LABOR AND EMPLOYMENT LAW

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presents

2024 Public Sector Conference

PERB - Social Movements in the Workplace

Friday, May 10, 2024
2:30 p.m. – 3:45 p.m.

Speakers:

Terri Witherspoon

Jennie Carbuccia

Conference Reference Materials

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Advancing Social Movements through the PERB Administrative Process

Jennie Carbuccia, Sweetwater Union High School District
Kimberly J. Procida, Public Employment Relations Board
Terri Witherspoon, California Teachers Association

May 10, 2024

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The Panelists

Jennie Carbuccia

General Counsel
Sweetwater Union High School District

Kimberly Procida

Regional Attorney
Public Employment Relations Board

Terri Witherspoon

Staff Attorney
California Teachers Association

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How Did We Get Here?

2013

AB 1266 (Ammiano)

Education Code §221.5(f) (The School Success and Opportunity Act)

Provides that students must be allowed to have access to programs and facilities that are consistent with their gender identity, irrespective of the gender listed in their school records.

How Did We Get Here?

2014

California Dept. of Education issues implementing guidance for AB 1266: https://www.cde.ca.gov/re/di/eo/faqs.asp

Answers frequently asked questions about:

a) fostering an educational environment that is safe and free from discrimination for all students, and

b) assists school districts with understanding and implementing policy changes related to AB 1266 and transgender student privacy, facility use, and participation in sports.

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How Did We Get Here?

"CDE guidance advises that parents will not be informed of a child's use of different name/pronoun if the child does not want them to know. Pursuant to the above protections, 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."

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Districts' Responses Prior to 2023

How are districts normally involved?

Districts generally followed CDE guidance or adopted board policies consistent with the guidance (California School Boards Association)

Sweetwater Policy

Policy 5145.41: personnel shall not disclose information related to gender expression to parents

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Litigation ignites the issue, and other Districts follow

January 2023: *Regino v. Staley* (E. Dist. Cal)

- Student in Chico Unified School District came out to a school counselor as transgender.
- Counselor followed CDE guidance and District policy and honored the student's wishes to not tell their parents
- Counselor encouraged student to talk to another adult and work toward parents.
- Student came out to a grandparent, who told the mom.
- Mom then sued the school district
- Asserted violation of her constitutional right to control the upbringing of her child.
- Represented by Harmeet Dhillon and the Center for American Liberty.

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Litigation ignites the issue, and other Districts follow

Spring and Summer 2023: Districts around the state adopt parental notification/forced outing policies

Policies require school employees who learn of a student's request to use a different name or pronoun to affirmatively out the student to their parent or guardian and obtain their permission.

Where these policies have changed, it was through School Board action, but at least one was done through administrative guidance.

Outcome: There is a statewide split between districts following CDE guidance and districts asserting local control.

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State v. Chino Valley Unified School Dist. (San Bernardino Sup. Court)

- School board adopted forced outing policy
- Attorney General filed suit
- Violates discrimination protections for students and privacy rights
- Obtained temporary restraining order and then Preliminary Injunction
- Bonta issued statement advising other districts of illegality
- Preliminary Injunction not appealed; trial on merits this summer

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Other Pending Litigation

***Mae M. v. Komrosky (Temecula Valley)* (Superior Ct, Riverside)**

Challenge by parents, students, and local CTA chapter to "CRT" Ban. Represented by Public Counsel. Amended complaint challenged forced outing policy adopted by School Board, asserting discrimination against transgender students and violates students' right to privacy

***Mirabelli v. Olsen* (Escondido Unified School Dist.) (Southern Dist. of Cal.)**

Two teachers sought to not have to follow Cal. Dept of Ed guidance and District policy on respecting the privacy of trans kids based on free speech and free exercise of religion. Represented by Thomas Moore Society.

***Tapia v. Jurupa Unified School District* (Central Dist. of Cal.)**

Teacher alleges failure to accommodate religious rights and deprivation of free speech rights to have to follow District policy that respects privacy of transgender students. Represented by Advocates for Faith and Freedom.

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The Public Employment Relations Board

The Public Employment Relations Board (PERB or Board) is a quasi-judicial administrative agency charged with administering the collective bargaining statutes covering employees of California's public schools, colleges, and universities, employees of the State of California, employees of California local public agencies (cities, counties and special districts), trial court employees, trial court interpreters, supervisory employees of the Los Angeles County Metropolitan Transportation Authority, Judicial Council employees, Orange County Transportation Authority employees, Bay Area Rapid Transit District (BART) employees, Sacramento Regional Transit District employees, Santa Cruz Metropolitan Transit District employees, Santa Clara Valley Transportation Authority employees, and child care providers who participate in a state-funded early care and education program.

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The Educational Employment Relations Act (EERA)

§ 3543 (a) Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

§ 3543.1 (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer.

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The Educational Employment Relations Act (EERA)

§ 3543.5 - It is unlawful for a public school employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, “employee” includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative. Knowingly providing an exclusive representative with inaccurate information, whether or not in response to a request for information, regarding the financial resources of the public school employer constitutes a refusal or failure to meet and negotiate in good faith.

Other Statutes

The Dills Act (§§ 3512, 3515.5, 3519) – state government

The Higher Education Employer-Employee Relations Act (§§ 3565, 3571) – the California State University System and the University of California System

The Meyers-Milias-Brown Act (§§ 3502, 3503, 3506.5) – municipalities, counties, and local special districts

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Unilateral Changes

Examples of unilateral changes by creating new policies:

- Employer adopted a new policy by claiming it had a right to not process group grievances (*Kern County Hospital Authority* (2022) PERB Decision No. 2847-M, pp. 11-12)
- Employer adopted attendance policies that implemented new rules on attendance and new bases for discipline (*County of Monterey* (2018) PERB Decision No. 2579-M, p. 10)
- Employer adopted regulations prohibiting the union from distributing leaflets to the general public and other staff on employer property (*Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 22)

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Interference

Examples of interference with the right to display union insignia:

- Employer banned the wearing of all union buttons without demonstrating special circumstances (*State of California (Department of Parks and Recreation)* (1993) PERB Decision No. 1026-S)
  - This applies to instructional settings as well (*East Whittier School District* (2004) PERB Decision No. 1727, p. 11)

- Employer's ban on union bumper magnets on an employer-owned vehicle assigned to an individual employee, as it was similar to an employee wearing a button pinned to clothing and did not interfere with employer operations (*Regents of the University of California* (2023) PERB Decision No. 2880-H, p. 11)

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PERB's Unfair Practice Charge Process

Unfair Practice Charge

↓

Complaint

↓

Informal Settlement Conference

↓

Formal Hearing before an Administrative Law Judge

↓

Board Decision

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Remedies

General Remedies

- Cease & Desist Orders
- Notices to Employees of Violation

Specific Remedies for Interference with Protected Employee Rights

- Rescind unlawful policies
- Remove disciplinary material from personnel files
- Provide make-whole relief, including reinstatement or back pay

Specific Remedies for Unilateral Changes

- Provide make-whole relief
- Rescind the policy change
- Order to bargain over the policy upon request of the exclusive representative

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CTA Pushes Back at PERB

- CTA members did not want to be put in the position of outing their students/violating privacy
- CTA members did not want to be violating guidance of the CDE
- CTA members want school to be a safe space for all students
- CTA chapters saw this as a unilateral change that was adopted without negotiating with the union

Seven CTA chapters filed Unfair Practice Charges with PERB asserting

- Policies are illegal and thus not subject to negotiation
- Even if they are illegal, policies impact working conditions (added duties, potential for discipline) so can't be adopted without negotiating with union.
- Even if not a mandatory subject of bargaining, still subject to effects bargaining

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Pending Cases Before PERB

- Anderson Union High School District
- Chino Valley Unified School District
- Clovis Unified School District
- Dry Creek Joint Elementary School District
- Murietta Valley Unified School District
- Rocklin Unified School District
- Temecula Valley Unified School District

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CTA Pushes Back at PERB on Pride Flag attacks

Along with parental notifications, several districts adopted policies aimed at banning Pride Flags in the classroom.

- controversial issues/ personal items policies
- all flags except the State and US flags.

Language was so broad that it interfered with other protected expression and/or so vague it couldn’t be followed

CTA chapters also filed charges alleging interference with protected activity and unilateral change.

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Case Study: Clovis Unified School District

1. Controversial issues and personal items policy

School Board adopted
items could not be displayed
-that reflected “politics, religion, social movements, or personal ethics”
-in a place that was in plain view of others
Shortly thereafter, teachers who had displayed Pride flags were told to take them down “because of the new board policy”

2. Transgender students guidance

Administration adopted new policy that openly challenged the legitimacy of the CDE guidance to protect student privacy in face of parental constitutional rights.
- Said they were within their rights to condition AB 1266 rights on approval of parents.

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Case Study: Clovis Unified School District

PERB charge asserted

Personal items policy constituted interference with protected activity and unilateral change

Transgender student policy constituted unilateral change to duties that would force educators to violate CDE guidance.

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Case Study: Clovis Unified School District

- PERB issued Complaint
- Informal Conference In July 2023
- District agreed to discuss these policies
- About a dozen meetings later we reached a settlement
- Focused on bringing employee expertise, countering myths
- Settlement Terms:
    1. Guidance for personal items in classrooms better defines space for personal items, allows explicitly for display of flags, allows classroom materials to include display of inspirational messages
    2. Revised Student Site Plan form allows for no parent involvement if the student raises concerns for their physical or emotional health if the parent were to be notified.

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Case Study: Chino Valley and Anderson

- Chino Valley and Anderson
- School Boards adopted similar policies
- Chino was sued by AG
- Anderson was threatened but not sued

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Case Study: Chino Valley and Anderson

Policy said certificated employees shall notify the parent(s)/guardian(s), in writing, within three days from becoming aware that a student is:

(a) requesting to be identified or treated, as a gender other than the student's biological sex or gender listed on the student's birth certificate or any other official records. This includes any request by the student to use a name that differs from their legal name (other than a commonly recognized diminutive of the child's legal name) or to use pronouns that do not align with the student's biological sex or gender listed on the student's birth certificate or other official records.

(b) accessing sex-segregated school programs, activities, or facilities that do not align with the student's biological sex or gender listed on the birth certificate or other official records.

(c) requesting to change any information contained in the student's official or unofficial records.

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Case Study: Chino Valley and Anderson

Recent attempts to moot out

- New policies removes the gender specific language and say that employees now have to notify parent(s)/guardian(s), in writing, within three days from the date any district employee,
- administrator, or certificated staff, becomes aware that a student is:
    - requesting to change any information contained in the student's official or unofficial records, or
    - participates in school-sponsored extracurricular and co-curricular activities or team(s

- Efforts to mooting out discriminatory litigation don't necessarily moot out unfair practice Unclear if will be applied in the same manner
- Still have new duties that were implemented without bargaining

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District Defenses

- Policies related to controversial issues are not bargainable, only impacts and effects are bargainable
- Rights on how districts run educational policy or provide student opportunities are not negotiable
- Hypothetical losses do not constitute upholding charge – what are the possible impacts?
- PERB does not have legal jurisdiction over whether these policies are lawful or not

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Current Status of PERB Cases

- Hearings in May
- Under Review by a PERB Administrative Law Judge
- Abeyance
- Settlement

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Concurrent Litigation

The Scope of PERB's Jurisdiction:

"[W]hile PERB has no authority to enforce or order remedies for violations of the Education Code, the Board and its agents may interpret the provisions of the Education Code or other matters of external law where necessary to administer EERA or to harmonize it with external law." (*Lake Elsinore Unified School District* (2018) PERB Decision No. 2548, pp. 11-12)

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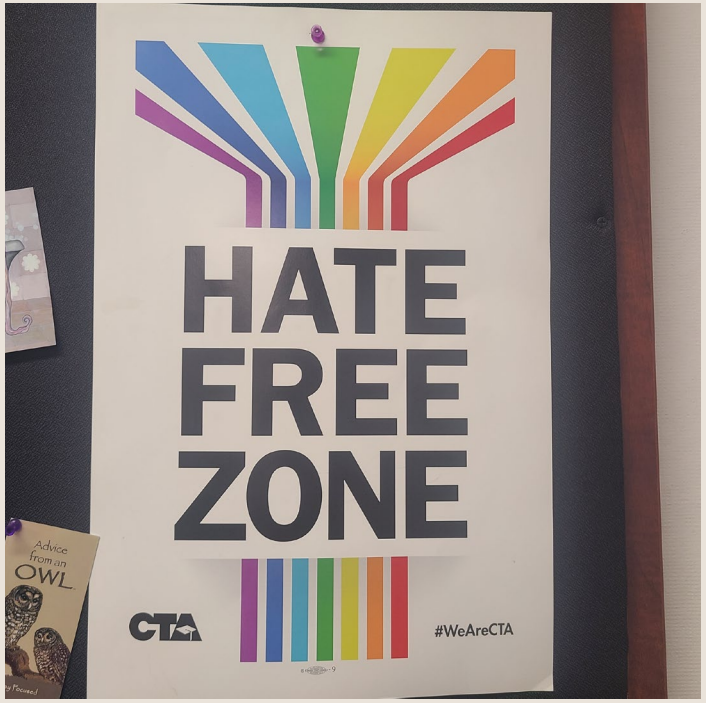
What Does This Mean for Other Sectors

Home Depot USA, Inc. (2024) 373 NLRB No. 25

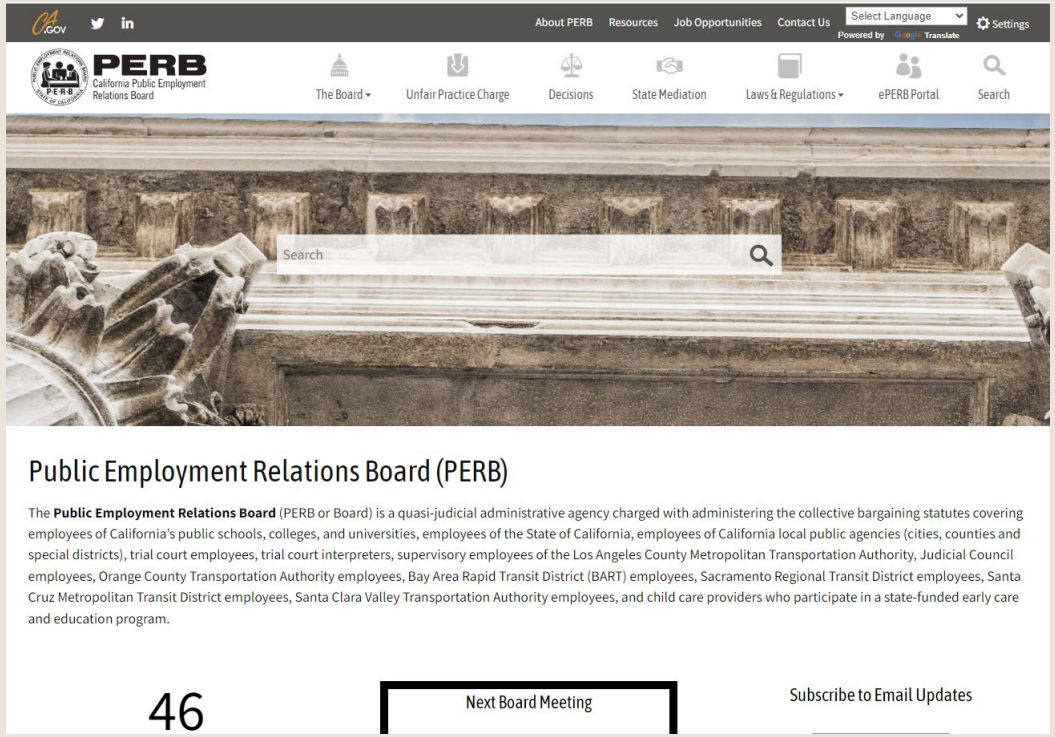
- Home Depot violated the NLRA when they fired an employee for wearing BLM on their apron
- NLRA protects the legal right of employees to engage in "concerted activities" for the purpose of "mutual aid or protection" — whether or not they are represented by a union
- The refusal to remove the BLM marking on the employee's apron was concerted because it was a logical outgrowth of prior racial discrimination protests at the workplace

What Does This Mean for Other Sectors

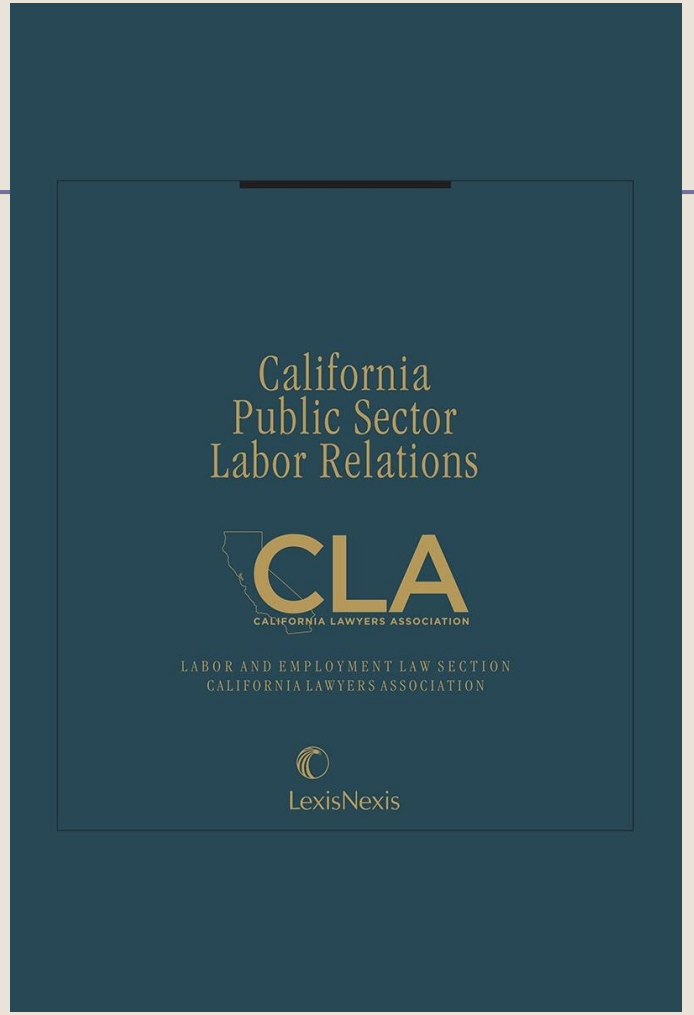
Race Relations in the Workplace



Resources



perb.ca.gov



Krantz & Shiners, *California Public Sector Labor Relations*

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Questions?

Frequently Asked Questions

School Success and Opportunity Act (Assembly Bill 1266) Frequently Asked Questions.

Consistent with our mission to provide a world-class education for all students, from early childhood to adulthood, the California Department of Education issues the following Frequently Asked Questions (FAQs) in an effort to (a) foster an educational environment that is safe and free from discrimination for all students, regardless of sex, sexual orientation, gender identity, or gender expression, and (b) assist school districts with understanding and implementing policy changes related to AB 1266 and transgender student privacy, facility use, and participation in school athletic competitions.

These FAQs are provided to promote the goals of reducing the stigmatization of and improving the educational integration of transgender and gender nonconforming students, maintaining the privacy of all students, and supporting healthy communication between educators, students, and parents to further the successful educational development and well-being of every student.

Expand All | Collapse All

1. What is Assembly Bill (AB) 1266?

   AB 1266, also known as the “School Success and Opportunity Act,” was introduced by Assemblyman Tom Ammiano on February 22, 2013. It requires that pupils be permitted to participate in sex-segregated school programs, activities, and use facilities consistent with their gender identity, without respect to the gender listed in a pupil’s records. AB 1266 was approved by Governor Brown on August 12, 2013.

   According to Assemblyman Ammiano, “This bill is needed to ensure that transgender students are protected and have the same opportunities to participate and succeed as all other students.” “AB 1266 clarifies California’s student nondiscrimination laws by specifying that all students in K-12 schools must be permitted to participate in school programs, activities, and facilities in accordance with the student’s gender identity.”

   As part of the analysis of AB 1266, Assemblyman Ammiano also stated, "Athletics and physical education classes, which are often segregated by sex, provide numerous well-documented positive effects for a student's physical, social, and emotional development. Playing sports can provide student athletes with important lessons about self-discipline, teamwork, success, and failure, as well as the joy and shared excitement that being a member of a sports team can bring. When transgender students are denied the opportunity

to participate in physical education classes in a manner consistent with their gender identity, they miss out on these important benefits and suffer from stigmatization and isolation. In addition, in many cases, students who are transgender are unable to get the credits they need to graduate on time when, for example, they do not have a place to get ready for gym class."

2. When did this law go into effect?

   AB 1266 became a provision within California Education Code, Section 221.5(f), on January 1, 2014. It is important to note that prior to the enactment of AB 1266, both state and federal law have prohibited gender-based discrimination for some time.

   Federal Protection:

   Title IX prohibits sexual harassment and discrimination based on gender or sex stereotypes in every jurisdiction. While Title IX does not specifically use the terms “transgender” or “gender identity or expression,” courts have held that harassment and other discrimination against transgender and gender nonconforming people constitutes sex discrimination. This position has also been supported by the U.S. Department of Education. These rights were clarified in the October 26, 2010, “Dear Colleague Letter” and the April 29, 2014, guidance issued by the U.S. Department of Education, Office for Civil Rights, described in the “Recent Developments and Resources” section at the end of this document.

   California Law:

   It is the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, equal rights and opportunities in the educational institutions of the state. (Education Code Section 200.)

   No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid. (Education Code Section 220.)

3. What specifically does AB 1266 provide?

   Pre-existing state law prohibits public schools from discriminating on the basis of several characteristics, including sex, sexual orientation, and gender identity. Pre-existing state law also requires that participation in a particular physical education activity or sport, if required of pupils of one sex, be available to pupils of each sex. AB 1266 requires a pupil be permitted

to participate in sex-segregated school programs, activities, and facilities including athletic teams and competitions, consistent with his or her gender identity, regardless of the gender listed on the pupil's records.

As amended, Education Code Section 221.5(f) provides that “a pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”

4. How should a school district, teacher, school administrator or other employee define gender, transgender, or gender identity?

   There are a number of developing terms used to describe transgender characteristics and experiences, which may differ based on region, age, culture, or other factors. Many of these terms are not currently defined by law. However, several common definitions have been used by the courts, the U.S. Department of Education, and a number of groups with educational equity expertise, including the Gay, Lesbian, Straight, Education Network, and the California School Boards Association. Any definitions provided in these materials are provided to facilitate the process of providing safe and nondiscriminatory learning environments and are not provided for the purpose of labeling any students.

"Gender" means sex, and includes a person's gender identity and gender expression. "Gender expression" means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. (*Education Code* Section 210.7.)

“Gender identity” refers to a person’s gender-related identity, appearance or behavior whether or not different from that traditionally associated with the person’s physiology or assigned sex at birth.

“Gender expression” refers to external cues that one uses to represent or communicate one’s gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics.

“Transgender” describes people whose gender identity is different from that traditionally associated with their assigned sex at birth. “Transgender boy” and “transgender male” refer to an individual assigned the female sex at birth who has a male gender identity. “Transgender girl” and “transgender female” refer to an individual assigned the male sex at birth who has a female gender identity. An individual can express or assert a transgender gender identity in a variety of ways, which may but do not always include specific medical treatments or procedures. Medical treatments or procedures are not considered a prerequisite for one’s recognition as transgender.

“Gender nonconformity” refers to one’s gender expression, gender characteristics, or gender identity that does not conform to gender stereotypes “typically” associated with one’s legal sex assigned at birth, such as “feminine” boys, “masculine” girls and those who are perceived as androgynous. Sexual orientation is not the same as gender identity. Not all transgender youth identify as gay, lesbian or bisexual, and not all gay, lesbian and bisexual youth display gender-nonconforming characteristics.

5. How can a teacher or school administrator determine whether a student is transgender or not?

The first and best option is always to engage in an open dialogue with the student and the student’s parent or parents if applicable (but see FAQs 6 and 7). Gender identity is a deeply rooted element of a person’s identity. Therefore, school districts should accept and respect a student’s assertion of their gender identity where the student expresses that identity at school or where there is other evidence that this is a sincerely held part of the student’s core identity. Some examples of evidence that the student’s asserted gender identity is sincerely held could include letters from family members or healthcare providers, photographs of the student at public events or family gatherings, or letters from community members such as clergy.

If a student meets one or more of those requirements, a school may not question the student’s assertion of their gender identity except in the rare circumstance where school

personnel have a credible basis for believing that the student is making that assertion for some improper purpose. The fact that a student may express or present their gender identity in different ways in different contexts does not, by itself, undermine a student's assertion of their gender identity.

A school cannot require a student to provide any particular type of diagnosis, proof of medical treatment, or meet an age requirement as a condition to receiving the protections afforded under California's antidiscrimination statutes. Similarly, there is no threshold step for social transition that any student must meet in order to have his or her gender identity recognized and respected by a school.

6. May a student's gender identity be shared with the student's parents, other students, or members of the public?

   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.

   - A. Public Records Act requests - The Education Code requires that schools keep student records private. Private information such as transgender status or gender identity falls within this code requirement and should not be released. (Education Code Section 49060.)

   - B. Family Educational and Privacy Rights (FERPA) - FERPA is federal law that protects the privacy of students' education records. FERPA provides that schools may only disclose information in school records with written permission from a student's parents or from the student after the student reaches the age of 18. (20 U.S.C. Section 1232g.) This includes any "information that . . . would allow a reasonable person in the school community . . . to identify the student with reasonable certainty." (34 C.F.R. Section 99.3.)

   - C. California Constitution - Minors enjoy a right to privacy under Article I, Section I of the California Constitution that is enforceable against private parties and government officials. The right to privacy encompasses the right to non-disclosure (autonomy privacy) as well as in the collection and dissemination of personal information such as medical records and gender identity (informational privacy).
     Even when information is part of a student's records and therefore covered by FERPA, the law provides several exceptions that permit appropriate communications under

circumstances in which the student or others may be at risk of harm. Transgender or gender nonconforming students are often subject to stressors which can place them at risk of self-harm. FERPA expressly permits the disclosure of information from a student's records "…to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals." (34 C.F.R. Section 99.36(a).) "If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals." *(Id.* Section 99.36(c).)

Moreover, although FERPA restricts disclosures of information obtained from a student's records, it was never intended to act as a complete prohibition on all communications. One threshold point that is often overlooked is that FERPA limits only the disclosure of records and information from records about a student. It does not limit disclosure or discussion of personal observations.

In other words, if a school employee develops a concern about a student based on the employee's observations of or personal interactions with the student, the employee may disclose that concern to anyone without violating, or even implicating, FERPA. Of course, in most cases, the initial disclosure should be made to professionals trained to evaluate and handle such concerns, such as school student health or welfare personnel, who can then determine whether further and broader disclosures are appropriate.

7. What steps should a school or school district take to protect a transgender or gender nonconforming student's right to privacy?

To prevent accidental disclosure of a student's transgender status, 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. Alternatively, schools could indicate in the student's records that the necessary identity documents have been reviewed and accepted without retaining the documents themselves. Furthermore, schools should implement similar safeguards to protect against disclosure of information contained in electronic records.

Pursuant to the above protections, 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. In those very rare circumstances where a school believes there is a specific and compelling "need to know," the school should inform the student that the school intends to disclose the student's transgender status, giving the

student the opportunity to make that disclosure her or himself. Additionally, schools must take measures to ensure that any disclosure is made in a way that reduces or eliminates the risk of re-disclosure and protects the transgender student from harassment and discrimination. Those measures could include providing counseling to the student and the student's family to facilitate the family's acceptance and support of the student's transgender status. Schools are not permitted to disclose private student information to other students or the parents of those students.

A transgender student's right to privacy does not restrict a student's right to openly discuss and express their gender identity or to decide when or with whom to share private information. A student does not waive his or her right to privacy by selectively sharing this information with others.

8. What is a school or school district's obligation when a student's stated gender identity is different than the student's gender marker in the school's or district's official records?

   A school district is required to maintain a mandatory permanent student record which includes the legal name of the student and the student's gender. If and when a school district receives documentation that such legal name or gender has been changed, the district must update the student's official record accordingly.

   If 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. This is critical in order to avoid unintentionally revealing the student's transgender status to others in violation of the student's privacy rights, as discussed above in section 6.

   If a student so chooses, district personnel shall be required to address the student by a name and the pronouns consistent with the student's gender identity, without the necessity of legal documentation or a change to the student's official district record. The student's age is not a factor. For example, children as early as age two are expressing a different gender identity. It is strongly suggested that teachers privately ask transgender or gender nonconforming students at the beginning of the school year how they want to be addressed in class, in correspondence to the home, or at conferences with the student's parents.

   In addition to preserving a transgender student's privacy, referring to a transgender student by the student's chosen name and pronouns fosters a safe, supportive and inclusive learning environment. To ensure that transgender students have equal access to the programs and activities provided by the school, all members of the school community must use a transgender student's chosen name and pronouns. Schools should also implement safeguards to reduce the possibility of inadvertent slips or mistakes, particularly among temporary personnel such as substitute teachers.

If a member of the school community intentionally uses a student's incorrect name and pronoun, or persistently refuses to respect a student's chosen name and pronouns, that conduct should be treated as harassment. That type of harassment can create a hostile learning environment, violate the transgender student's privacy rights, and increase that student's risk for harassment by other members of the school community. Examples of this type of harassment include a teacher consistently using the student's incorrect name when displaying the student's work in the classroom, or a transgender student's peers referring to the student by the student's birth name during class, but would not include unintentional or sporadic occurrences. Depending on the circumstances, the school's failure to address known incidents of that type of harassment may violate California's antidiscrimination laws.

9. How does a school or school district determine the appropriate facilities, programs, and activities for transgender students?

A school may maintain separate restroom and locker room facilities for male and female students. However, students shall have access to the restroom and locker room that corresponds to their gender identity asserted at school. As an alternative, a "gender neutral" restroom or private changing area may be used by any student who desires increased privacy, regardless of the underlying reason. The use of such a "gender neutral" restroom or private changing area shall be a matter of choice for a student and no student shall be compelled to use such restroom or changing area.

If there is a reason or request for increased privacy and safety, regardless of the underlying reason, any student may be provided access to a reasonable alternative locker room such as:

- A. Use of a private area in the public area of the locker room facility (i.e., a nearby restroom stall with a door, an area separated by a curtain, or a P.E. instructor's office in the locker room).
- B. A separate changing schedule (either utilizing the locker room before or after the other students).
- C. Use of a nearby private area (i.e., a nearby restroom or a health office restroom).

It should be emphasized that any alternative arrangement should be provided in a way that keeps the student's gender identity confidential.

Schools cannot, however, require a transgender student to use those alternatives. Requiring a transgender student to be singled out by using separate facilities is not only a denial of equal access, it also may violate the student's right to privacy by disclosing the student's transgender status or causing others to question why the student is being treated differently.

Some students (or parents) may feel uncomfortable with a transgender student using the same sex-segregated restroom or locker room. This discomfort is not a reason to deny access to the transgender student. School administrators and counseling staff should work with students and parents to address the discomfort and to foster understanding of gender identity, to create a school culture that respects and values all students.

10. How should a school or district determine the appropriate placement for transgender students related to sports and physical education classes?

    Transgender students are entitled to and must be provided the same opportunities as all other students to participate in physical education and sports consistent with their gender identity. Participation in competitive athletic activities and contact sports are to be addressed on a case-by-case basis. For additional guidance, the California Interscholastic Federation issued new bylaws in 2013, which provide a detailed process for gender identity participation in interscholastic sports. (See, Recent Developments section below.)

11. May a school district or school enforce a gender-based dress code?

    Nondiscriminatory gender segregated dress codes may be enforced by a school or school district pursuant to district policy. Students shall have the right to dress in accordance with their gender identity, within the constraints of the dress codes adopted by the school. School staff shall not enforce a school's dress code more strictly against transgender and gender nonconforming students than other students.

12. How should school districts and schools address harassment, bullying and abuse of transgender students?

    California law requires that schools provide all students with a safe, supportive and inclusive learning environment, free from discrimination, harassment, and bullying. Examples of harassment and abuse commonly experienced by transgender students include, but are not limited to, being teased for failing to conform to sex stereotypes, being deliberately referred to by the name and/or pronouns associated with the student's assigned sex at birth, being deliberately excluded from peer activities, and having personal items stolen or damaged. School district efforts to prevent and address harassment must include strong local policies and procedures for handling complaints of harassment, consistent and effective implementation of those policies, and encouraging members of the school community to report incidents of harassment. Beyond investigating incidents, schools should implement appropriate corrective action to end the harassment and monitor the effectiveness of those actions.

13. Should a school district or school generally review its gender-based policies?

    As a general matter, schools should evaluate all gender-based policies, rules, and practices and maintain only those that have a clear and sound pedagogical purpose. Examples of policies and practices that should be reconsidered include: gender-based dress code for graduation or senior portraits and asking students to line up according to gender. Gender-

based policies, rules, and practices can have the effect of marginalizing, stigmatizing, and excluding students, whether they are gender nonconforming or not. In some circumstances, these policies, rules, and practices may violate federal and state law. For these reasons, schools should consider alternatives to them.

Whenever students are separated by gender in school activities or are subject to an otherwise lawful gender-specific rule, policy, or practice, students must be permitted to participate in such activities or conform to such rule, policy, or practice consistent with their gender identity.

RECENT DEVELOPMENTS AND RESOURCES

The California School Boards Association's (CSBA) Legal Guidance on Rights of Gender Nonconforming Students in Schools

CSBA has also developed a model board policy and administrative regulation that can be adopted by districts. The most current CSBA sample language is available through GAMUT Policy and Policy Plus:

- Board Policy 5145.3 - Nondiscrimination/Harassment
- Administrative Regulation 5145.3 - Nondiscrimination/Harassment

Office for Civil Rights Complaint and Resolution Agreement

On July 24, 2013, the U.S. Department of Education's Office for Civil Rights and the U.S. Department of Justice's Civil Rights Division entered into a Resolution Agreement with the Arcadia Unified School District to resolve a complaint alleging violations of Title IX. The case was brought on behalf of a transgender student who was denied access to the boys' restrooms and locker rooms, and required to sleep in a separate facility during an overnight field trip. The agreement requires the school district to treat the student in a manner consistent with his gender identity for all purposes. Moreover, the school district agreed to retain a consultant to revise their policies to prohibit discrimination on the basis of gender identity and implement a district-wide training program for staff and students.

The Resolution Agreement (PDF; Posted 29-Jan-2016) between the Office for Civil Rights and Arcadia Unified School District

California Interscholastic Federation

In February 2013, the California Interscholastic Federation (CIF) issued new bylaws which provide that all students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity. CIF Regulation 300 D, Gender Identify Participation, provides:

Participation in interscholastic athletics is a valuable part of the educational experience for all

students. All students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records. The student and/or the student's school may seek review of the student's eligibility for participation in interscholastic athletics in a gender that does not match the gender assigned to him or her at birth, should either the student or the school have questions or need guidance in making the determination, by working through the procedure set forth in the "Guidelines for Gender Identity Participation."

NOTE: The student's school may make the initial determination whether a student may participate in interscholastic athletics in a gender that does not match the gender assigned to him or her at birth.

The new California Interscholastic Federation bylaws

Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, April 29, 2014

In April 2014, the U.S. Department of Education, Office for Civil Rights, issued guidance making clear that federal law prohibits discrimination against students on the basis of transgender status: "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation (PDF; Posted 29-Jan-2016)."

Office for Civil Rights Dear Colleague Letter, October 26, 2010

In October 2010, the U.S. Department of Education, Office for Civil Rights, issued a Dear Colleague Letter that, among other things, clarified that although Title IX does not prohibit discrimination on the basis of sexual orientation, harassment directed at a student because that student is gay, lesbian, bisexual, or transgender may constitute sexual harassment and sex discrimination prohibited by Title IX.

The U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter, October 26, 2010 (PDF; Posted 29-Jan-2016)

Other Resources

Gay-Straight Alliance Network/Tides Center, Transgender Law Center and National Center for Lesbian Rights. (2004). Beyond the Binary: A Tool Kit for Gender Identity Activism in Schools. San Francisco, CA: GSA Network (PDF; Posted 29-Jan-2016)

Gerald P. Mallon, "Practice with Transgendered Children," in *Social Services with Transgendered Youth* 49, 55-58 (Gerald P. Mallon ed., 1999)

Stephanie Brill & Rachel Pepper, *The Transgender Child*, 61-64 (2008).

Questions: School Health and Safety Office | shso@cde.ca.gov | 916-319-0914

Last Reviewed: Thursday, February 29, 2024

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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

AURORA REGINO,

Plaintiff,

vs.

SUPERINTENDENT KELLY STALEY, in her official capacity; CAITLIN DALBY, in her official capacity; REBECCA KONKIN, in her official capacity; TOM LANDO, in his official capacity; EILEEN ROBINSON, in her official capacity; and MATT TENNIS, in his official capacity,

Defendants.

Case No.: 2:23-cv-00032-JAM-DMC

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS

(Fed. R. Civ. Proc. 12)

Date: May 23, 2023
Time: 1:30 p.m.
Crtrm.: 6
Judge: Hon. John A. Mendez

Complaint Filed: January 6, 2023
Trial Date: Not Yet Set

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 23, 2023 at 1:30 p.m., or as soon thereafter as the matter may be heard in Courtroom 6 of the above-entitled court, located at 501 I Street, Sacramento, California 95814, Defendants KELLY STALEY, CAITLIN DALBY, REBECCA KONKIN, TOM LANDO, EILEEN ROBINSON, and MATT TENNIS (collectively, "Defendants") will and hereby do move this Court to dismiss the following claims raised in the operative Verified Complaint filed by Plaintiff AURORA REGINO in the above-captioned matter ("Complaint"):

1. All causes of action, including but not limited to, Count One, Count Two, Count Three, and Count Four, as to Defendants CAITLIN DALBY, REBECCA KONKIN, TOM LANDO, EILEEN ROBINSON, and MATT TENNIS, pursuant to Federal Rule of Civil Procedure 12(f), as these individuals are named as defendants in their official capacities with Chico Unified School District ("District") only, redundant to the naming of Defendant KELLY STALEY in her official capacity with the District;
2. First Cause of Action as to all Defendants pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"), as the Complaint does not allege the deprivation of a life, liberty or property right secured by the Constitution or laws of the United States;
3. First Cause of Action as to all Defendants pursuant to Rule 12(b)(6), as the Complaint does not allege an abuse of power which shocks the conscience;
4. Second Cause of Action as to all Defendants pursuant to Rule 12(b)(6), as the Complaint does not allege the deprivation of a life, liberty or property right secured by the Constitution or laws of the United States;
5. Second Cause of Action as to all Defendants pursuant to Rule 12(b)(6), as the Complaint does not allege an abuse of power which shocks the conscience;
6. Third Cause of Action as to all Defendants pursuant to Rule 12(b)(6), as the Complaint does not allege the deprivation of a life, liberty or property right secured by the Constitution or laws of the United States;
7. Third Cause of Action as to all Defendants pursuant to Rule 12(b)(6), as the

Complaint does not allege an abuse of power which shocks the conscience;

8. Third Cause of Action as to all Defendants pursuant to Rule 12(b)(6), as the Complaint does not allege facts establishing an entitlement to individual notice and hearing;
9. Fourth Cause of Action as to all Defendants pursuant to Rule 12(b)(6), as the Complaint does not allege the deprivation of a life, liberty or property right secured by the Constitution or laws of the United States;
10. Fourth Cause of Action as to all Defendants pursuant to Rule 12(b)(6), as the Complaint does not allege an abuse of power which shocks the conscience; and
11. Fourth Cause of Action as to all Defendants pursuant to Rule 12(b)(6), as the Complaint does not allege facts establishing an entitlement to individual notice and hearing.

This motion is based on the instant Notice of Motion and Motion, the Memorandum of Points and Authorities set forth below, the contemporaneously-filed request for judicial notice, all pleadings in this action, as well as any evidence and arguments that may be offered in the forthcoming reply briefing and hearing on the motion. This motion is made following the conference of counsel pursuant to the Court's standing order which took place on March 20, 2023.

LEONE ALBERTS & DUUS

Dated: March 27, 2023

/s/ Jimmie E. Johnson
BRIAN A. DUUS, ESQ.
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Attorneys for Defendants
SUPERINTENDENT KELLY STALEY, CAITLYN DALBY, REBECCA KONKIN, TOM LANDO, EILEEN ROBINSON, and MATT TENNIS

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In this litigation, Plaintiff AURORA REGINO ("Plaintiff") attacks a lawful regulation of the Chico Unified School District ("District"). Specifically, Plaintiff alleges that the District's Administrative Regulation 5145.3 ("AR 5145.3") violates her right to direct the upbringing of her children by "socially transitioning" those children without her prior consent. However, the allegations fail to raise a legally-cognizable claim in several respects. First, despite Plaintiff's assertions, AR 5145.3 does not authorize District employees to "socially transition" students. As explained in the regulation itself, testimony previously submitted in this litigation, and the current World Professional Association for Transgender Health Standards of Care for the Health of Transgender and Gender Diverse People, Version 8 ("WPATH SOC 8"), "social transitioning" is the child's own decision to adopt a gender expression which aligns with their own, self-determined gender identity – not a third person's use of alternative names and pronouns when communicating with that person. Far from directing students to express themselves in a particular way, AR 5145.3 simply requires District personnel to accept social transitioning decisions a student has already made. Second, despite Plaintiff's assertions, the right to direct the upbringing of a child (1) does not usurp the constitutionally-recognized right of privacy held by that child; (2) does not empower a parent or guardian to impose their own gender identity preferences upon the child; nor (3) empowers a parent or guardian to impose their own curriculum preferences upon a public school district. Finally, Plaintiff's procedural due process claims fail to establish that she is entitled to any legally-cognizable rights with respect to AR 5145.3; and even assuming such procedural rights do exist, the claims fail to establish any violation of those rights by the actions of the District.

For these reasons, the Court should grant the instant motion, and dismiss all causes of action raised in the Complaint. In the alternative, should this Court not dismiss this litigation in its entirety, it should nonetheless dismiss Defendants CAITLIN DALBY, REBECCA KONKIN, TOM LANDO, EILEEN ROBINSON, and MATT TENNIS (collectively, "Board Member Defendants") from the lawsuit who have been named in their official capacities only, redundant

to the naming of Defendant KELLY STALEY ("Superintendent Staley") in her official capacity.

PERTINENT BACKGROUND

A. Parties

Defendant KELLY STALEY is the Superintendent for the District. Verified Complaint, ECF 1 ("Complaint"), ¶ 19. In her position, Defendant Staley is responsible for overseeing implementation of District policies. Complaint, ¶ 19. Defendants CAITLIN DALBY, REBECCA KONKIN, TOM LANDO, EILEEN ROBINSON, and MATT TENNIS are members of the District's Board of Education ("Board"). Complaint, ¶¶ 14-18. The Board is the governing body of the District. Complaint, ¶ 13. Each of these individuals are named as parties to the litigation in their official District capacities only. Complaint, ¶¶ 14-19.

Plaintiff AURORA REGINO is the mother of A.S. and C.S., minor students who attend District schools. Complaint, ¶¶ 3, 11. During the 2021-2022 school year, A.S. attended the District's Sierra View Elementary School ("Sierra View").

B. AR 5145.3

AR 5145.3 sets forth how the District will comply with applicable state and federal civil rights laws concerning discrimination, harassment, intimidation, and bullying based on any protected category, including race, color, and ancestry, among others. Request for Judicial Notice ("RJN") No. 1. As of the 2021-2022 school year, AR 5145.3 read, in pertinent part:

> Gender transition refers to the process in which a student changes from living and identifying as the sex assigned to the student at birth to living and identifying as the sex that corresponds to the student's gender identity.[1]
>
> …
>
> To ensure that transgender and gender-nonconforming students are afforded the same rights, benefits, and protections provided to all students by law and Board policy, the district shall address each situation on a case-by-case basis, in accordance with the

[1] See also, Dkt., "Declaration of Jack Turban," Feb. 14, 2023 (ECF 22-3) (at para. 19, defining "social transition"); RJN No. 2 (WPATH SOC 8, at p. S253) (defining "transition").

following guidelines:

1. Right to privacy: A student's transgender or gender-nonconforming status is the student's private information and the district shall only disclose the information to others with the student's prior written consent, except when the disclosure is otherwise required by law or when the district has compelling evidence that disclosure is necessary to preserve the student's physical or mental well-being. … As appropriate given the student's need for support, the compliance officer may discuss with the student any need to disclose the student's transgender or gender-nonconformity status or gender identity or gender expression to the student's parents/guardians and/or others…. The district shall offer support services, such as counseling, to students who wish to inform their parents/guardians of their status and desire assistance in doing so.

…

6. Names and Pronouns: If a student so chooses, district personnel shall be required to address the student by a name and the pronoun(s) consistent with the student's gender identity, without the necessity of a court order or a change to the student's official district record. …

RJN, No. 1 [at pp. 4-7].

C. Pertinent Allegations

The Complaint alleges, in pertinent part:

27. In December 2021, before winter break, A.S. met with [school counselor] Ms. Robertson to discuss her feelings. … Ms. Robertson encouraged A.S. to join a small group of other girls around her age that she (Ms. Robertson) organized when school resumed the following month (the "Girls Group"). …

…

30. After one or two Girl's Group meetings, A.S. went to Ms. Robertson's office to tell her that she 'felt like a boy' or words of similar effect. Ms. Robertson asked A.S. if she had a boy's name that she would like to be called and whether she would like to be

> referred to by male pronouns. A.S. was unsure whether she wanted others at school to start calling her by a male name and pronouns, but she felt pressured by Ms. Robertson, so she responded in the affirmative and told Ms. Robertson her boy's name was "J.S." …
>
> 31. After the meeting, Ms. Robertson walked A.S. back to her classroom and told her teacher that A.S. was now going by the name "J.S." and male pronouns, and her teacher immediately began referring to her as such. …
>
> …
>
> 34. During this time, school personnel continued referring to A.S. by her new name and pronouns. Every day at school, A.S. was known as "J.S." and referred to with male pronouns, while at home, she remained A.S. Despite requiring a parental permission slip for A.S. to participate in an arts-and-crafts club, the District socially transitioned A.S. from a girl to a boy without even *informing* her mother, much less obtaining her permission to do so.

Complaint, ¶¶ 27, 30, 31, 34 (emphasis in original).

Based upon these allegations, Plaintiff raises the following causes of action:

- Count One – Facial Challenge to Parental Secrecy Policy Under 42 U.S.C. § 1983 – Substantive Due Process (Complaint, ¶¶ 56-62);
- Count Two – As Applied Challenge to Parental Secrecy Policy Under 42 U.S.C. § 1983 – Substantive Due Process (Complaint, ¶¶ 63-67);
- Count Three – Facial Challenge to Parental Secrecy Policy Under 42 U.S.C. § 1983 – Procedural Due Process (Complaint, ¶¶ 68-71); and
- Count Four – As Applied Challenge to Parental Secrecy Policy Under 42 U.S.C. § 1983 – Procedural Due Process (Complaint, ¶¶ 72-75).

ARGUMENT

I. THE COMPLAINT FAILS TO STATE FACTS CONSTITUTING A FACIAL VIOLATION OF PLAINTIFF'S SUBSTANTIVE DUE PROCESS RIGHTS

A. Plaintiff Fails to Allege the Deprivation of a Right Secured by Federal Law

Count One raises a claim under title 42, United States Code section 1983 ("Section

1983"), alleging that AR 5145.3 facially violates Plaintiff's substantive due process rights. Complaint, ¶¶ 56-62. To state a claim under Section 1983 alleging a violation of substantive due process, the complainant must establish a "deprivation of life, liberty, or property." *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006) (internal grammatical marks and citation omitted). In addition, the complainant must also establish a "cognizable level of executive abuse of power as that which shocks the conscience." *Id.* (internal grammatical marks and citations omitted). Finally, "[a] facial challenge to a [policy] is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [policy] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Here, with regard to the "deprivation of life, liberty, or property" element, Count One alleges that AR 5145.3 denies Plaintiff of her right to direct the upbringing of A.S. Complaint, ¶¶ 58-59. Indeed, parents hold a liberty interest in making decisions concerning the care, custody, and control of their children. *Fields v. Palmdale Sch. Dist.,* 427 F.3d 1197, 1204 (9th Cir. 2005). However, Plaintiff contends that her rights include the authority to decide for herself whether A.S. will become transgender – and that her child might have no say in the matter:

> The Parental Secrecy Policy *authorizes children to make* mature, consequential, private, and potentially life-altering *decisions without parental* knowledge or *consent* by excluding parents from the decision-making process on these matters;
>
> …
>
> *The Parental Secrecy Policy usurps parents' responsibility as the ultimate decision-maker regarding* their children's mental health and well-being, including but not limited to *decisions related to their gender identity and expression*….

Complaint, ¶ 59 (emphasis added, quoted language from subparagraphs (a), (e)).

The question, therefore, is whether a parent does, in fact, have the right to know their child's transgender status, as well as the authority to compel their own transgender preferences upon the child. To that end, the federal constitution provides individuals a right of privacy concerning personal information. *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977). This right applies to the sex lives of students with regard to their parents. For example, in *C.N. v. Wolf,* 410

F.Supp.2d 894, 903 (C.D. Cal. 2005), the Court found that a minor student had raised a valid claim of invasion of privacy by asserting that the school district had disclosed her sexual orientation to a parent without the student's consent. See also, *Nguon v. Wolf*, 517 F.Supp.2d 1177, 1191, 1195-96 (C.D. Cal. 2007) (citing *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000)).

More recently, a federal district court specifically held that minor students also have a privacy right to maintain their gender identity a secret from their parents. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ. ("J&J Parents")*, 2022 U.S. Dist. LEXIS 149021 (D. Md. Aug. 18, 2022) (appeal pending). While this particular federal court represented the District of Maryland, it relied heavily upon the Ninth Circuit's *Fields* analysis in coming to its determination. *Id.*, at **26, 34-35. The federal court found that maintaining a "student's gender identity confidential unless and until that student consents to disclosure … both protect[s] the student's privacy and create[s] …a zone of protection . . . in the hopefully rare circumstance when disclosure of the student's gender expression while at school could lead to serious conflict within the family, and even harm." *Id.* at **38-39. Indeed, gender identity, in general, has long been considered information subject to the right of privacy by the Ninth Circuit. *Nelson v. NASA*, 568 F.3d 1028, 1037-38 (9th Cir. 2009) (J. Wardlaw concurring); see also *Sterling*, 232 F.3d at 196 ("It is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity.")

A month after the *J&J Parents* decision, a New Hampshire Superior Court likewise found that minor students have a privacy right to maintain their gender identity a secret from their parents. Finding such a right attune to previous federal court appellate decisions, including the right of minor students to keep private their use of a school's birth control clinic, *Doe v. Irwin*, 615 F.2d 1162, 1168-69 (6th Cir. 1980), and conversations with a school counselor, *Thomas v. Evansville-Vanderburgh Sch. Corp.* 258 Fed.Appx. 50, 52-54 (7th Cir. 2007), the New Hampshire court held that "the Policy does not prevent parents from observing their children's behavior…; 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…; choosing with whom the children 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." Order, *Jane Doe v. Manchester Sch. Dist.*, Case No. 216-2022-CV-00117, at **6-7 (N.H. Superior Court, Hillsborough County, Northern District, Sept. 5, 2022); RJN No. 3.

Finally, in the instant litigation, this Court denied Plaintiff's motion for preliminary injunction, finding that "[i]n the absence of the requisite legal and statutory support for Plaintiff's contention that she has a constitutional right that was violated, Plaintiff cannot establish a likelihood of success on the merits for her facial substantive or procedural due process claims." Dkt., "Order," Mar. 9, 2023 (ECF 37).

In short, every court known to the District to consider the question has found that a child has a right of privacy as to their gender information – including gender identity – which supersedes any desire and/or right of a parent (1) to have access to such information, let alone (2) impose their own gender identity preferences upon the child.

In addition, case law has long established that parents have no right to impose their preferences as to how school districts educate their students. "[O]nce parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished," and "they do not have a fundamental right generally to direct *how* a public school teaches their child." *Fields,* 427 F.3d at 1206 (emphasis in original; rejecting a substantive due process challenge to a public school's questioning of children about sexual topics). In short, while "parents have a right to inform their children when and as they wish on the subject of sex, they have no constitutional right . . . to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1231 (9th Cir. 2020) (quoting *Fields*, 427 F.3d at 1206; internal grammatical marks and citation omitted).

Thus, the Ninth Circuit has made it clear that the scope of a parent's right to direct the

educational upbringing of their child, which would include teacher-student conversations concerning gender identity, generally stops at the schoolhouse door. Plaintiff exercised her right to direct the educational upbringing of A.S. by choosing to enroll her child in the District. Upon Plaintiff making that decision, it was the District's decision as to what curriculum and extracurricular activities would be afforded her child. In turn, it was A.S.'s own personal decision whether to inform Plaintiff of her gender transition. The law requires the District to respect A.S.'s decision.

For all of these reasons, Plaintiff cannot establish the "deprivation of life, liberty, or property" element of her Section 1983 substantive due process claim. Plaintiff does not have a federal constitutional right to know the gender identity of her child – let alone force her own gender identity preferences upon A.S. Nor, does Plaintiff have the right to stop the District from including gender identity studies in her daughter's educational curriculum.

B. Plaintiff Fails to Allege District Conduct that "Shocks the Conscience"

In addition to her failure to establish any "deprivation of life, liberty, or property," Plaintiff further fails to allege facts constituting conduct that "shocks the conscience." "[W]e consider conduct to be conscience-shocking if it was taken with deliberate indifference toward a plaintiff's constitutional rights." *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1195 (9th Cir. 2013). "[C]onduct deliberately 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…." *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 849 (1998).

Here, as discussed above, there has been unanimity in federal court decisions that students have a controlling, constitutional right to privacy concerning their sex and gender information. In addition, as discussed in connection with the preceding motion for preliminary injunction, the California Department of Education ("CDE") has issued guidance pursuant to its statutory authority under California Education Code section 33308.5, subdivision (a), that California law requires the District to accept the direction of students regarding their gender identity – including requests concerning the confidentiality of that information. RJN No. 4 [FAQ Nos. 6-8]. Thus, given the unanimity of federal case decisions, and the direction of the CDE, the

fact that the District's regulation simply requires it to respect the gender identity and privacy wishes of its students does not constitute "deliberate indifference" towards Plaintiff's parental rights in a manner that "shocks the conscience."

Moreover, as noted above, the federal court in *J&J Parents* found that maintaining a "student's gender identity confidential unless and until that student consents to disclosure … create[s] …a zone of protection . . . in the hopefully rare circumstance when disclosure of the student's gender expression while at school could lead to serious conflict within the family, and even harm." 2022 U.S. Dist. LEXIS 149021 at **38-39. Given that there is unquestionably a government interest in protecting minors from possible domestic violence, any purported emotional distress Plaintiff may have collaterally incurred as a result of the District protecting its students from potential physical harm fails the *Lewis* standard.

C. Plaintiff Fails to Allege How AR 5145.3 Would Be Invalid in Every Conceivable Circumstance

Finally, again, "[a] facial challenge to a [policy] is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [policy] would be valid." *Salerno*, 481 U.S. at 745. Here, given that there are unquestionably circumstances in which disclosing a student's gender identity to a parent or guardian will "lead to serious conflict within the family, and even harm," as found in *J & J Parents*, 2022 U.S. Dist. LEXIS 149021 at **38-39, Plaintiff cannot satisfy the *Salerno* standard of establishing that AR 5145.3 would be invalid in every conceivable circumstance.

D. AR 5145.3 Satisfies Rational Basis Review

Where a substantive due process claim does not involve a fundamental right, rational basis review applies. *Witt v. Dep't. of the Air Force*, 527 F.3d 806, 817 (9th Cir. 2008). With respect to a substantive due process claim, rational basis review requires the challenged legislative enactment to bear only a "reasonable relation to a legitimate state interest." *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). Here, as touched upon in *J&J Parents*, 2022 U.S. Dist. LEXIS 149021 at *39, the District has a legitimate state interest to "protect the student's privacy and create …a zone of protection . . . in the hopefully rare circumstance when

disclosure of the student's gender expression while at school could lead to serious conflict within the family, and even harm," and maintaining a "student's gender identity confidential unless and until that student consents to disclosure" has a reasonable relationship with that interest.

Accordingly, for all of these reasons, independently and in concert, Count One fails to state facts raising a legally-cognizable, facial, substantive due process claim.

II. THE COMPLAINT FAILS TO ESTABLISH AN AS-APPLIED VIOLATION OF PLAINTIFF'S SUBSTANTIVE DUE PROCESS RIGHTS

Count Two alleges the same substantive due process claim as Count One, except it raises an as-applied challenge to AR 5145.3 rather than a facial one. Complaint, ¶¶ 63-67. An "as-applied attack … challenges only one of the rules in a statute, a subset of the statute's applications, or the application of the statute to a specific factual circumstance, under the assumption that a court can separate valid from invalid subrules or applications." *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011) (internal grammatical marks and citation omitted). "The underlying constitutional standard, however, is no different then [sic] in a facial challenge." *Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 608 F.3d 1084, 1096 (9th Cir. 2010). "Facial and as-applied challenges differ in *the extent* to which the invalidity of a statute need be demonstrated … invariant, however, is the *substantive rule of law* to be used." *Id.* at 1096 (quoting *Brooklyn Legal Servs. Corp. v. Velazquez*, 462 F.3 219, 228 (2nd Cir. 2006), emphasis in original, grammatical marks and citation omitted). Thus, to prevail in Count Two, Plaintiff must still establish a "deprivation of life, liberty, or property," as well as a "cognizable level of executive abuse of power as that which shocks the conscience." *Brittain*, 451 F.3d at 991 (internal grammatical marks and citations omitted). Now, however, Plaintiff need not establish that AR 5145.3 is unlawful in every conceivable circumstance, but only that it was applied to her, specifically, in an unconstitutional manner.

Here, with regard to the purported "gender transitioning," the verified Complaint alleges that the District instructed its students to "explore their identity and consider whether they felt like they were not the gender associated with their biological sex." Complaint, ¶ 25; see also Complaint, ¶ 32. Again, a school's curriculum choices do not interfere with a parent's rights to

raise their children. *Barr*, 949 F.3d at 1231; *Fields*, 427 F.3d at 1206. From there, the Complaint admits that A.S. "began feeling like she might be a boy." Complaint, ¶ 26. Notably, the Complaint does not allege that the District instructed or suggested to A.S. that she "might be a boy." The Complaint then admits that "A.S. went to Ms. Robertson's office to tell her that she 'felt like a boy'…." Complaint, ¶ 30. In other words, the pleading admits that it was A.S. who approached District personnel regarding her gender identity, not vice-versa.

Next, the pleading admits that Ms. Robertson responded by simply "ask[ing] A.S. if she had a boy's name that she would like to be called and whether she would like to be referred to by male pronouns." Complaint, ¶ 30. Notably, the Complaint does not allege that Ms. Robertson directed A.S. that she must do so. While the Complaint alleges that A.S. "felt pressured" by this simple request, nothing in the verified pleading suggests that Ms. Robertson's question would "shock the conscience" – especially in light of the CDE guidance requiring school districts to address transgender students in the manner the student directs. Complaint, ¶ 30.

The Complaint then admits that A.S. "responded in the affirmative and told Ms. Robertson her boy's name was 'J.S.'" Complaint, ¶ 30. In other words, A.S. chose her own identity, not the District. Then, according to the pleading, "[a]fter the meeting, Ms. Robertson walked A.S. back to her classroom and told her teacher that A.S. was now going by the name 'J.S.' and male pronouns, and her teacher immediately began referring to her as such," in line with the requirements of AR 5145.3. Complaint, ¶ 31.[2]

Finally, the Complaint alleges that "[o]ver the course of the spring semester of 2022, A.S.

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[2] The pleading goes on to allege that District personnel aside from Ms. Robertson and her teacher also started referring to A.S. as "J.S.," without A.S. having formally authorized disclosure of her gender identity to those other persons, Complaint, ¶ 31; however (1) notably, the pleading does not allege that it was District personnel who spread knowledge of A.S.'s gender identity to those other persons – as opposed to friends of A.S., or casual observation by District personnel of how A.S. identified themself to those friends; and (2) any transgression by the District on this account concerns the fundamental rights of A.S. (who is not a party to this action), not Plaintiff.

had two additional one-on-one meetings with Ms. Robertson. At these meetings, Ms. Robertson provided A.S. with additional resources regarding her new male identity, such as referring A.S. to a local community group that advocates for LGBTQ+ causes and discussing 'breast binding' with her." Complaint, ¶ 33. Notably, as to the former, the pleading merely alleges that Ms. Robertson notified A.S. of a local community group to which she might be interested. The Complaint does not allege that Ms. Robertson directed A.S. to join, visit, or even review the group. As to the latter, the pleading notably does not allege who started the conversation regarding "breast binding," how brief the "discussion" may have been; nor, if Ms. Robertson's contribution to the conversation included anything more than general moral support for A.S.'s gender identity choices.

In other words, the Complaint does not include any factual allegations regarding the alleged "gender transition" of A.S. that would constitute the District acting in a way divergent from the framework of its AR 5145.3 requiring the consideration of additional factors in this "as applied" analysis beyond those included in the "facial" analysis discussed above – an analysis that establishes that the pleading fails to raise a cognizable substantive due process claim.

With regard to maintaining the confidentiality of A.S.'s gender identity from Plaintiff, the Complaint alleges "A.S. told Ms. Robertson that she wanted to tell her mother about her new identity, but Ms. Robertson was not supportive of this course of action. [Ms. Robertson] … encouraged [A.S.] to speak with other family members first. … On or about April 8, 2022, A.S. told her grandmother about her new identity. A.S.'s grandmother informed [Plaintiff] of the news later that day." Complaint, ¶¶ 33, 35. Notably, the pleading does not allege that the District advised A.S. to keep the information secret from Plaintiff. Indeed, as admitted in the verified pleading, the District simply "*encouraged*" A.S. to "speak with other family member *first*…," with the unsurprising result that those family members would notify Plaintiff rather than A.S. having to do so, herself. Again, the District has a governmental interest in protecting its students from hostile reactions by family members upon learning of a new gender identity.

Accordingly, like the "social transitioning" allegations, the allegations concerning the District advising A.S. to tell other family members of her gender identity "*first*" before

discussing the matter with their mother does not establish that the District acted in a way divergent from the face of its AR 5145.3 requiring the consideration of additional factors in this "as applied" analysis beyond those included in the "facial" analysis discussed above. In turn, whereas the facial analysis discussed above establishes that the District did not violate any substantive due process rights, the Court should dismiss Count Two, as well.

III. THE COMPLAINT FAILS TO STATE FACTS CONSTITUTING ANY VIOLATION OF PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS

Based upon the same factual allegations discussed above, Counts Three and Four raise additional Section 1983 claims asserting facial and as-applied violations of Plaintiff's procedural due process rights. Complaint, ¶¶ 68-75. However, "[t]he first inquiry in every [procedural] due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). "Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process." *Id.* To that end, as discussed above, AR 5145.3 does not infringe upon Plaintiff's right to direct the upbringing of her child. Accordingly, on this ground alone, the Court should dismiss Counts Three and Four.

Moreover, even assuming *arguendo* that the Complaint does raise legally-cognizable allegations of AR 5145.3 infringing upon Plaintiff's liberty interests, her procedural due process claims still fail. For over a century, the United States Supreme Court has held that when a public entity deprives a person of a liberty interest through legislative action, that person is not entitled to any procedural due process beyond the standard requirements of the legislative process. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915). This fact has been repeatedly recognized by both District Courts within the Ninth Circuit Court of Appeals, as well as by outside federal appellate courts. For example, the Eleventh Circuit Court of Appeal, citing *Bi-Metallic*, has recently explained, "[i]n deciding what the Due Process Clause requires when the State deprives persons of life, liberty or property, the Supreme Court has long distinguished between legislative and adjudicative action. The State often deprives persons of liberty or property though legislative action – general laws that apply to more than a few people. When the

state does so, the affected persons are not entitled to *any* process beyond that provided by the legislative process." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020) (emphasis in original, grammatical marks and citation omitted). Likewise, the Eastern District of California, recently found that "[w]ith respect to Procedural Due Process, assuming that Plaintiffs have a protected liberty interest, under *Halverson v. Skagit Cnty*, 42 F.3d 1257 (9th Cir. 1994), 'governmental decisions which affect large areas and are not directed at one or a few individuals do not give rise to the constitutional procedural due process requirements of individual notice and hearing.' Rather, for actions that are legislative in nature, due process is satisfied when officials perform their responsibilities in the normal manner prescribed by law." *Culinary Studios, Inc. v. Newsom*, 517 F.Supp.3d 1042, 1052 (E.D. Cal. 2021).

Here, the Complaint lacks any allegation that the District imposed AR 5145.3 pursuant to some manner prohibited by law. See Complaint. Accordingly, on this additional, independent ground, the Court should dismiss both of Plaintiff's procedural due process claims.

IV. THE BOARD MEMBER DEFENDANTS ARE REDUNDANT PARTIES TO THE LITIGATION ENTITLED TO DISMISSAL

Federal Rule of Civil Procedure 12(f) ("Rule 12(f)") provides for striking "any redundant … matter." Fed. R. Civ. P. 12(f). Here, Superintendent Staley is named as a defendant to this litigation in her official capacity only. Complaint, ¶ 19. Yet, the Board Member Defendants are also named as defendants in their official capacities only. Complaint, ¶¶ 14-18. "A suit against a governmental officer in their official capacity is equivalent to a suit against the governmental entity itself." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991). As such, in effect, Plaintiff has redundantly named the District as a defendant to this litigation six times over.

"[W]hen both an officer and the local government entity are named in a lawsuit and the officer is named in his official capacity, the officer named in his official capacity is a redundant defendant and may be dismissed." *Luke v. Abbott*, 954 F.Supp. 202, 203 (C.D. Cal. 1997). Here, by naming Superintendent Staley in her official capacity, Plaintiff has already named the District as a defendant to the lawsuit. Additionally naming the Board Member Defendants in their official capacities is unnecessary and duplicative to having named the Superintendent. As such,

the Board Member Defendants are entitled to dismissal.

Moreover, as Plaintiff admits in the Complaint, it is Superintendent Staley, not the Board, that enforces the regulation in question. Complaint, ¶ 19. Indeed, Education Code section 35035, subdivision (a) expressly provides that "[t]he superintendent of each school district shall… [b]e the chief executive officers of the governing board of the school district." In addition, the District's own Board Policy 2110 expressly provides that "[a]s Chief executive officer of the Board of Education, the Superintendent of Schools shall have complete administrative supervision of the school system; and in accordance with the powers, he/she shall be responsible for the efficient operation of the system in all its divisions, in accordance with state law and Board policy." RJN No. 5 [at p. 1]. In turn, the District's Board Policy 9310 further provides that "[t]he Superintendent … shall be responsible for developing and enforcing administrative regulations for the operation of the district." RJN No. 6 [at p. 2]. The Complaint does not seek a mandatory injunction requiring the Board Member Defendants to enact certain new legislation, see Complaint; nor, could this Court make that type of order even if such a prayer was raised, *Associated Gen. Contractors of Amer. v. City of Columbus*, 172 F.3d 411, 418 (6th Cir. 1999). Accordingly, the injunctive relief sought by Plaintiff in this matter can only be attained through Superintendent Staley, not the Board Member Defendants. As such, the Court should dismiss the Board Member Defendants from this litigation.

CONCLUSION

For these reasons, the Court should grant the instant motion to dismiss with prejudice.

LEONE ALBERTS & DUUS

Dated: March 27, 2023

/s/ Jimmie E. Johnson
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No. 23-16031

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AURORA REGINO,
Plaintiff-Appellant
v.
KELLY STALEY, Superintendent
Defendant-Appellee
and
CAITLIN DALBY; REBECCA KONKIN; TOM LANDO; EILEEN ROBINSON; MATT TENNIS,
Defendants.

On Appeal from a Decision of the United States District Court for the Eastern District of California
No. 2:23-cv-00032-JAM-DMC Honorable John A. Mendez

AMICI BRIEF OF CALIFORNIA TEACHERS ASSOCIATION, CALIFORNIA FEDERATION OF TEACHERS, CALIFORNIA ASSOCIATION OF SCHOOL PSYCHOLOGISTS, CALIFORNIA ASSOCIATION OF SCHOOL COUNSELORS, CALIFORNIA SCHOOL NURSES ORGANIZATION, AND CALIFORNIA ASSOCIATION OF SCHOOL SOCIAL WORKERS IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state that they are nonprofit corporations, and they do not have a parent corporation nor issue stock.

Date: January 9, 2024

/s/ *Theresa C. Witherspoon*
Attorneys for *Amici Curiae* Educational Professionals

INTEREST OF *AMICI CURIAE*

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, *Amici* California Teachers Association, California Federation of Teachers, California Association of School Psychologists, California Association of School Counselors, California Association of School Social Workers, and California School Nurses Organization (collectively "Educational Professionals") file this *amici curiae* brief. Counsel for *Amici* sought and received the consent of both Appellant and Appellee to the filing of this brief.

Founded in 1863, the California Teachers Association ("CTA") is a nonprofit labor organization representing 310,000 educational employees in California, including teachers, school psychologists, school nurses, and school counselors. Over 1,000 chapters of CTA represent members in collective bargaining with school districts in California. CTA is the state affiliate of the National Education Association. CTA's mission is to protect and promote the well-being of its members; to improve the conditions of teaching and learning; to advance the cause of free, universal, and quality public education for all students; to ensure that the human dignity and civil rights of all children, youth and adults are protected; and to secure a more just, equitable, and democratic society.

California Federation of Teachers ("CFT") is union of educators and classified professionals. CFT is a nonprofit labor organization comprising more

than 135 local unions across California, representing more than 120,000 employees working at every level of public and private education in the state. CFT's mission is to represent the interests of its members and the interests of the communities they serve through support for local collective bargaining, legislative advocacy, political action, and organizing. By these means, CFT helps its members to achieve dignity and respect in their workplace, decent lives for themselves and their families, and security in their retirement. The CFT exists to bring its members together to act on behalf of education workplace rights, academic freedom, legislative solutions to educational policy issues, and for full access to quality education for our students. CFT is the California affiliate of the American Federation of Teachers.

The California Association of School Psychologists ("CASP") is a nonprofit membership-based professional organization of over 2,000 School Psychologists and Licensed Educational Psychologists in California. CASP is affiliated with the National Association of School Psychologists ("NASP"). CASP's purpose is to empower school psychologists and licensed educational psychologists to strengthen educational systems and the students they serve. This mission is based on the core beliefs of educating families and community members, empowering educators, providing ethical and evidence-based practices resources, promoting the belief that every person has a right to discover their potential to learn in alignment

with diversity and inclusion, and striving to engage in strategic outreach to recruit and retain diverse school psychologists.

California Association of School Counselors ("CASC") is a nonprofit membership-based professional organization of 2,215 School Counselors in California. CASC's purpose is to promote excellence in the profession of school counseling by: leading and advancing the profession of school counseling in California; actively involving school counselors in the pursuit of students' academic achievement, college and career readiness, and mental health support, as well as equipping school counselors with the requisite knowledge, skills, connections, and resources to promote equity and access to high-quality education for the overall success of every student in California schools.

California Association of School Social Workers ("CASSW") is a nonprofit membership-based professional organization of 550 school social workers in California. CASSW is dedicated to promoting the professional development of School Social Workers to enhance the educational experience of students and their families. CASSW works to empower and equip school social workers to address systemic barriers in education and promote social justice, liberation, and well-being for students, families, and communities.

California School Nurses Organization ("CSNO") is a nonprofit membership based professional organization of 1,800 school nurses throughout California.

CSNO's mission is to ensure that school nurses optimize student health and enhance learning through a network distinguished by: facilitating grassroots efforts within regional sections; developing and providing professional learning opportunity; fostering the development of leaders; conducting research and using evidence based practice; providing standards of care; and advocating for school health services.

Amici and their members collectively share a strong interest in supporting LGBTQ+ students and using their professional expertise to create a safe, nondiscriminatory, and supportive learning environment for all students. *Amici*'s members teach, counsel, nurse, and otherwise support students in California's schools on a daily basis. Their members are deeply familiar with the best professional practices for supporting students in the educational environment, including LGBTQ+ students. *Amici* also have long and proud histories of promoting inclusive education and supporting legislation and other advocacy efforts intended to protect and advance the rights of LGBTQ+ students and employees.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici curiae* certify that no person or entity, other than *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief or authored the brief in whole or in part.

INTRODUCTION

Educational Professionals file this brief in support of Appellee urging affirmance of the District Court's granting of the school District's Motion to Dismiss. Should this Court establish a new, expansive due process right to the forced disclosures sought by Appellant, significant harm would be done to the trusting relationships that school staff have with students – trust that is critical to work performed by the members of the *amici* organizations. To best support LGBTQ+ students, Educational Professionals must respect the parameters of a student-led process, where students are in fact encouraged to engage their parents or guardians and share information with them about their gender identity – in a manner and at a time when it is psychologically and physically safe for students, in accordance with the recommended best practices of Educational Professionals.

California has long successfully supported LGBTQ+ students and respected their rights to privacy and to non-discriminatory learning environments. The Chico Unified School District policy in question appropriately supports a safe and inclusive learning environment, and Plaintiff's constitutional challenge to that policy fails.

ARGUMENT

I. As found by the District Court, parents do not have a constitutional right to be notified over the student's objection of a student's presentation of their gender identity at school.

Educational Professionals agree with the District Court's ruling that Appellant's Complaint did not state a cognizable substantive due process right to be affirmatively informed that the school District was respecting plaintiff's child's request to begin using a different name and pronoun at school. In the public school context, this Court has long held that schools have a broad right to determine how to best serve the needs of their students, and individual parents do not have veto power over all aspects of school policy. (*See Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) (parents do not have a fundamental right "to interfere with a public school's decision as to how it will provide information to its students or what information it will provide, in its classrooms or otherwise" with respect to survey addressing sex and sexuality.)) Rather than intruding into a parent's personal liberties, the District's policy – which fully conforms with longstanding legal guidance from the California Department of Education – *prevents* the government from inserting itself into personal family matters. The policy respects student privacy rights under the California Constitution, and it allows family members to discuss gender identity on their own terms when they choose to do so.

The facts as alleged indicate that the student simply requested to use a different name and pronoun; school staff supported the student in this request; and school staff honored the student's desire to not inform their parents. Those facts do not establish an impingement on a parent's fundamental right such that Appellant established a violation of a substantive due process right.

Educational Professionals also agree with the District Court's conclusion that plaintiff failed to state an actionable procedural due process claim or First Amendment claim. *Amici* do not specifically address or repeat the District Court's reasoning on those issues. *Amici* instead address false premises of Appellant's arguments and the harms that would be caused to both students and student-school staff relationships were Appellant's constitutional theory adopted.

II. Allowing a student to socially transition at school is not medical treatment; it is an important student-sought support for transgender and gender non-conforming students.

Contrary to Appellant's assertions, social transitioning is not a medical treatment. While the process of generally changing gender expression from one gender to another is called "transition," "social transitioning" is the aspect of a person's transitioning that may include changes in clothing, grooming, pronouns, names, and identity documents. (National Association of School Psychologists. (2014). *Safe schools for transgender and gender diverse students* [Position statement]. Bethesda, MD: Author. pp. 6-7, citing American Psychological

Association. (2011). *Answers to your questions about transgender people, gender identity, and gender expression*. Washington, DC, available from http://www.apa.org/topics/lgbtq/transgender.pdf). In schools, this typically occurs when a student requests to have their preferred gender identity or expression acknowledged, and those around them respect and support this request. "Social transition" is a term distinguishable from "medical transition," the latter of which may include medical treatments such as hormone treatments and surgery. (*Id*. at p. 7.) Children, adolescents, and adults may undergo social transition at any time. (*Id*.) In the school context, this may include the student asking to be referred to by their chosen name and pronouns; wearing clothing, hairstyles, and make-up consistent with their gender identity; and having access to sex-segregated programs and facilities consistent with their gender identity, such as sports teams and bathrooms, as required by California Education Code Section 221.5(f).

When a student requests to socially transition at school, the best practice is for a trained Educational Professional to meet with the student and ask them how they prefer to be treated in various contexts, allowing the student to determine what they believe will be safest and most comfortable for them. Sometimes this will mean, for example, providing access to gender-neutral facilities. The process should always be student-led.

Treating students in accordance with their gender identity is imperative to the overall psychological and physical well-being of students. One study showed transgender and gender non-conforming students experienced a 29% decrease in suicidal thoughts if they have just one place where they can comfortably be accepted as themselves and go by their preferred name. (Russell, S.R., 63 *Journal of Adolescent Health* pp. 503-505 (2018) "Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth"). For students exploring their gender identity, school can be that safe place; however, for students to feel comfortable sharing that information, students must know that Educational Professionals will not share that information with anyone over the student's objections. Having supportive professionals and policies in place that allow a student to socially transition safely at school is an important way to provide vital support to these students.

In an effort to shoehorn forced-outing of students into a constitutional due process right, Appellant argues, wrongly, that parents must always be informed if a student is socially transitioning at school because it constitutes "medical treatment." But allowing a student to socially transition is not medical treatment. Rather, it is a means of social support. Social transitioning at school may be recommended as part of a broader plan that includes medical treatment, but supporting a student socially in their gender identity is not itself medical treatment.

Just as encouraging students to engage in healthy eating habits and exercise may be a means of supporting the medical treatment of various health conditions, such encouragement does not in and of itself constitute a medical treatment about which a parent must be informed or give consent.

Appellant's assertions that various authorities have established that social transitioning is a medical or psychological treatment are not actually supported by the authorities to which she cites. For example, on page 33 of Appellant's Opening Brief, Appellant cites *Edmo v. Corizon, Inc*., 935 F.3d 757, 770 (9th Cir. 2019) and *Lamb v. Norwood*, 899 F.3d 1159, 1161 (10th Cir. 2018) for this proposition; however, in each case, the court only references "treatments," not specifically medical or psychological treatments, and clarifies that social transitioning is one way to support gender dysphoria. Appellant also cites *Koe v. Noggle*, No. 1:23-CV-2904-SEG, 2023 WL 5339281, at *6 (N.D. Ga. Aug. 20, 2023), and *Monroe v. Meeks*, 584 F. Supp.3d 643, 678 (S.D. Ill. 2022), but those decisions only state that elements of social transitioning can be included as *part* of a gender dysphoria treatment plan. None of these cases establish that social transitioning in and of itself is a medical or psychological treatment, but rather they demonstrate that it can be a part of supporting someone with gender dysphoria.

Appellant's concern that social transitioning is a drastic "medical" action is belied by the reality of working with transgender and gender non-conforming

youth, as social transitioning often happens incrementally – just as occurred in this case. A student requesting certain trusted adults to use a different name and pronoun is often an early step, when the student feels psychologically safe to explore their gender identity in the school context. Educational Professionals advise, and have consistently found, that it is optimal for a trusted adult at school to support a student-led process, which involves listening to the student first and foremost, and following the student's lead with respect to how their gender presentation should be supported at school.

Abiding by the student's requests with respect to social transitioning also allows a student to change their mind about their gender identity, should the student choose to do so. Educational Professionals providing that initial support for a student exploring their gender identity, even if the student asks that their parents not be informed, is a recommended best practice both to ensure the student knows that adults can be a supportive and trusted resource and to directly support the student's well-being.

The District Court recognized that the District policy is student-led and is not something that is *done to* students, but rather follows the student's lead. As the District Court correctly stated, the policy is "not proactive, but reactive; District staff are not directed to force students to adopt transgender identities or keep their identities secret from their parents. Instead, District staff are directed to affirm a

student's expressed identity and pronouns and disclose that information only to those the student wishes." (District Court Decision, p.10.) The Court further found that it was "indisputable" that under the District policy, the decision for a student to use a different name and/or pronoun is made by the student, not the District. (*Id*.) The District policy is thus consistent with the recommendations and best practices of Educational Professionals.

III. Educational Professionals encourage students to share their gender identity with parents, guardians and other trusted adults when it is safe to do so.

Contrary to Appellant's gross mischaracterization of the District policy, Educational Professionals do not encourage or maintain "parental secrecy" policies. Educational Professionals recommend that as part of a process of supporting a student who "comes out" to an Educational Professional or who seeks support in their gender identity, Educational Professionals should discuss with the student how and when they can safely come out to their parent or guardian. Examples of this assistance include role playing the conversation that the student could have with their parent/guardian; encouraging the student to talk with their friends about role playing conversations with loved ones; brainstorming other family members to whom they can come out first who may be able to facilitate coming out to the parent/guardian; and offering to be part of a conversation between the parent/guardian and student.

This is, in fact, exactly what happened with Appellant's child. The student disclosed their gender identity to a school counselor—a member of *amici* California Association of School Counselors and California Teachers Association. The counselor discussed with the student whether anyone at home knew about their gender identity, but the student made clear that this was not something that, at the time, they believed anyone at home would accept. As part of supporting the student, the school counselor talked with the student about whether there was another adult family member with whom the student could speak first about their gender identity. The counselor offered to role play the coming out process with their mother, and she encouraged the student to role play the conversation with friends. She offered to facilitate a conversation between the student and the mother. Eventually, as a result of the role plays encouraged by the counselor, the student did disclose their gender identity to a grandmother, who, in turn, discussed her grandchild's gender identity with the parent-appellant. This incremental and discrete disclosure process occurred in large part *because* the school counselor was following best practices for Educational Professionals on encouraging the student to share their gender identity with their parents and other trusted family members.

This practice is also consistent with California Department of Education ("CDE") Guidance on supporting transgender students, titled "School Success and Opportunity Act (Assembly Bill 1266) Frequently Asked Questions."

(https://www.cde.ca.gov/re/di/eo/faqs.asp.) FAQ No. 5 states: "The first and best option is always to engage in an open dialogue with the student and the student's parent or parents if applicable." The guidance also recognizes, "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." (*Id.* at FAQ No. 6.)

Neither Chico nor other California school districts maintain a "secrecy policy" as mischaracterized by Appellant. District policies, consistent with CDE guidance, are aimed at encouraging connection with parents regarding the student's gender identity to the fullest extent possible. Many students do disclose their gender identity to a parent or guardian, but *amici* are concerned about the significant minority of highly vulnerable transgender and gender non-conforming students who may need additional time and support, or where school is the only place where they can feel safely supported. "Within the home environment, some LGBTQ+ youth experience family rejection, which may include abuse, exclusion, being forced to leave home, and efforts to change a youth's sexual orientation or gender identity." (National Association of School Psychologists. (2022). *Safe and Supportive Schools for Transgender and Gender Diverse Students*. [Position Statement]). The National Association of School Psychologists ("NASP") ethical guidelines state that school psychologists must not reveal any "information about

the sexual orientation, gender identity, or transgender status of a student (including minors) … without the individual's permission."[2] Moreover, NASP and the American Psychological Association "recommend schools develop policies that respect the right to privacy for students. . . with regard to . . . gender identity, or transgender status, and that clearly state that school personnel will not share information with anyone about the . . . gender identity. . . or transgender status of a student . . . without that individual's permission." (American Psychological Association & National Association of School Psychologists. (2015). *Resolution on gender and sexual orientation diversity in children and adolescents in schools*.) The Chico District policy follows these best practices by encouraging parental involvement while appropriately allowing the student to assert privacy rights – and to protect their own safety and psychological health -- with respect to their gender identity.

[2] The NASP Standard I.2.5 Privacy Related to Sexual Orientation and Gender Identity and Expression, states: "School psychologists respect the right of privacy of students, parents, and colleagues with regard to sexual orientation, gender identity, or transgender status. They do not share information about the sexual orientation, gender identity, or transgender status of a student (including minors), parent, or school employee with anyone without that individual's permission."

IV. Educational Professionals' duty not to discriminate against students requires that they respect the names and pronouns of transgender or non-binary students under California law.

California law makes clear that students have the right to attend school free from discrimination, including discrimination based on gender identity. (*See* Cal. Education Code section 220: "No person shall be subjected to discrimination on the basis of . . .gender identity [or] gender expression . . . in any program or activity conducted by an educational institution. . . .") California also specifically requires that students "be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records." (Cal. Education Code §221.5(f)). Educational Professionals are agents of schools and thus have a duty to follow these laws and to refrain from discriminating against transgender or gender non-conforming students. Treating a student in a manner inconsistent with their gender identity is a form of discrimination, as it evinces hostility and animus toward members of a protected group under state and federal law. (*See Bostock v. Clayton Cty.* 590 U.S. ---, 140 S. Ct. 1731, 1743 (2020) (discrimination based on transgender status is discrimination based on sex); Cal. Education Code §220 (prohibits discrimination based on gender identity and gender expression in educational institutions.))

A public school's discriminatory treatment of students based on gender identity also violates California's Equal Protection Clause. Indeed, a California Superior Court in San Bernardino County has enjoined another school district from implementing the very type of forced-outing policy that Appellant here attempts to turn into a constitutional mandate. (*See People of the State of Cal. v. Chino Valley Unified School Dist.*, CIV SB17301 (San Bernardino Sup. Ct. 2023.)) As the *Chino Valley* case recognizes, forcing schools to inform parents of a student's LGBTQ+ status when the student objects to that disclosure discriminates against those students; violates their equal protection rights; violates their privacy rights; and threatens serious harm to some of the most vulnerable students whom *amici* serve.

Appellant's arguments directly conflict with this well-established anti-discrimination law and should be rejected. Educational Professionals, who must abide by state anti-discrimination law, know firsthand that those legal obligations and the District's policy here provide critical protection to students and help ensure that schools are safe and supportive learning environments for all students.

V. The policy advocated by Appellant would cause serious harm to Educational Professionals and their ability to form trusting relationships with students—a key component of student success.

Appellant's preferred policy not only would cause harm to vulnerable students, but it would also harm Educational Professionals who are tasked with the important job of educating and supporting students.

The American Psychological Association and the National Association of School Psychologists encourage school-based mental health professionals to serve as allies and advocates for gender and sexual orientation diverse children and adolescents in schools. (National Association of School Psychologists (2017), *Safe and supportive schools for LGBTQ+ youth* (Position statement). Bethesda, MD: Author.) *Amici*'s members take these responsibilities seriously and endeavor to ensure that schools are inclusive learning environments for all youth, including LGBTQ+ youth.

For students to feel comfortable coming to Educational Professionals for support, students must be able to trust those individuals. If Educational Professionals charged with teaching and counseling students must affirmatively share information with a parent over the objection of a student, the result is an eroding of that trust. When the trust between Educational Professionals and students breaks down, those employees can no longer competently perform their jobs because students will no longer come to them for assistance. *Amici*'s

members regularly observe how students who trust them are more engaged in learning and more academically successful.

Amici have seen the harmful effects of policies consistent with Appellant's position that have been adopted in a small number of school districts in California, in contravention of the CDE guidance and state law. Where school boards have adopted policies requiring students' gender identity to be disclosed to parents over the student's objection and regardless of the student's safety or other concerns, not only are LGBTQ+ students silenced and verbally attacked, but Educational Professionals have been subjected to harmful homophobic and transphobic stereotypes. *Amici*'s members have been threatened at their homes, harassed on social media, and called horrible epithets at school board meetings for supporting LGBTQ+ students. The counselor whose name was plastered all over the complaint here faced such vitriol as a result of the false allegations and gross distortions in the complaint. (*See* Robertson, Mandi, *Guest Comment: Identity Support*, Chico News & Review, July 25, 2023, https://chico.newsreview.com/2023/07/25/guest-comment-identity-support/.)

Further, compelling school employees to discriminate against students based on their gender identity (or any other protected characteristic) – and possibly to cause harm to those students by forcibly outing them – is demoralizing for school professionals and may contribute to an already severe shortage of teachers and

other education professionals. *Amici*'s members report increased frustration and distress over discriminatory forced-outing policies. Many Educational Professionals believe that such policies are political weapons that harm students and hinder their ability to perform their jobs.

Impeding Educational Professionals' work, including the critical work of building trusting relationships with students who may not have supportive home environments, is bad for kids and bad for the Educational Professionals who are charged with educating and supporting them.

VI. Appellant's chosen approach, if adopted, would impose burdensome and impossible to administer notification requirements on schools.

Educational Professionals are privy to a variety of information about their students that does not ordinarily get reported to their parents. Even though parents may desire to know this information, schools regularly allow students to choose whether aspects of how they live their lives at school are shared with parents or others. Examples include pregnancy, condom distribution in high school, romantic relationships, styles of dress, library book usage, joining clubs, or wearing make-up. With many of these aspects, students have been found to have a right to privacy that prevents schools from sharing this information with parents. (*See* e.g. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1191 (C.D. Cal. 2007) (student had right not to have her same-sex relationship at school disclosed to her parents)).

Appellant's asserted right to information about her child's gender expression at school violates student privacy rights and also has no workable limiting principle. Should a school be required to report to his parent if a boy wears nail polish or puts on make-up at school? If a student removes religious garb at school, must the educator notify the parent? If Alexandra asks to be called "Alex," does the school have to obtain the parent's permission? Given the amount of time that students spend in the school environment and the number of ways that students can choose to express themselves outside the view of their parents, it would be wholly unreasonable – and wholly burdensome -- to require schools to affirmatively report all such matters to parents. And the federal Constitution does not require it.

VII. CDE guidance and California law have been successfully applied for a decade.

Educational Professionals have been successfully maintaining students' confidence with respect to their gender identity for many years, in accordance with California law and the guidance of the California Department of Education. Shortly after the passage of Assembly Bill 1266 in 2013, which protects students' right to access programs and facilities consistent with their gender identity, the CDE issued its guidance entitled "Frequently Asked Questions: School Success and Opportunity Act (Assembly Bill 1266)." This guidance specifies important concepts related to Educational Professionals working with transgender students, including:

- 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.

- [S]chools 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.

These concepts, which help protect students from discrimination, have been followed and implemented as policy by schools throughout California with great success for many years. Only now, as the issue of transgender students has become the political issue *de jour,* are challenges like Appellant's being made to these policies. Appellant's challenge, disguised as a constitutional claim, is a harmful and unnecessary attack on LGBTQ+ individuals. Educational Professionals experience the challenges and risks faced by many LGBTQ+ students on a daily basis, and they have long seen that respecting their students' right to learn in a supportive and non-discriminatory environment is what best serves their students' needs.

CONCLUSION

Amici strongly urge the Court to affirm the District Court's order granting the Motion to Dismiss.

Dated: January 9, 2024

/s/ Theresa C. Witherspoon
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2024, I electronically filed the foregoing with the Clerk of Court using the ECF System, which will send notification of such filing to all counsel of record.

Dated: January 9, 2024

/s/ Theresa C. Witherspoon
Theresa C. Witherspoon
Attorneys for *Amici Curiae* Educational Professionals

California Department of Justice Office of the Attorney General		**Legal Alert**
Subject: **Forced Disclosure Policies re:** **Transgender and Gender Nonconforming Students**	*No.* OAG-2024-02 *Date:* 01/11/2024	*Contact for information:* LegalAlerts@doj.ca.gov

TO: All County and District Superintendents, Charter School Administrators, County Office, School Board, and Charter School Boards, and other interested parties

The Office of the California Attorney General issues this legal alert to remind all school boards that forced gender identity disclosure policies—which target transgender and gender nonconforming students by mandating that school personnel disclose a student's gender identity or gender nonconformity to a parent or guardian without the student's express consent—violate state law.1

For purposes of this alert, "forced disclosure policies" refers to policies that require schools to inform parents and guardians, with minimal exceptions, whenever a student requests to use a name or pronoun different from that on their birth certificate or official records, even when the student does not consent. Such policies also require notification if a student requests to use facilities or participate in school programs that do not align with their sex or gender on official records, and tracking and recording of requests made by transgender and gender nonconforming youth. Some districts' policies require such disclosures even when revealing the student's gender identity or gender nonconformity to their parents could put them at risk of physical, emotional, or psychological harm. In this alert, the term "transgender and gender nonconforming" includes gender diverse, gender non-binary, and gender nonconforming students.

1) Forced disclosure policies violate California's Equal Protection Clause by expressly discriminating based on gender identity. Education is a fundamental right under California's equal protection clause. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 608–09, 616–17; Cal. Const. Art. 1, § 7.) The invidious and prejudicial treatment to which transgender people have historically been subject is beyond dispute. (*Whitaker By Whitaker* (7th Cir. 2017) 858 F.3d 1034, 1051 ["There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity"]; *Grimm v. Gloucester Cty. Sch. Bd.* (4th Cir. 2020) 972 F.3d 586, 611 [same].) Such discrimination in the school context denies or limits these students equal access to education and causes psychological, emotional, and other harm.

Because gender identity is an aspect of gender, transgender or gender nonconforming individuals constitute a protected class under California's equal protection clause. As a result, any policy that singles out transgender and gender nonconforming students for disfavorable treatment vis-à-vis cisgender students is invalid unless it survives strict scrutiny. (See *Catholic Charities of Sacramento, Inc. v. Super. Ct.* (2004) 32 Cal.4th 527, 564; *Taking Offense v. State* (2021) 66 Cal.App.5th 696, 722-723, review on other grounds granted Nov. 10, 2021, S270535; see also *O'Connell v. Super. Ct.* (2006) 141 Cal.App.4th 1452, 1465 [fundamental right of equal

1 Please refer to the attached legal memoranda and reply brief for the Attorney General's full legal analysis. On October 19, 2023, the San Bernardino Superior Court granted a preliminary injunction against the Chino Valley Unified School District Board of Education's ("Board") mandatory gender identity disclosure policy, finding that the State is likely to prevail on the merits because the provisions violate California's Equal Protection Clause and discriminate against transgender and gender nonconforming students on the basis of sex. Because the Court found the Board's policy provisions violate equal protection, the Court did not reach the State's privacy and statutory arguments, which are also addressed below.

access to public education, warranting strict scrutiny of legislative and executive action that is alleged to infringe on that right]; Civ. Code, § 51, subd. (e)(5); Gov. Code, § 12926, subd. (r)(2); Ed. Code, § 210.7 [all defining "[s]ex" to include a person's "gender identity and gender expression"].) In addition, policies which by their operative language specifically target transgender and gender nonconforming students, on their face, discriminate on the basis of sex. (See *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 17; *Woods v. Horton* (2008) 167 Cal.App.4th 658, 674.)

To survive strict scrutiny, a school district must establish that a forced disclosure policy (1) serves a *compelling* governmental interest, and that the distinctions drawn by the policy are (2) *necessary* to further its purpose and (3) *narrowly tailored* to do so. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 832; *Connerly v. State Pers. Bd.* (2001) 92 Cal.App.4th 16, 33, 43.) Forced disclosure policies fail all three prongs of the strict scrutiny test.

As to the first prong, districts advancing such policies have pointed to "outdated social stereotypes" that being transgender or gender nonconforming is a "mental illness," "perversion," or "mental health" issue that requires parental intervention as the governmental interest justifying such a policy. (*Sail'er Inn, Inc.*, *supra*, 5 Cal.3d at p. 18.) An intent to classify all individuals who are transgender or gender nonconforming as mentally ill or otherwise "disordered" for purposes of forced disclosure cannot be a compelling government interest. (See *id.* at p. 22.)

To the contrary, local school districts (which are agents of the State for purposes of operation of our public school system) have a duty of care to protect, and a compelling interest in protecting, all students, including transgender and gender nonconforming students, from emotional, psychological, and physical harm, including from a parent. (See, e.g., *Cleveland v. Taft Union High School Dist.* (2022) 76 Cal.App.5th 776, 799; see also *In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [the "welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect"]; *In re Roger S.* (1977) 19 Cal.3d 921, 928 [parental right can be limited "'if it appears that parental decisions will jeopardize the health or safety of the child'"] [citations omitted]; *Brennon B. v. Super. Ct.* (2022) 13 Cal.5th 662, 681 ["[T]he management and controls of the public schools [is] a matter of state care and supervision, and local districts are the State's agents for local operation of the common school system"] [citations omitted].) Districts adopting forced disclosure policies ignore this countervailing compelling interest and risk breaching the duty of care they owe their students. Such an unlawful breach cannot form the basis for a compelling government interest.

Forced disclosure policies also fail the second and third prongs of strict scrutiny because they are not narrowly tailored or necessary to any non-discriminatory interest the policy might purport to advance. Generally, a policy is narrowly tailored if there is no alternative means of adequately serving the compelling interest that would impose a lesser burden on the constitutional interest. (*People v. Son* (2020) 49 Cal.App.5th 565, 590.) Only the "most exact connection between justification and classification" will suffice. (*Woods*, *supra*, 167 Cal.App.4th at p. 675.) And the classification must be "necessary rather than convenient." (*Ibid.*) The availability of gender-neutral alternatives—"or the failure of the legislative body to consider such alternatives"—will be "fatal to the classification." (*Ibid.*)

To the extent forced disclosure policies are intended to promote parental involvement by informing parents of concerns about a student's well-being, there are other gender-neutral options, such as a policy informing parents when any student—cisgender or transgender—is exhibiting symptoms of depression or other significant mental health issues. And numerous feasible and effective alternatives to forced disclosure policies exist. For example, schools can adopt policies to allow disclosure with a student's consent; allow disclosure where a student does not consent where there is a compelling need to do so to protect the student's wellbeing; allow staff to encourage students to inform their parents; and provide counseling and other support tools to help students initiate these conversations in the time and manner of the family's choosing. All such policies better protect families, parents, and students without placing students at risk: "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens." (*Prince v. Massachusetts* (1944) 321 U.S. 158, 165.) These alternatives are fatal to the policies.

Second, policies that do not create any exception for children who may face emotional, physical, or psychological abuse at home as a result of the school's disclosure to parents or family cannot satisfy the narrow tailoring prong. (See James et al., The Report of the 2015 U.S. Transgender Survey, Nat. Center For Transgender Equality (Dec. 2016) p. 65; Austin et al., *Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors* (Mar. 2022) 37 J. of Interpersonal Violence 2696, 2698-2699.) Policies without such exceptions have already inflicted and continue to inflict irreparable physical, mental, and emotional harm upon transgender and gender nonconforming students, as demonstrated by research findings. For example, one in ten transgender individuals have experienced violence at the hands of an immediate family member (James et al., *supra*, The Report of the 2015 U.S. Transgender Survey at p. 65); 15 percent ran away or were kicked out of their home because they were transgender (*ibid.*); fewer than 40 percent of LGBTQ+ youth identified their home as supportive of their identity (The Trevor Project, *2022 National Survey of LGBTQ on Youth Mental Health* (2022) p. 20); and coming out to adverse parents has been shown to increase the risks of major depressive symptoms, suicide, homelessness, and drug use (see Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults* (Jan. 2009) 123 Pediatrics 346; Choi, et al., *Serving Out Youth 2015: The Needs and Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness, Williams Institute* (June 2015) p. 5).

In addition, such policies harm transgender and gender nonconforming students by forcing them to choose between hiding their identity in school or being compelled to share it with a parent or guardian whom they believe may emotionally, psychologically, or physically harm them. When forced with this decision, many students feel compelled to stay in the closet. (James et al., *supra*, The Report of the 2015 U.S. Transgender Survey at p. 51.) When young people are forced to hide their identity from peers or others, the psychological health effects can be serious. (Pachankis et al., *Sexual Orientation Concealment and Mental Health: A Conceptual and Meta-Analytic Review* (Oct. 2020) 146 Psychological Bulletin 831.) Rather than facilitating conversations between students and parents, these policies instead cause students to further hide who they are, denying students the care and support they need, including the support that would give students the tools they need to have these conversations with family. Such policies thus lack the exact connection required under strict scrutiny to prove that forced outing policies are necessary to promote parental involvement.

2) Forced disclosure policies violate California statutory prohibitions on discrimination based on gender, gender expression, and gender identity. Forced disclosure policies also run afoul of Education Code section 220's and Government Code section 11135, subdivisions (a)'s and (c)'s express commands not to discriminate on the basis of gender identity and gender expression. A law that categorically "presum[es]" the need for forced disclosures for one group but not another "reflect[s] . . . unexamined role stereotypes," plainly betraying a "statute . . . discriminatory on its face." (*Arp v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 406–407.) Forced outing policies target one group, and "that group alone" for discriminatory treatment, which violates state antidiscrimination law. (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 89 [Unruh Act]; see also *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 35 [Unruh Act violation because "[sex]-based . . . differential treatment is precisely the type of practice prohibited"]; *Bangerter v. Orem City Corp.* (10th Cir. 1995) 46 F.3d 1491, 1500 [where policy "facially single[s] out" group and "appl[ies] different rules to them," it directly reveals "discriminatory intent and purpose"].) Specifically singling out transgender and gender nonconforming students shows that "the decisionmaker . . . selected . . . a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." (*Personnel Adm'r of Mass. v. Feeney* (1979) 442 U.S. 256, 279 [cleaned up].)

3) Forced disclosure policies violate students' California constitutional right to privacy with respect to how and when to disclose their gender identity. "[M]inors, as well as adults, possess a constitutional right of privacy under the California Constitution." (*Poway Unified Sch. Dist. v. Super. Ct. (Copley Press)* (1998) 62 Cal.App.4th 1496, 1505; Cal. Const. Art. 1, § 1.) Courts have repeatedly affirmed that an individual has a constitutionally protected privacy interest in their sexual orientation or gender identity. (See, e.g., *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 444–445 [describing "sexual orientation and conduct" as legally protected privacy interest]; *Powell v. Schriver* (2d Cir. 1999) 175 F.3d 107, 111–112 [transgender identity is an excruciatingly "private and intimate" detail about oneself protected by the right to privacy].) Moreover, forced disclosure

provisions intrude upon a core aspect of a student's privacy and autonomy—their ability to express their core values and identity. (*Am. Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 335-339 [policy requiring parental consent before minor could obtain an abortion violated minor's constitutional right to privacy because it burdened a "decision . . . so central to the preservation of her ability to define and adhere to her ultimate values regarding the meaning of human existence and life"]; see also *Hill v. Nat. Collegiate Athletic Assn*. (1994) 7 Cal.4th 1, 25 ["Privacy rights also have psychological foundations emanating from personal needs to establish and maintain identity and self-esteem by controlling self-disclosure"].) Where, as here, there is "an obvious invasion of an interest fundamental to personal autonomy"—such as the most basic expression of gender identity—there must be a compelling government interest "to overcome the vital privacy interest," and there must not be less restrictive alternatives. (*Hill*, *supra*, 7 Cal.4th at pp. 34, 40.) As discussed *supra* in subsection 1), there is no compelling government interest that overrides the privacy invasion, and there are a number of less restrictive alternatives to address any parental interest.

Additionally, a student's disclosure of their gender identity to persons of their choosing at school does not negate their reasonable expectation of privacy in their gender identity generally. (See *Mathews v. Becerra* (2019) 8 Cal.5th 756, 769 [requiring reasonable expectation of privacy "in the circumstances"].) As the California Supreme Court explained, individuals in our society play "multiple, often conflicting" social roles, and people may still "fear exposure . . . to those closest to them . . . . The claim is not so much one of total secrecy as it is of the right to *define* one's circle of intimacy." (*Hill, supra*, 7 Cal.4th at p. 25.) "It does not follow that disclosure in one context necessarily relinquishes the privacy right in all contexts"; rather, the privacy analysis requires a "reasonable expectation of privacy in *the circumstances*," and the specific context matters—disclosure of a student's transgender identity at school is different than the disclosures to parents required by forced disclosure policies. (*Nguon v. Wolf* (C.D. Cal. 2007) 517 F.Supp.2d 1177, 1191, 1195-1196 [student had reasonable expectation of privacy in sexual orientation with respect to parents, even if she was publicly homosexual at school]; see *Hill, supra*, 7 Cal.4th at p. 25.)

Indeed, districts' insistence on forced disclosure policies inherently acknowledges that students may not share at home what that they otherwise share at school. And unfortunately, research supports their reasons to do so. (See The World Prof. Assn. for Transgender Health*, Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (Version 8, 2022) p. S62 ["Evidence indicates [transgender] adolescents are at increased risk of mental health challenges, often related to family/caregiver rejection"]; Ryan et al., *supra*, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 Pediatrics at p. 346 [study showing, e.g., lesbian, gay, and bisexual youth who experience parental rejection are eight times more likely to attempt suicide and six times more likely to report major depressive symptoms]; James et al., *supra*, The Report of the 2015 U.S. Transgender Survey at p. 65 [one in ten transgender youth have experienced violence at the hands of an immediate family member because they are transgender].) Due to those risks and others cited above, many transgender and gender nonconforming students are not "out" to their immediate families. (See The Trevor Project, *supra*, at p. 20.) Forced disclosure provisions unlawfully intrude upon transgender and gender nonconforming students' ability to express their core values and identities. These privacy and autonomy interests are protected by the California constitution, and the State and local school districts have a compelling interest in not only protecting student privacy under the circumstances here but also ensuring that transgender and gender nonconforming students are protected from the reasonable risk of physical, emotional, and psychological harm that forced disclosure causes.

In sum, by singling out transgender and gender nonconforming students for different, adverse treatment that puts them at risk of harm, forced disclosure policies violate their constitutional right to equal protection and privacy, as well as their statutory protection from discrimination under California law.

###

SETTLEMENT AGREEMENT BETWEEN
ASSOCIATION OF CLOVIS EDUCATORS AND
CLOVIS UNIFIED SCHOOL DISTRICT

This Settlement Agreement ("Agreement") is made and entered into between the Clovis Unified School District ("District") and the Association of Clovis Educators ("ACE"), with regard to Case No. SA-CE-3124-E, hereinafter "the Matter," pending before the Public Employment Relations Board ("PERB").

This Agreement is entered into as a compromise to settle all disputes and controversies existing between ACE and the District relating to or arising out of the Matter, as follows:

1. ACE will request to withdraw the Complaint issued by PERB in the Matter, with prejudice.

2. The District agrees to issue the Guidance on personal items in the workplace on which agreement was reached on February 3, 2024, a copy of which is attached as Attachment A. Site administrators and Department supervisors will inform employees of the new Guidance within two weeks after the Complaint is withdrawn, except that due to Spring Break, the period of March 25 through April 1, 2024 will not count toward the two weeks.

3. The District confirms it has rescinded the prior Student Site Plan Administrative Guidance and will replace the current SSP form with the revised form on which agreement was reached on March 6, 2024, a copy of which is attached as Attachment B. District representatives will communicate these changes to representatives from employee groups, School Psychologists, Mental Health Support Providers, GSA Advisors, and District administration within two weeks after the Complaint is withdrawn, except that due to Spring Break, the period of March 25 through April 1, 2024 will not count toward the two weeks.

4. This Settlement Agreement represents a full and complete resolution of the claims and disputes between the Parties based upon the above-referenced matter.

5. The undersigned represent that they have read and understand the terms of this Agreement and that they are authorized to execute this Agreement on behalf of their principals.

[Signatures on next page]

ASSOCIATION OF CLOVIS EDUCATORS

Amy Kilburn, President

Dated: 4/2/2024

CLOVIS UNIFIED SCHOOL DISTRICT

Barry Jager, Associate Superintendent

Dated: 4.4.24

APPROVED AS TO FORM

Theresa Witherspoon, Staff Attorney
California Teachers Association

Dated: 4/4/24

David Moreno
Counsel For Clovis Unified School District

Dated: 04/04/2024

508-327/6889783.1

ATTACHMENT A

GUIDELINES

The District presents the following guidelines to help employees understand and comply with the provisions of Board Policy No. 6144 (Controversial Issues) and Board Policy Nos. 4119.25, 4219.25, and 4319.25 (Community Participation, Political Activities, and Personal Items of Employees.)

These guidelines are intended to clarify the distinction between appropriate classroom items and personal items maintained by employees in their workspace.

Classroom Items

Classroom items displayed in the classroom should be consistent with District approved curricula. The following items are appropriate for classroom display:

- Curriculum visual supports
- Student work
- District provided visuals
- Positive, motivational messages, famous quotes, or messages promoting a safe learning environment for every student.

These types of items may be displayed to support and encourage students in their academic performance. Classroom items may be subject to approval by the supervisor.

Personal Items

Personal items may be displayed provided they do not distract from the academic environment. The following items are appropriate for classroom display:

- Family photos
- Personal interest items (e.g., college, athletics, flags, the arts)
- Symbols of one's culture or religious beliefs

In the classroom, personal items (size of items must be reasonable) must be displayed separate from classroom items. For a teacher, this generally means their desk and the immediate area by their desk, although if the desk is positioned in a manner that the personal items visually distract student learning, an alternative location for personal items, will be found after consultation and mutual agreement between the supervisor and the employee. For other staff members, this means a location proportionate to the space in their office, work cubicle, or work station in mutual agreement with the supervisor.

Personal items shall not endorse political candidates or ballot issues, convey messages inconsistent with the District's nondiscrimination policies, or include obscene materials.

Questions over the application of these guidelines may be brought to the direct supervisor or Assistant Superintendent for clarification. Misunderstandings over the interpretation of the policy may be brought to the Associate Superintendent of Human Resources or designee for final resolution.

ATTACHMENT B

CLOVIS UNIFIED SCHOOL DISTRICT

STUDENT SITE PLAN (SSP)
(Education Code § 221.5, AB 1266)

The SSP is intended to be a safe, confidential, dignified, student-initiated, and student-driven process used when a student or parent/guardian requests a change to the student's name and/or pronoun, or student access to a facility consistent with their gender identity different than previously used. The District recognizes the importance of site staff collaborating with parents/guardians, while protecting our students and taking into account student's behavior record. It is recommended that the form be completed with an SSP Facilitator or other PPS/Admin credential holder.

PART A. PARENTS/GUARDIANS INVOLVEMENT

1. Name of Parents/Guardians: _____ _____

2. Parent(s)/guardians present during and/or consent to Student Site Plan:

   __ Yes (If yes, proceed to Part B.)

   __ No (If "No," proceed to question 3.)

   Student may also request a staff member be present.

3. Does the student express concern for their physical or emotional health if the parent/guardian is informed of their request to acknowledge their gender identity?

   __ Yes (If yes, discuss with student the pros and cons of having a formalized document or a verbal plan* and parents' involvement in continuing this SSP. Continue discussion with student regarding available school programs and activities and use of facilities. Students will still have access to programs and facilities consistent with their gender identity.

   __ No (If no, develop a plan with the student on how to incorporate the parent(s)/guardian(s) into the SSP process)

   Safety Concerns: Involve principal if there are safety concerns regarding disclosing the student's gender identity to his/her/their parents.

4. Discuss with student options for supporting them in coming out to their parents/guardians. Tools could include: role playing, facilitating a conversation with a parent/guardian, and discussing the value of having the parent/guardian involved.

PART B. STUDENT INFORMATION

1. Legal Name:_____ Student I.D:_____
2. Chosen/Preferred Name:_____ Pronouns:_____
3. Sex at Birth: __Male __Female
4. Gender Identity:_____ Gender Expression:_____
5. Student records in Q have or will be updated to reflect the information in 2 – 4 above? __Yes __No
6. Name and pronoun to be used with parents/guardians:
   a. Parent/guardian 1: _____
   b. Parent/guardian 2: _____
   c. Parent/guardian 3: _____
   d. Parent/guardian 4: _____

* For a verbal plan, continue going through SSP questions with student, but do not complete a formal written plan.

PART C. IDENTITY IN SCHOOL PROGRAMS, ACTIVITIES, AND FACILITIES

1. Identity in School Programs and Activities _____

_____

_____

(e.g.: attendance roster, names used with different teachers and staff, public acknowledgment at school, yearbook, student ID card, walk-through registration, diploma, PE Fitness testing.)

If student requests to participate in athletics consistent with gender identity, involve principal or designee.

2. Facilities: Check applicable box(es)

2.1 Restroom:
__ Consistent with sex at birth
__ Consistent with gender identity
__ Gender neutral/nurse office/cluster office

2.2 Locker/Changing Room:
__ Consistent with sex at birth
__ Consistent with gender identity
__ Gender neutral/nurse office/cluster office

3. Additional Conditions/Safeguards _____

_____

_____

(e.g., safeguards needed during field trips, in the swim unit, during overnight trips, CIF guidelines for sports (if relevant, provide copy to student), etc., attach page(s) for additional space)

4. Date Effective:_____. **This Student Site Plan will remain in effect throughout student's enrollment at CUSD; any changes will need to be made to this Student Site Plan. Students desiring to make changes to the SSP should contact _____. Student privacy and confidentiality shall be maintained in accordance with applicable laws.**

By signing below, student and parents/guardians (if applicable) acknowledge that student, starting on the date stated above, will participate in sex-segregated school programs and activities and/or use school facilities as stated in this Student Site Plan. Student and parents/guardians also consent to update, if applicable, student records as stated in Section B.5 above. It is recommended the SSP be reviewed at least annually with the student, parent/guardian (if applicable), and staff.

Student:_____ Date:_____

Parent/Guardian:_____ Date:_____

Print Name:_____

Parent/Guardian:_____ Date:_____

Print Name:_____

PART D. DISTRIBUTION OF STUDENT SITE PLAN

1. **Distribution of Student Site Plan** to the site principal, deputy principal/learning director (7-12), guidance instructional specialist (elementary schools) and the following ***(mark as applicable with student and parent / guardian (if applicable) permission)***:

   __ Additional Site Administrators, including Learning Director and Counselor

   __ School Registrar

   __ Teacher(s) and PE Supervision:_____

   __ Support Staff (School Psychologist, MHSP, Transitions Team, Student Relations Liaisons, School Nurse):_____

   __ Athletic Coaches and/or Club Advisors:_____

   __ Another CUSD School or School District if Student Transfers

2. **Update in Q**, if applicable, student records as stated in Section B.5: __Yes __No

SSP Facilitator:

Signature_____ Date:_____

Print Name:_____

Title:_____

Principal (required if Principal is not the SSP Facilitator):

Signature_____ Date:_____

Print Name:_____

Title:_____

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