶¶54-57, 77); (Dkt. 78, ¶¶185-187, 200).

This is undisputedly a medical and healthcare issue – the Defendants put forth no evidence to the contrary. As such, the School District went against the parents' wishes on how to medically treat their child. This directly implicates an infringement against the parental autonomy right to direct the care for their child. *Michels*, 2019 WI 57 at ¶24.

b. As the Liberty Issue at Stake is the Right to Decide Medical Decisions for One's Child, the District Must Survive the Strict Scrutiny Approach.

Defendants first contend that the test that should be applied to their actions is the test of shocking the conscience. (Dkt. 69, p. 10). Their argument is that a violation of substantive due process resulting from executive action requires a "shocks-the-conscience" standard. *Black v. City of Milwaukee*, 2016 WI 47, ¶43, 369 N.W.2d 272, 882 N.W.2d 333; *see also* *Gorokhovsky v. City of Chi.*, 813 F. App'x 221, 223 (7th Cir. 2020). This is a high standard to show, requiring that it offend "even hardened sensibilities" or the "decencies of civilized conduct." *Black*, 2016 WI 47 at ¶44.

They argue this is a different standard than if a legislature had taken action that violates substantive due process where that would only require passing a standard of rational basis or strict scrutiny, depending on the liberty infringed upon. *State v. Alger*, 2015 WI 3, ¶39, 360 Wis. 2d 193, 858 N.W.2d 346 (explaining that if no fundamental right or suspect class is implicated rational basis applies whereas if those were implicated strict scrutiny would apply).

***6** Defendants contend that even if this Court where to apply the legislative standard to this issue it would only need to pass the lesser rational basis review. (Dkt. 88, pp. 9-10). Continuing further down that path they also suggest that if this Court where to find strict scrutiny would apply, their actions would pass that as well because defendants narrowly tailored their actions to fit a compelling state interest. (*Id*., at p. 15).

Plaintiffs have rebutted the claim that the "shocks-the-conscience" test is the appropriate one by pointing out that the Seventh Circuit has acknowledged that the shocks-the-conscience analysis is not applicable to every substantive due process claim. *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999). Even the Supreme Court has noted that the "shocks-the-conscience" test can be applied *alongside* the fundamental liberty test, i.e., strict scrutiny. *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (plaintiff failed both shocks-the-conscience test and strict scrutiny so there not a violation of the Fourteenth Amendment). They allege that some of the other federal circuits have misapplied the shocks-the-conscience test due to a misreading of the case *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). (Dkt. 89, pp. 3-4). When reading *Lewis*, the Supreme Court in citing to support the use of this test notes a previous case, *United States v. Salerno*, 481 U.S. 739 (1987), where they include a parenthetical quoting the case. *Lewis*, 523 U.S. at 847. The relevant portion from *Salerno* quoted in *Lewis* is "'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' … *or* interferes with rights 'implicit in the concept of ordered liberty.'" *Salerno*, 481 U.S. at 746 (internal citations omitted) (emphasis added). The shocks-the-conscience test is just one of the avenues to attack egregious government conduct, but there are also still the protections in place for conduct that interferes with fundamental rights. *See id*.

Plaintiffs have put forth two expert affidavits, one from a clinical psychiatrist and another a transgender clinical psychologist, which this Court finds persuasive. (Dkt. 74, p. 4, n. 1-2). Defendants have put forth nothing in rebuttal to plaintiff's expert affidavits. These affidavits unquestionably show this is a question of making a medical and/or healthcare decision for a child

and one that the District has interfered with. This means there is a fundamental liberty interest at stake that the government is interfering with and thus the District's actions must pass strict scrutiny.

The School District could not administer medicine to a student without parental consent. The School District could not require or allow a student to participate in a sport without parental consent. Likewise, the School District can not change the pronoun of a student without parental consent without impinging on a fundamental liberty interest of the parents.

c. Additionally, This Case Does Not Implicate Title IX and Defendants Reliance on Such is Unwarranted.

Another area of dispute is whether or not Title IX applies to this situation. Defendants have said that they wanted to continue to refer to A.F. by her requested male name and pronouns out of a worry that they may be in violation of Title IX had they not done so. (Dkt. 69, p. 7). They further say directly that "[t]he federal government has also taken the position that failing to respect a student's chosen pronoun can violate Title IX." (Dkt. 69, p. 22). To support this proposition the District refers to a Dear Colleague letter regarding Transgender Students[1]. (*Id.*).

[1] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

***7** However, this letter has since been rescinded and is no longer in effect, partially due to the fact that a federal district court in *Texas v. United States*, 201 F. Supp. 3d 810, 831 (N.D. Tex. 2016) enjoined this letter and said it violated the law. Even further, within the Seventh Circuit, these letters are not law and are persuasive at best. *See Doe v. Purdue Univ.*, 928 F.3d 652, 669 (7th Cir. 2019) ("That said, the letter, standing alone, is obviously not enough to get [plaintiff] over the plausibility line."); *see also Cephus v. Blank*, 2022 U.S. Dist. Lexis 224964 at *19 (WD. WI. 2022) (explaining that the Seventh Circuit has precedent saying Dear Colleague letters are relevant to see if a Title IX claim is plausible). The Dear Colleague letter defendants rely on has no impact on whether or not Title IX would be implicated in a factual pattern such as this one. In fact, the Seventh Circuit weighed in recently in a case that reinforces the Plaintiffs position that Title IX would not apply here. (*See* Dkt. 87, pp. 13-15).

In *Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861 (7th Cir. 2023) a teacher requested a Title VII exemption to referring to transgender students by the names that best suited their gender identities and instead requested to refer to all students solely by their surnames. *Id.*, 64 F.4th at 864. The Seventh Circuit ultimately concluded that this exception could not be found by a reasonable jury to impose only a *de minimis* harm to the "school's conduct of its business." *Id.* Therefore they granted summary judgment in favor of the school district. *Id.* In doing so they did note a defense

raised by the school district, which they found to be unavailing, regarding the district's reliance on previous Seventh Circuit caselaw, *Whitaker v Kenosha Unified SD*, 858 F.3d 1034, 1050 (7th Cir 2017). *Id.*, 64 F.4th at 916. The Court noted that "[e]ven if we were to accept that the School District considered *Whitaker*, at best that case creates only a speculative risk of Title IX liability based on Kluge's actions," which suggests that *Whitaker* does not wholeheartedly confirm if Title IX applies to this issue. *Id.* The Court again references this proposition later when referring to how existing cases, such as *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), could be read into Title IX but the Court concluded that, "[s]uch legal assumptions, without the benefit of Supreme Court or Seventh Circuit authorities establishing Title IX liability for transgender discrimination, present merely speculative risk of Title IX liability for the School District." *Id*.

In short, Title IX is not applicable. While the Seventh Circuit's position is only a persuasive authority to this Court, neither the Supreme Court of the United States nor any other Wisconsin authority has addressed this issue. This Court finds the determination of the Seventh Circuit that the issue of transgenderism has not been applied to Title IX to be a persuasive one at this time.

d. The Actions of the District Do Not Pass the Test of Strict Scrutiny.

Strict scrutiny requires that a "statute must be narrowly tailored to advance a compelling state interest" and it "is an exacting standard, and it is the rare case in which a law survives it." *State v. Roundtree*, 2021 WI 1, ¶27, 395 Wis. 2d 94, 952 N.W.2d 765 (internal citations omitted); *Glucksberg*, 521 U.S. at 721.

Defendant's argue that their actions would survive this because they were narrowly tailored to support a "vulnerable population of students" while also "complying with state and federal laws and guidance for the treatment of transgender and gender non-conforming students." (Dkt. 88, p. 16). They rely on a federal district court case from Maryland to support this where the court there found that the school district did not need to tell parents if their kids went with different names/pronouns. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 2022 U.S. Dist. LEXIS 149021 (D. Md. Aug. 18, 2022).

***8** However, there the court found the fundamental right to be whether parents had a right "to be promptly informed of their child's gender identity." *John & Jane Parents 1*, at *20. The court also focused on the fact that parents do not have a right to direct their child's education. *Id.*, at *25. That court viewed the case as closer to one's where curriculum was challenged. *Id.*, at 33.

The Maryland court did not consider the medical implications of such actions in the same way as they are presented before this Court. Further, federal district courts are only persuasive to this Court, and this is coming from one that is not even within this Court's federal circuit.

Kettle Moraine's reliance on attempting to comply with state and federal laws as well as guidance is also unavailing because there is no definitive guidance on this issue from relevant jurisdictions and the federal guidance pertaining to Title IX is, at best, an unsettled question.

Plaintiffs suggest that the District's actions are not narrowly tailored because there are not the necessary procedural protections in place that are necessary to override a parent's choice of how to medically treat their child. This is required as seen in *Michels* were the parent's decision was only overridden after introducing "clear and convincing" evidence. *Id.*, 2019 WI 57 at ¶37. Perhaps the District could introduce clear and convincing evidence in order to supplant a parent's medical judgment, but they certainly cannot do so on a whim in the manner that they did, and they have put forth no evidence – let alone clear and convincing evidence in this case. As Plaintiffs correctly point out, even in cases where Wisconsin's Child Protective Services are involved there is still a right to proper procedural fairness before a parent is deprived of their child within Wis. Stat. §§ 48.13; 48.27; 48.30. (Dkt. 74, p. 34).

II. There Is an Unwritten Policy in Place by the District and as Such P.W. and S.W. Have Standing.

Finally, Defendants seek to avoid the serious issues in this case by claiming that Kettle Moraine does not have a policy on how to handle transgender issues such as are raised in this case. To be clear, many school districts have grappled with this controversial issue in the way that parents and voters expect – promulgate a policy, provide for public input, and then adopt or reject the policy through a vote of the people's representatives on the school board. Unfortunately, in this case, Kettle Moraine chose a different path.

While the actions the School District has already taken violated the rights of the B.F. and T.F., if there is no set policy in place, can the second set of plaintiffs, P.W. and S.W., claim a sufficient enough injury to sustain this case? This Court answers yes.

The requirements for what count as justiciable controversies are statutory in nature. *See* *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶35, 244 Wis. 2d 333, 627 N.W.2d 866; *see also* Wis. Stat. §§ 806.04 and 813.01.

Defendants also discuss the alleged hypothetical nature of the potential injury to P.W. and S.W. It is true that in Wisconsin a plaintiff does to show that there is a requirement that an injury "must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Fox. v. Wis. Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 525, 334 N.W.2d 532, 537 (1983) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). In *Fox,* the plaintiff did not have standing because his claims rested on a series of "increasingly unlikely events actually occur[ing]." 112 Wis. 2d at 529.

***9** Looking at the events in *Fox* shows a much more abstract fact pattern and reasoning to reach an injury than what the Plaintiffs suggests could take place here. In *Fox*, the district attorney sought to stop a prison being built in Portage, Wisconsin out of the fear that it may detrimentally affect prisoners' mental health, which may cause a higher rate of recidivism, which may increase crime and welfare costs in Milwaukee, Wisconsin, which may make his job harder and injure him as a district attorney. *Fox*, 112 Wis. 2d at 529.

That fact pattern is a much broader and hypothetical one than that of P.W. and S.W.'s children developing questions about their gender identity and asking the School District to refer to them by new pronouns and the School District obliging them against the request of the parents, or even simply never informing the parents.

The Plaintiffs expert affidavits are undisputed for purposes of summary judgment. *See* Wis. Stat. § 802.08(3); *Clauder*, 209 Wis. at 684. These experts speak to how fast this type of change in a child can come about to the point where it may be "out of the blue" or "come as a surprise to others" such as parents, family members, or friends. (Dkt. 78, p. 71, ¶196); (Dkt. 77, p. 6, ¶11). Indeed, even in this present case it is undisputed that A.F. began experiencing this change in her belief regarding her gender identity in December of 2020 without prior indication, shocking both of her parents. (Dkt. 79, p. 1, ¶¶2-3). P.W. and S.W. do have an imminent threat because if their children decide tomorrow to change their gender identity the School District may go along with that at the potential detriment of the child's health because that does not necessarily mean the parent's will also agree with the child's decision to switch pronouns and such split affirmations are psychologically unhealthy to a child. (Dkt. 78, ¶¶ 200-201); (Dkt. 77, ¶¶ 74-76).

Plaintiffs rely on *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) to support the proposition that a single decision can in effect create a policy. (Dkt. 89, p. 8). There, the Supreme Court handled questions regarding municipalities that "even a single decision by such a body unquestionably constitutes an act of official government policy." *Pembaur*, 475 U.S. at 480 (citing *Owen v. City of Independence*, 445 U.S. 622 (1980)). The Court further wrote that single officials with final policymaking authority can create a policy and if an official has such authority is a question of state law. *Id.*, 475 U.S. at 483. School districts are "an arm of the city government" and thus subject to restrictions that municipalities are as they are "not a separate governmental unit." *State ex rel. West Allis v. Dieringer*, 275 Wis. 2d 208, 222, 81 N.W.2d 533, 541 (1957); *see also Greenfield v. West Milwaukee*, 272 Wis. 215, 75 N.W.2d 424 (1956) (explaining that a statute splitting assets and liabilities amongst municipalities included school districts in the definition of municipality).

Here, Pat Deklotz, the superintendent or School's District administrator, *Wis. Stat. § 115.001(8)*, acted on this issue after discussing it with the school board. (Dkt. 73, pp. 3-4, ¶¶1-2). District administrators have rule-making authority if they act with the consent of the school board. *Wis. Stat. § 120.13(1)(b)1.*

Rather than doing what the voters have elected them to do, the Kettle Moraine School Board abrogated their responsibility to either pass judgment on a policy regarding these serious issues or to affirm the actions of their employee, the superintendent. Instead, the School District has hidden behind claims of no parental right or unfounded Title IX issues rather than give parent's in their district what they deserve – clear guidance on how the district intends to handle these controversial issues. By failing to act, the District has implemented a policy, by the actions of their employee, which implicates the rights of P.W. and S.W. in the decision-making authority of their children. The injury that they may suffer is not far too attenuated so as to make the injury "hypothetical." As mentioned by the expert affidavits, and as seen through A.F., this is an issue that can arise seemingly out of nowhere and the School District has already shown by their actions that their policy is a willingness to go against parental wishes when handling the medical treatment of gender dysphoria in minors through affirming them by social transition.

CONCLUSION

***10** This Court has before it what modern society deems a controversial issue – transgenderism involving minors within our schools. Clearly, the law on this issue is still developing across the country and remaining largely unsettled. However, this particular case is not about that broad controversial issue. This particular case is simply whether a school district can supplant a parent's right to control the healthcare and medical decisions for their children. The well established case law in that regard is clear – Kettle Moraine can not. The School District abrogated the parental rights of B.F. and T.F. on how to medically treat A.F. when the district decided to socially affirm A.F. at school despite B.F. and T.F. requesting it does not. Through its policy of disregarding parental wishes on a medical or health related decision and with how fast questioning ones gender can arise, P.W. and S.W. are at real risk of being harmed by the current School District policy.

The current policy of handling these issues on a case-by-case basis without either notifying the parents or by disregarding the parents wishes is not permissible and violates fundamental parental rights.

IT IS HEREBY ORDERED,

1) Defendant's Motion for Summary Judgment is DENIED.

2) Plaintiff's Motion for Summary Judgment is GRANTED.

3) Kettle Moraine School District's policy to enable and affirm a minor student's transition to a different gender identity at school without parental consent violates parents' constitutional right to determine the appropriate medical and healthcare for their children.

4) Kettle Moraine School District's policy violated T.F. and B.F. constitutional rights as parents to determine the appropriate medical and healthcare for their children.

5) Kettle Moraine School District is enjoined from allowing or requiring staff to refer to students using a name or pronouns at odds with the student's biological sex, while at school, without express parental consent.

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2021 WL 1907790
Only the Westlaw citation is currently available.
United States District Court, N.D. California,
San Jose Division.

MARIO V.; Geraldine Julie B.; I.G.V., a minor by and through Guardian Ad Litem Mario V.; Oscar G.; Christina G.; O.D.G., a minor by and through Guardian Ad Litem Christina G.; Y.P., a minor by and through Guardian Ad Litem Christina G.; Hugo P.; Alicia P.; A.P.H., a minor by and through Guardian Ad Litem Alicia P.; and other Similarly Situated Plaintiffs, Plaintiffs,
v.
Henry ARMENTA and Diana Garcia, Defendants.

Case No. 18-cv-00041-BLF
|
Signed 05/12/2021

Attorneys and Law Firms

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ORDER GRANTING DEFENDANT GARCIA'S MOTION FOR SUMMARY JUDGMENT; AND DENYING DEFENDANT ARMENTA'S MOTION FOR SUMMARY JUDGMENT

[Re: ECF 73, 74]

BETH LABSON FREEMAN, United States District Judge

***1** This putative class action was filed after an elementary school teacher performed blood sugar testing on students without their parents' knowledge or consent. Several students and parents brought suit against the teacher, the school principal, the school, and the school district. The school

and the school district thereafter were dismissed, leaving only the teacher, Henry Armenta, and the school principal, Diana Garcia, as defendants in the case. Armenta and Garcia are sued in their individual capacities.

Garcia has filed a motion for summary judgment, which is joined by Armenta. For the reasons discussed below, the motion for summary judgment is GRANTED as to Garcia and DENIED as to Armenta.

I. BACKGROUND

Armenta taught fifth grade at Oscar F. Loya Elementary School ("Loya" or "the school"). *See* Armenta Dep. 13:15-14:23, Bonner Decl. Exh. 3, ECF 75-4. He ran an after school program in his classroom for students who needed help with their homework or a place to do homework. *See id.* 15:1-11. Armenta is diabetic, and he tests his blood sugar levels in the afternoon with a glaucometer. *See id.* 22:16-21. The test involves pricking a finger with a lancet. *See id.* 71:11-25. In 2011, Armenta began offering to administer glaucometer tests to students who came to his classroom after school and volunteered to be tested. *See id.* 14:16-24. Armenta rewarded children who agreed to the testing with Gatorade, potato chips, and other treats. *Id.* 70:18-71:10. Armenta did not notify the children's parents that he would be pricking their fingers with a lancet, nor did he obtain parental consent for the blood testing. *See id.* 26:16-24.

On February 6, 2017, the parents of a Loya student informed the school principal, Garcia, that Armenta had performed blood testing on their child and on other children. *See* Garcia Decl. ¶ 2, ECF 73-2. Garcia reported the information to the school district, to Child Protective Services, and to the Salinas Police Department. *See id.* ¶¶ 3, 7. Garcia also interviewed the child of the reporting parents, as well as six other students. *See id.* ¶ 4. Garcia spoke with Armenta, who admitted to doing blood sugar testing on students. *See id.* ¶ 5. Garcia directed Armenta to report to the school district. *See id.* ¶ 6. Armenta has not taught at Loya since February 6, 2017. *See id.* Armenta now works as a Lyft driver. *See* Armenta Dep. 13:14-19, Bonner Decl. Exh. 3, ECF 75-4.

Several students ("Minor Plaintiffs") and their parents ("Parent Plaintiffs") filed this action on January 3, 2018. *See* Compl., ECF 1. The operative SAC asserts two claims under 42 U.S.C. § 1983. Claim 1, against both Garcia and Armenta, is a § 1983 claim for violation of Plaintiffs' Fourteenth Amendment rights. Claim 2, against Armenta only, is a § 1983 claim for violation of Minor Plaintiffs' Fourth Amendment rights. Plaintiffs seek to litigate these claims on behalf of themselves, all similarly situated Loya students who were subjected to blood testing by Armenta, and those children's parents.

II. LEGAL STANDARD

***2** "A party is entitled to summary judgment if the 'movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *City of Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). "The moving party initially bears the burden of proving the absence of a genuine issue of material fact." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). "Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial." *Id.* "[T]he non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor." *Id.* "The court must view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor." *City of Pomona*, 750 F.3d at 1049. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Id.* (internal quotation marks and citation omitted).

III. DISCUSSION

Garcia has filed a motion for summary judgment on Claim 1, the only claim asserted against her. Armenta, against whom Claim 1 also is asserted, has filed a joinder. The Court addresses the merits of the summary judgment motion first as to Garcia, and then as to Armenta.

A. Garcia

Claim 1 is for violation of Plaintiffs' Fourteenth Amendment right to family association. *See* SAC ¶¶ 33-36. "Parents and children have a well-elaborated constitutional right to live together without governmental interference." *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000). That right to family association is an essential liberty interest protected by the Fourteenth Amendment. *See id.* "The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." *Id.* at 1141.

Plaintiffs assert that Armenta violated this right by testing students' blood without parental consent, and that Garcia violated the right by failing to stop him. *See* SAC ¶¶ 36-38. As to Garcia, Plaintiffs allege that she "knew or should have known about the unsafe medical practices, including pricking the fingers of multiple students using a blood sugar testing device to extract blood from minor fifth (5th) grade students, happening on school premises for several years." SAC ¶ 38. Plaintiffs further allege that Garcia "fail[ed] to take action to stop or correct Defendant ARMENTA's abusive conduct." *Id.*

Garcia contends that she is entitled to summary judgment because there is no evidence that she knew about Armenta's blood testing of students before any of the named Minor Plaintiffs were pricked. Garcia also contends that Plaintiffs' allegations that she "should have known" about

Armenta's conduct are insufficient to raise a constitutional claim. Finally, Garcia argues that Minor Plaintiffs have not alleged a violation of their protected liberty interests.

In opposition, Plaintiffs argue that there is a factual dispute as to when Garcia learned about Armenta's blood testing activities. Plaintiffs do not dispute Garcia's contention that allegations as to what she "should have known" are insufficient to raise a constitutional claim. Plaintiffs argue only that there is evidence that Garcia knew Armenta was performing blood testing on students without notice to or consent from their parents. Plaintiffs also argue that Minor Plaintiffs have alleged a violation of their protected liberty interests under the Fourteenth Amendment.

1. Knowledge of Armenta's Conduct

There is no *respondeat superior* liability under § 1983. *See* *Preschooler II v. Clark Cty. Sch. Bd. of Trustees*, 479 F.3d 1175, 1182 (9th Cir. 2007). However, a supervisor may be liable for the constitutional violations of his or her subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them. *See id.* In *Preschooler II*, the Ninth Circuit held that plaintiffs could pursue § 1983 claims against a school principal and other school officials based on their alleged knowledge that a teacher was abusing a student and their failure to report or take corrective action against the teacher. *See* *id.* at 1183. Plaintiffs therefore may assert a § 1983 claim against Garcia on the theory that she knew Armenta was testing students' blood sugar but did not report him or take corrective action against him.

***3** Plaintiffs' allegations that Garcia "should have known" about Armenta's blood testing activities are insufficient to assert a constitutional violation. As Garcia points out, "Mere negligence or lack of due care by state officials in the conduct of their duties does not trigger the substantive due process protections of the Fourteenth Amendment and therefore does not state a claim under section 1983." *Woodrum v. Woodward Cty., Okl.*, 866 F.2d 1121, 1126 (9th Cir. 1989). Plaintiffs' opposition brief does not address their claim that Garcia "should have known" of Armenta's conduct, and Plaintiffs therefore have abandoned that claim. *See* *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009) (failure to address claims in opposition to summary judgment constitutes abandonment).

Garcia has the initial burden on summary judgment to show that Plaintiffs cannot prevail on their claim that she knew Armenta was blood testing students but failed to take corrective action. Garcia submits her declaration that she learned about Armenta's activities for the first time on February 6, 2017, when parents of a student who had been subjected to blood testing complained to her. *See* Garcia Decl. ¶¶ 9-10, ECF 73-2. Garcia states that she never observed or was informed of Armenta's testing of students' blood sugar prior to that date. *See id.* ¶ 9. On February 6, 2017 – the date Garcia states she first learned of Armenta's conduct – Garcia reported Armenta to the school

district, Child Protective Services, and the Salinas Police Department. *See id.* ¶¶ 3, 6-7. Armenta has not taught at Loya since February 6, 2017. *See id.* ¶ 6.

In addition to submitting her declaration, Garcia addresses record evidence that Parent Plaintiff Christina G. called the school during the 2015-2016 school year to report that Armenta had pricked the fingers of her two children, Minor Plaintiffs Y.P. and O.D.G. *See* Christina G. Dep. 25:10-15, 31:1-9, Exh. A to Bengtson Decl., ECF 73-3. Christina G. testified that she spoke to a school receptionist, Lydia, who promised "to speak to somebody about it." *Id.* 31:1-9. Garcia counters Christina G.'s deposition testimony with the declaration of the receptionist in question, Lydia Valtierra, who states that she has no recollection of receiving the call described by Christina G., is "confident" that she did not receive such a call, and is "confident" she never told Garcia that Armenta was testing the blood of Loya students. Valtierra Decl. ¶¶ 2-3, ECF 73-1.

This evidence is sufficient to meet Garcia's initial burden on summary judgment. The burden thus shifts to Plaintiffs to submit evidence sufficient to create a factual dispute.

Plaintiffs submit Christina G.'s deposition testimony, in which she described in some detail the call she remembers making to Lydia Valtierra during the 2015-2016 school year. *See* Christina G. Dep. 33:21-34:13, Exh. 1 to Bonner Decl., ECF 75-2. Christina G. testified that she was embarrassed about making the call, and that she asked to use her manager's office so that she could have privacy. *See id.* 33:24-34:5. Christina G. trusted Valtierra, however, because Valtierra was the volleyball teacher for Christina G.'s child Y. P. *See id.* 31:1-4. Christina G. specifically remembers saying to Valtierra, "you have a daughter," when discussing how upset Christina G. was about the blood testing. *See id.* 34:8-13. Valtierra reportedly assured Christina G. that she would tell someone about Armenta's conduct. *See id.* Plaintiffs also submit Valtierra's deposition, in which she testified that she is a mandated reporter and that if she had been told Armenta was testing students' blood, she would have reported it to the principal, Garcia. Valtierra Dep. 36:5-24, Exh. 2 to Bonner Decl., ECF 75-3. Plaintiffs argue that this evidence is sufficient to create a triable issue of fact as to whether Christina G. reported Armenta's blood testing activities to Valtierra during the 2015-2016 school year and whether Valtierra in turn reported those activities to Garcia.

***4** The Court agrees that Plaintiffs' evidence is sufficient to create a factual dispute as to whether Garcia learned of Armenta's blood testing of students during the 2015-2016 school year, rather than on February 6, 2017 as she claims. Garcia's evidentiary objections to Valtierra's testimony as too speculative is OVERRULED. Valtierra properly may testify that, as a mandated reporter, she would have told Garcia about Armenta's conduct had it been reported to her. A reasonable jury could credit Christina G.'s testimony that she made the call in 2015-2016 over Valtierra's testimony that she has no recollection of receiving such a call. Further, a reasonable jury could infer that upon receiving Christina G.'s call, Valtierra performed her duty as a mandated reporter and informed Garcia of the claims.

However, even assuming for purposes of this motion that Garcia was informed of Armenta's conduct during the 2015-2016 school year, there is no evidence that the named Minor Plaintiffs were tested after Christina G. called the school, thus rendering this disputed fact immaterial to the claims. The SAC identifies four Minor Plaintiffs who were pricked by Armenta: I.G.V., O.D.G., Y.P and A.P.H. Two of the four, Y.P. and O.D.G., were pricked only once, the day before Christina G. telephoned the school and spoke to Valtierra. *See* Christina G. Dep. *See id.* 24:16-22, 27:11-28:8, Exh. 1 to Bonner Decl., ECF 75-2. According to Christina G., Y.P. and O.D.G. never went back to Armenta's classroom after that. *See id.* 24:16-22. The other two Minor Plaintiffs, I.G.V. and A.P.H, cannot remember when they were pricked by Armenta. *See* I.G.V.'s Response to Garcia's Special Interrogs., Set 1, at 2, Exh. F. to Bengtson Decl., ECF 73-3; A.P.H's Response to Garcia's Special Interrogs., Set 1, at 2, Exh. G to Bengtson Decl., ECF 73-3. Absent some evidence that Garcia knew about Armenta's blood testing of students prior to the time the named Minor Plaintiffs were pricked, no reasonable trier of fact could find Garcia liable for violating Plaintiffs' Fourteenth Amendment rights.

Accordingly, Garcia's motion for summary judgment is GRANTED. The possibility that other unnamed class members were injured after Christina G.'s call to the school does not save this claim. Prior to class certification, if it is found that the defendants are entitled to summary judgment on the named plaintiffs' individual claims, "there is no further action for the district court to take." *Corbin v. Time Warner Ent.-Advance/Newhouse P'ship*, 821 F.3d 1069, 1085 (9th Cir. 2016). Summary judgment for Garcia therefore is appropriate regardless of Plaintiffs' class allegations, as this action has not been certified.

2. Minor Plaintiffs' Protected Liberty Interests

As an alternative basis for summary judgment against Minor Plaintiffs, Garcia argues that Minor Plaintiffs have failed to allege a violation of their protected liberty interests under the Fourteenth Amendment. In Claim 1, Plaintiffs cite California Education Code § 48200 for the proposition that "[s]tudents have an inalienable right to attend safe, secure and peaceful campuses because of the compulsory nature of education." SAC ¶ 40. Plaintiffs further allege that "[a] special relationship is formed between a school district and its students, resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students." *Id.* According to Plaintiffs, this duty was breached by Garcia and Armenta. *See* SAC ¶ 41.

Garcia points out that § 48200, which provides that children between the ages of 6 and 18 are "subject to compulsory full-time education," says nothing about an inalienable right to attend a safe school campus. Garcia contends that § 48200 does not give rise to a Fourteenth Amendment liberty interest in a safe school campus. In their opposition brief, Plaintiffs abandon their Fourteenth

Amendment claim based on § 48200, instead arguing that all Plaintiffs, including Minor Plaintiffs, have a Fourteenth Amendment right to family association. In reply, Garcia argues that Claim 1 alleges violation of the right to family association only on behalf of Parent Plaintiffs, and not on behalf of Minor Plaintiffs.

***5** At the hearing, the Court engaged Plaintiffs' counsel in a colloquy regarding the manner in which the right to family association is pleaded in the SAC. In particular, the Court pointed to language in Claim 1 suggesting that the right is asserted only on behalf of Parent Plaintiffs. For example, Claim 1 alleges that "[p]arents and children have a fundamental right to family association under the liberty interest of the 14th Amendment which includes the right to make important medical decisions *for their children.*" SAC ¶ 35 (emphasis added). Other allegations likewise are framed in terms of Parent Plaintiffs' rights to make medical decisions for their children. *See* SAC ¶¶ 36-38. Plaintiffs' counsel clarified that Claim 1 is intended to assert violations of the Fourteenth Amendment right to family association on behalf of both Parent Plaintiffs and Minor Plaintiffs. Counsel's assertion is consistent with Ninth Circuit authority holding that "parents have a right arising from the liberty interest in family association to be with their children while they are receiving medical attention," and "*children have a corresponding right to the love, comfort, and reassurance of their parents while they are undergoing medical procedures.*" *Wallis*, 202 F.3d at 1142 (emphasis added). Accordingly, while Claim 1 could be pleaded more artfully, the Court finds that when liberally construed Claim 1 encompasses a Fourteenth Amendment claim for violation of the right to family association on behalf of both Parent Plaintiffs and Minor Plaintiffs.

The Court declines Garcia's invitation to disregard the language in *Wallis* as erroneous or mere dicta. Moreover, the Court finds Garcia's argument that children do not have a right to make their *own* medical decisions to be a mischaracterization of Minor Plaintiffs' claim. Under *Wallis*, Minor Plaintiffs had the right to have their parents make medical decisions for them, and to have their parents present during medical procedures. *See* *Wallis*, 202 F.3d at 1141 ("The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state."). Minor Plaintiffs have asserted a violation of protected liberty interests based on Armenta's testing of their blood without parental consent.

Garcia's alternative motion for summary judgment against Minor Plaintiffs is DENIED. As discussed above, however, Garcia is entitled to summary judgment on other grounds.

B. Armenta

Armenta joins Garcia's motion for summary judgment. The bulk of the motion, addressing Garcia's knowledge of Armenta's conduct, does not apply to Armenta. However, Armenta joins the portion of the motion arguing that summary judgment against Minor Plaintiffs is appropriate as to Claim 1,

because California Education Code § 48200 does not give rise to a Fourteenth Amendment liberty interest in a safe school campus.

As discussed above, Plaintiffs have abandoned their Fourteenth Amendment claim grounded in § 48200. However, the Court finds that when liberally construed Claim 1 encompasses a Fourteenth Amendment claim for violation of the right to family association on behalf of both Parent Plaintiffs and Minor Plaintiffs. Consequently, Armenta is not entitled to summary judgment against Minor Plaintiffs on Claim 1.

Armenta's motion for summary judgment is DENIED.

IV. ORDER

(1) Garcia's motion for summary judgment is GRANTED;

(2) Armenta's motion for summary judgment is DENIED; and

(3) This order terminates ECF 73 and 74.

All Citations

Not Reported in Fed. Supp., 2021 WL 1907790

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Reply to: Matawan Office

April 10, 2024

Via eCourts
New Jersey Appellate Division
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625-0970

Re: Platkin et al. v. Middletown Township Board of Education, et al.
Docker Number: A-000037-23

Dear Honorable Judges of the Appellate Division:

As the Court is aware, this office represents Appellant School District and Board of Education in the above-referenced matter. Kindly accept this letter brief in lieu of a more formal brief in response to the Amicus brief submitted by American Civil Liberties Union of New Jersey and Garden State Equality (collectively, the "Amici").

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellants rely upon the statement of facts and procedural history submitted in their initial brief.

PRELIMINARY STATEMENT

The Amici brief, similar to the Respondents' brief, continues to mischaracterize the carefully tailored Amended Policy 5756 and the safeguards in place. The Amici attempt to circumvent the fundamental rights of parents guaranteed in the constitution in directing the upbringing of their children and reiterate the notion that governmental actors are better equip to handle the emotional well-being of their child. In doing so, the Amici rely on the premise that parents are viewed as a negative actor that will only harm the emotional well-being of the child. This convoluted idea requires a determination by a governmental actor whether a parent is capable of handling their own child's gender identity and expression. Surely, these are not the type of policies the State should support in providing governmental actors more autonomy over the upbringing a child than the parent.

Furthermore, the overarching goal of the Laws Against Discrimination ("LAD") is to ensure that individuals are not treated differently based on certain traits or characteristics, including gender identity or expression. Notwithstanding, the Amici are advocating for a policy which results in preferential treatment for transgender students over cisgender students. The parties fail to understand the narrow scope of the policy and the limited circumstances in which parents are notified. Namely, the Amended Policy 5756 provides for parental notification when:

i) A student formally changes a mandatory student record, including gender, as defined by N.J.A.C. 6A:32-7.3(b)(1);
ii) A student participates in a sport for a gender other than that assigned at birth;
iii) Referring a student for outside health services, and the student's sexual identity and expression is germane to the referral; and
iv) A student uses a gendered bathroom, other than that assigned at birth, except a gender-neutral bathroom.

It is important to emphasize that notice is not required for a student requesting a different pronoun, dressing differently, or getting a school ID with a different name. More specifically,

> **"The school district shall accept a student's asserted gender identity; parental consent is not required. A student need not meet any threshold diagnosis or treatment requirements to have his or her gender identity recognized and respected by the school district, school, or school staff members. In addition, a legal or court-ordered name change is not required.** The Board finds that conversations with counselors, teachers or other staff about one's gender identity and expression are entitled to confidentiality. However, in the event a student requests a public social transition accommodation, such as public name/identity/pronoun change, bathroom/locker room accommodation, or club/sports accommodations, or the like, the school district shall notify a student's parents or guardian of the student's asserted gender identity and/or name change, or other requested accommodation, provided there is no documented evidence that doing so would subject the student to physical or emotional harm or abuse. **It shall be the policy of the Board to support and facilitate healthy communication between a transgender student and their family, rather than foster an unreasonable expectation that a public in-school transition will remain confidential or require district staff to affirmatively misrepresent information to parents."**

As evident from above, when notice is implicated, disclosures are not made until the administrator sits down with the student and explains the process. The student is provided the opportunity to personally disclose the information prior to parental notification and provided resources to assist in the process. Moreover, disclosure is not made until consultation with the board attorney, school counsel and any other appropriate administrators and other teaching staff members. It is at this time, the level of risk of disclosure is taken into account, including the student's reporting of fear of any potential physical or emotional harm and any previous reports from the DCPP. Thus, the notification process is student-centered with a school-supportive environment. The haphazard approach suggested by the Amici is arbitrary, non-sensical and poses more of a risk for "outing" a child without providing ***any*** resources to the student.

LEGAL ARGUMENT

I. Parental Rights are Protected by the Constitution.

The Amici attempt to downplay the fundamental constitutional right of a parent under the Fourteenth Amendment to make decisions concerning the care, custody and control of their children. As noted by Justice O'Connor:

> "**The liberty interest at issue in this case-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.** More than 75 years ago, in *Meyer v. Nebraska*, 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and **"to control the education of their own."** Two years later, in *Pierce v. Society of Sisters*, 268 U. S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* 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."** Id. at 535. We returned to the subject in *Prince v. Massachusetts*, 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. **"It is cardinal with us 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."**

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

As recognized by the Amici, the constitution prohibits governmental actors from interfering with parental decision-making on matters of great-importance. The interest of parents in the care custody and control of their children is clearly a matter of great importance and recognized as the oldest fundamental liberty interests by the Supreme Court. Id. Notwithstanding, the Amici advocate for school districts to maintain a policy of presumptive nondisclosure. However, this position fails to acknowledge that disclosure of the Amended Policy 5756 is implicated in four defined situations. Namely,

i) A student formally changes a mandatory student record, including gender, as defined by N.J.A.C. 6A:32-7.3(b)(1);
ii) A student participates in a sport for a gender other than that assigned at birth;
iii) Referring a student for outside health services, and the student's sexual identity and expression is germane to the referral; and
iv) A student uses a gendered bathroom, other than that assigned at birth, except a gender-neutral bathroom.

Even when such events implicate disclosure, there are specific procedures and resources in place for students to assist in the process. Amici advocate for the position that parents should not be informed about the emotional well-being of their child when it comes to critical sexual or gender issues, even when trained and licensed education professionals believe these issues are having a material impact on a child's physical or mental health and well-being. Again, Amended Policy 5756 permits the following:

> **"The school district shall accept a student's asserted gender identity; parental consent is not required. A student need not meet any threshold diagnosis or treatment requirements to have his or her gender identity recognized and respected by the school district, school, or school staff members. In addition, a legal or court-ordered name change is not required."**

Thus, this issue is dissimilar to that in Doe v. Del. Valley Reg'l High Sch. Bd. of Educ., a case involving school policies related to treatment of transgender students. 2024 WL 706797 1 (D.J. N.J. Feb. 21, 2024). The question in that matter pertained to whether Plaintiff has a fundamental constitutional right that requires the Board Defendants to obtain Plaintiff's consent prior to recognizing and referring to Jane as to her preferred gender. Id. at 6. As demonstrated above, this is not at issue, as Amended Policy 5756 requires a school district to accept a student's asserted gender identity without parental consent. Amended Policy 5756 requires parental notice in regard to the name change only when a request is made by the student for a mandatory student record, including gender. Thus, this case has no bearing to the matter at hand.

Moreover, the Amici reiterate the acknowledgement by the Attorney General that schools would be obligated to respond truthfully to a parent or guardian who contacted the school to request confirmation that their child had made such a request or statement regarding their chosen pronoun and gender. As such, parents are free to contact the school at any juncture to make such an inquiry. As the teachers cannot obfuscate the records and need to respond truthfully, the information would be disclosed at this time. In addition to this approach not being in the best interest of the student, it also fails to provide any support for the student. The advocated policy would be exponentially more harmful than the narrowly tailored and thoughtful approach proposed by Amended Policy 5756. Any notification under Amended Policy 5756 would be accompanied by a plethora of resources for the student along with an evaluation by the district whether such disclosure could be harmful. Therefore, the policy advocated for by the Amici is not student-centered and in fact would place the student at a higher risk compared to Amended Policy 5756.

II. Deference Should not be Provided to the Agency's Interpretation of the Law Against Discrimination Because Parental Notification Regarding a Student's Gender Identity Does Not Raise Constitutional Concerns.

The Amici set forth that deference should be provided to the Division of Civil Rights ("DCR") for their interpretation of the Laws Against Discrimination ("LAD") as it relates to gender identity. However, the Amici fail to take into account the Attorney General's lack of prosecution to prevent similar polices of parental notification and parental involvement since 2014. See Da234-235, Para. 6-7.

Although interpretations of a statue by agencies empowered to enforce them are given substantial deference in the context of statutory interpretation, the presumption of valid is not without limits. Reilly v. AAA Mid-Atlantic Ins. Co. of New Jersey, 194 N.J. 474, 485 (2008). The Supreme Court has cautioned that "if an agency's statutory interpretation is contrary to the statutory language, or

if the agency's interpretation undermines the Legislature's intent, no deference is required." Id. It should be noted that deference does not go so far as to "permit an administrative agency under the guise of an administrative interpretation to give a statute any greater effect than is permitted by the statutory language." Id.

As previously noted in the initial moving brief, Stauss Esmay Associations, LLP ("Strauss"), is an outside vendor that contracts with districts to draft and advise on policies and regulations. See Da 57, Para. 4 and Da234, Para. 4. In September 2014 and again in July of 2015, Strauss recommended adoption of transgender polices, which included parental notification and consent for certain younger students. See Da234, Para. 5 and Da238-244. Neither the Attorney General nor the Director of the DCR initiated a lawsuit against Middletown for adopting these polices.[1] The lack of prosecution is significant insofar as the LAD was amended in 2006 to include gender identity and expression as a protected class.

Furthermore, the LAD has never been substantively applied in the manner which the Amici suggest before this Court. It is telling that the Amici failed to cite any caselaw, decision, opinion or other determination that supports the position that parental notification violates the LAD. As the DCR and Attorney General never had an issue with parental notification in the past, despite being in place since at least 2014, deference would not be appropriate. It is of further importance that this matter stems from guidelines, which are not mandatory. Instead, the Attorney General is making allegations based upon those guidelines, which is not akin to an agency interpreting a statute or regulation. There was no formal process to adopt these guidelines, such as a public hearing, nor does the legislature require these guidelines be adopted. Therefore, deference should not even be considered in the context of this matter.

[1] Middletown Township Board of Education chose not to adopt these policies at this time.

III. The Court should not consider New Arguments Proffered by the Amici Concerning the New Jersey State Constitution.

The Amici argue, for the first time by any party, that the New Jersey constitution is implicated by Amended Policy 5756. Such argument was not previously addressed.

Generally, an appellate court will not consider issues that were not raised previously, including constitutional issues. See Deerfield Ests., Inc. v. Twp. of E. Brunswick, 60 N.J. 115, 120 (1972) (providing that constitutional issues that were not raised and argued below will not be considered unless raising a question of jurisdiction or "present[ing] a matter of real public importance"). See also State v. Walker, 385 N.J. Super., 388, 410 (App. Div. 2006).

As the Amici are setting forth arguments not previously raised by either party, the Court should not consider them. If the Court is inclined to consider the arguments, then the scope should be limited. The issue before the Court is narrow: does Amended Policy 5756 unlawfully treat students differently based on their "gender identity and expression" in violation of LAD, N.J.S.A. 10:5-4.

Instead, the Amici propose that the Court should utilize a three-factor test in determining the application of equal protections by weighing the governmental interest in the statutory classification of equal protections against the interests of the affected class. The test considers the following: 1) the nature of the right at stake; 2) the extent to which the challenged statutory scheme restricts that right; and 3) the public need for statutory restriction. Lewis v. Harris, 188 N.J. 415, 443 (2006).

The nature of the right at stake is squarely addressed and considered by Amended Policy 5756. The policy acknowledges that the LAD makes it unlawful for schools to subject individuals to differential treatment based on gender identity and expression. The narrowly tailored policy strikes a balance between the fundamental and constitutional rights of parents to control the upbringing of their child with the free expression of a child within school. More specifically, the policy **does not require**

notification when a student requests a different name in class, on non-official records, due to one's attire, or based upon any confidential conversations a student may have with a teacher or counsel. Instead, notification is triggered for one of the four following events:

i) A student formally changes a mandatory student record, including gender, as defined by N.J.A.C. 6A:32-7.3(b)(1);
ii) A student participates in a sport for a gender other than that assigned at birth;
iii) Referring a student for outside health services, and the student's sexual identity and expression is germane to the referral; and
iv) A student uses a gendered bathroom, other than that assigned at birth, except a gender-neutral bathroom.

Further, prior to any notification, a meeting is held with the student to explain the process. The student is provided with the opportunity to self-disclose to their family and additional resources to help through the process (i.e. role playing with the administrator, counseling and any other resources to facilitate the family's acceptance and support of the student's transgender status). The policy also takes into account any documented evidence that disclosure would subject the student to physical or emotional harm or abuse. Even considering the test proposed by the Amici, it is clear that the construction of Amended Policy 5756 was created to balance the constitutional rights of parents with adequate safeguards to protect the well-being of the student.

Moreover, it important to note the paradoxical nature of the Amici's position in this matter. The Amici contend that transgender students will be targeted or treated differently under Amended Policy 5756, which the LAD intends to prevent. However, by affording transgender students the right to avoid parental notification for changing mandatory student record, participating in a sport other than the assigned at birth, and any referral of a student to outside health services when such referral is germane to the referral, they are being treated differently than cisgender students. Thus, it would be inequitable to support such a policy.

IV. The Studies Cited by the Amici should be disregarded as they constitute inadmissible hearsay, are irrelevant, unduly prejudicial, and lack any probative value pursuant to N.J.R.E. 801, 802, 401 and 403(a).

The Amici cite several surveys and studies in an attempt to support the proposition that disclosure of a student's gender identity to their parent is harmful. However, such studies are inadmissible hearsay that should not be considered by the Court.

R. 1:6-6 provides only facts which are admissible in evidence may be considered by the Court when hearing a motion. The studies upon which Amici rely constitute inadmissible hearsay, are irrelevant and unduly prejudicial and should not be considered by this Court pursuant to N.J.R.E. 801, 802, 401 and 403(a).

N.J.R.E. 801 and 802 provide that hearsay, defined as an out of court statement offered to prove the truth of the matter asserted, is not admissible. The various studies cited are the exact definition of hearsay and, if considered by the Court, deprive the Board Defendants of the opportunity for cross-examination. As such, these studies cannot be considered.

N.J.R.E. 401 provides that relevant evidence is generally admissible. The studies upon which the Amici rely are irrelevant to the Court's disposition of the issue before it. The studies cited are self-reported surveys with no scientific analysis, are subjective and fails to provide any basis that it represents the entire community at issue. Rather, these studies are inflammatory, unduly prejudicial and provide no probative value, as they attempt to portray the transgender community as depressed, fearful and suicidal. In that regard, N.J.R.E. 403(a) provides, "Except as otherwise provided by these rules or other law, the court may exclude relevant evidence if its probative value is substantially outweighed by the risk of: (a) Undue prejudice, confusing the issues, or misleading the jury…"

Accordingly, there are a number of studies and discourse which demonstrate that parental involvement with transitioning students is imperative for the health and well-being of transgender students.[2] Despite studies being available on both sides, these studies still constitute as hearsay, are biased and unduly prejudicial, and cannot be considered by this Court.

Respectfully submitted,

s/ *Bruce W. Padula*

Bruce W. Padula

c: Respondents' Counsel of Record
Client
4867-0915-1158, v. 2

[2] For example:

1. Affidavit and Expert Opinion of Dr. Erica E. Anderson, PhD, dated February 3, 2023, submitted in B.F., et al v. Kettle Moraine School District, 21-cv-1650, Wisconsin Circuit Court ("Parental Involvement is Essential at Every Stage of the [transition] Process," ¶¶ 58-78, concluding that "a school policy that involves school adult personnel in socially transitioning a child or adolescent without the consent of parent or over their objection violates widely accepted mental health principles and practice" Id. at ¶ 78.) See Da172-215
2. New York Times, "When Students Change Gender Identity, and Parents Don't Know; Educators are facing wrenching new tensions over whether they should tell parents when students socially transition at school," January 22, 2023. See Da216-223.
3. "Are Teachers Obliged to Tell Parents Their Child Might Be Trans? Courts May Soon Decide," Sawchuck, Education Week, April 28, 2022. See Da224-232.