United States Court Of Appeals
For The Eighth Circuit

No. 17-2279

Anmarie Calgaro,

Plaintiff – Appellant,

v.

St. Louis County; Linnea Mirsch, individually and in her official capacity as Interim Director of St. Louis County Public Health and Human Services; Fairview Health Services, a Minnesota nonprofit corporation; Park Nicollet Health Services, a nonprofit corporation; St. Louis County School District; Michael Johnson, individually and in his official capacity as Principal of the Cherry School, St. Louis County School District; and E.J.K.,

Defendants – Appellees.

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SUMMARY OF THE CASE

Anmarie Calgaro is a "fit parent" who objects to her unemancipated child receiving life-changing sex-change medical services, county general assistance and public school services without her parental consent and, beyond that, without parental notice and opportunity to be heard. Calgaro has identified, under the U.S. Supreme Court decision in *Troxel*,[1] three sets of violations of her substantive and procedural rights under the Fourteenth Amendment's Due Process Clause. *Troxel* protects parental rights of "fit parents" of unemancipated minors from all and any unreasonable governmental diminishment. First, county customs and policies relating to implementation of Minnesota Statutes § 256D.05, subd. 1(a)(9) for general assistance benefits violate Calgaro's substantive and procedural due process rights as a "fit parent." Second, the medical service providers' customs and policies relating to implementation of Minnesota Statutes § 144.341 violate Calgaro's substantive and procedural due process rights as a "fit parent." Third, school district customs and policies relating to its determination of "emancipation" of unemancipated minors violate Calgaro's substantive and procedural due process rights as a "fit parent."

The U.S. District Court dismissed the complaint and granted summary judgment to County. In doing so, the court also denied Calgaro's motion for summary judgment. The Appellant seeks reversal, including entry of summary judgment in favor of Calgaro. The Appellant requests 30 minutes for oral argument.

[1] *Troxel v. Granville*, 530 U.S. 57, 65-70 (2000).

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure Rule 26.1 and Rule 26.1A of the Local Rules of the United States Court of Appeals for the Eighth Circuit, Appellant, through her attorney, states as follows: Anmarie Calgaro has no corporate interests to disclose.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Minnesota issued a final decision on May 23, 2017 having jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The appellate court has jurisdiction under 28 U.S.C. § 1291 regarding all final decisions of the district courts of the United States. Appellants filed the Notice of Appeal on June 6, 2017 after the district court's decision dismissed the underlying complaint on all issues. Therefore, the district court decision is final.

STATEMENT OF ISSUE PRESENTED

I

The County operating under Minnesota Statutes § 256D.05, subd. 1(a)(9) determine whether parental consent is required for dealings with the County based on "[a] child under the age of 18 who is not living with a parent … if: the child is legally emancipated." Based on Minnesota Statutes § 256D.05, subd. 1(a)(9), the County defendants determined that Calgaro's parental consent was not required for E.J.K. to make decisions with the County even though Calgaro is a fit parent. The County's custom and policy is to make its determination under Minnesota Statutes § 256D.05, subd. 1(a)(9) that parental consent was not required without parental notice and opportunity to be heard.

> Whether the County's customs and policies relating to implementation of Minnesota Statutes § 256D.05, subd. 1(a)(9) violate Calgaro's substantive and procedural due process rights as a fit parent.

> Apposite cases: *Troxel v. Granville*, 530 U.S. 57, 65-77 (2000); *Parham v. J. R.,* 442 U.S. 584 (1979); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

> Apposite constitutional and statutory provisions: U.S. Constitution, Fourteenth Amendment, Due Process Clause; Minnesota Statutes § 256D.05, subd. 1(a)(9).

II

The medical service providers operating under Minnesota Statutes § 144.341 determine whether parental consent is required based on "any minor who is living separate and apart from parents or legal guardian…and managing personal financial affairs." Based on Minnesota Statutes § 144.341, the medical service providers determined that Calgaro's parental consent was not required for E.J.K. to make decisions with the County even though Calgaro is a fit parent. The medical service provider's custom and policy is to make its determination under Minnesota Statutes § 144.341 that parental consent was not required without parental notice and opportunity to be heard.

Whether the medical service providers' customs and policies relating to implementation of Minnesota Statutes § 144.341 violate Calgaro's substantive and procedural due process rights as a fit parent.

Apposite cases: *Troxel v. Granville*, 530 U.S. 57, 65-77 (2000); *Parham v. J.R.,* 442 U.S. 584 (1979); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Apposite constitutional and statutory provisions: U.S. Constitution, Fourteenth Amendment, Due Process Clause; Minnesota Statutes § 144.341.

III

The school district operating under its own customs and policies on "emancipation" of unemancipated minor students determines whether parental consent is required without input from a fit parent. The principal of the school found that E.J.K. was emancipated and that Calgaro's parental consent was not required for E.J.K. to make decisions with the school even though Calgaro is a fit parent. The school district's custom and policy is to make its determination of emancipation of the unemancipated minor without parental notice and opportunity to be heard.

Whether the school district's customs and policies relating to its determination of emancipation of unemancipated minors violate Calgaro's substantive and procedural due process rights as a fit parent.

Apposite cases: *Troxel v. Granville*, 530 U.S. 57, 65-77 (2000); *Parham v. J. R.,* 442 U.S. 584 (1979); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Apposite constitutional and statutory provisions: U.S. Constitution, Fourteenth Amendment, Due Process Clause.

STATEMENT OF THE CASE

I. The district court disregards Calgaro's complaint allegations as "distracting."

Calgaro, the mother of E.J.K., has not been challenged nor has any evidence been shown that she is an unfit parent. She loves her child regardless of decisions made by her child. But, because of the decisions of Appellees—not a court—they have had a direct effect on Calgaro's parental-child relationship. Calgaro took umbrage as a parent that governmental entities and government-authorized private entities made judicial determinations regarding emancipation without parental notice nor an opportunity to be heard. In so making those decisions, Calgaro's protected constitutional rights and presumption as a fit parent—also constitutionally protected—were abridged without any court order. Ultimately, at the age of 16, her son began medical treatments to change his gender; Calgaro was completely cut off from receiving her son's educational records and from participating in E.J.K.'s high school education. The actions of the entities overriding Calgaro's parental rights, without any determination of *her* fitness as a parent, became a parent's worse nightmare. Calgaro took her claims to federal court, but to no avail.

Oddly, the district court disregarded Calgaro's claim of what occurred as she alleged in her complaint. Instead, the district court asserted through its order to

dismiss[2] that the "Defendants' emancipation determinations did not terminate Calgaro's parental rights. Only a court order can do so."[3] The court even found her allegations within a 229 paragraph complaint[4] that the "Defendants 'determined [E.J.K.] emancipated" as "distracting."[5] The district court denied Calgaro's civil rights claims under 42 U.S.C. § 1983. Moreover, as to the actions of each entity, the court concluded that each entity was well within their authority to determine emancipation without parental notice and was not subject to § 1983 claims.[6] The district court dismissed Calgaro's motion to dismiss and for summary judgment and granted St.

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[2] Memo. and Or. at 3 (May 23, 2017); ADD. 3. While the court accepted the standard of review for a motion to dismiss, "to survive a motion to dismiss for failure to state a claim, a complaint 'must contain sufficient matter *accepted as true,* to 'state a claim that relief is plausible on its face." (citations omitted) (emphasis added), *id.*, the court nevertheless found Calgaro's allegations that the Defendants had "determined [E.J.K.] emancipated as "distracting." *Id.* at 4; ADD. 4. "Distracting" is not a legal standard under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

[3] *Id.* at 5; ADD. 5.

[4] The complaint is 229 paragraphs long to contain sufficient factual matter to assert a claim for relief as a direct result of *Iqbal-Twomby Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) and *Bell Atl. Corp v. Twomby,* 550 U.S. 544, 570 (2007).

[5] *Id.* at 4; ADD. 4. How else would Calgaro present her allegations? As the complaint noted, the Mid-Minnesota Aid Clinic's letter announced E.J.K. "emancipated." Defendant St. Louis County noted its reliance on a statute that specifically uses the work "emancipation." Likewise, the remaining Defendants *excluded* Calgaro from making or participating in decisions that affected *her minor child.* They did so per the sole representation of the child. What other word would fit those determinations but "emancipation?" *See Black's Law Dictionary* 560 (Bryan A. Garner ed., 8th ed., West 2004) ("1. The act by which one who was under another's person's power and control is freed. 2. A surrender and renunciation of the correlative rights and duties concerning the care, custody, and earnings of a child; ….").

[6] *Id.* at 6-12; ADD. 6-12.

Louis County's motion for summary judgment mistakenly believing Calgaro did not oppose that motion.[7]

Calgaro seeks adjudication from this Court that as a fit parent, at the very least under the circumstances of this case, she had a pre-deprivation right to notice and an opportunity to be heard. The implications are great for every parent in Minnesota.

II. A child obtains a letter of emancipation, without any court proceeding, and suddenly a county provides a minor child with general assistance, a school district refuses parental involvement in her own child's education, and life changing sex-change treatments are provided to the child.

A fit mother finds herself without a parental say regarding the health and welfare of her child.

What happened? Anmarie Calgaro is E.J.K.'s mother. She also has a state district court order adjudicating that she has "joint legal custody" over E.J.K.[8] But, decisions were made by Appellees that not only affected her as a fit parent and her parental rights, but eviscerated that court order of "joint legal custody" with no notice, no hearing and no opportunity to be heard. Then, there is no statutory nor common law process in Minnesota for a parent to restore her fundamental parental

[7] *See e.g.* Calgaro's Memo. in Opp. to Mot. to Dismiss and for S.J. at 15; Dckt.65 (However, no argument was made regarding Linnea Mirsch of St. Louis County purposefully.).

[8] Anmarie Calgaro Decl. Ex. A, Findings of Fact, Concl. of Law, Or. and Or. for Judg. Apr. 2008); Dckt.66.

rights in this situation after the Appellees made their respective administrative decisions under color of state law based on the "letter of emancipation."

In this case, one of Calgaro's minor children E.J.K. obtained a "letter of emancipation" from a legal aid service agency. The "letter" was not a court order. There was no investigation, no hearing, nor adjudication of E.J.K.'s claim to emancipation. Nevertheless, the "letter" was used by the Appellees to deny his mother access to county records, school records and medical records, and more disconcerting, opened the door to life-altering elective medical services, including potentially surgery, which would change E.J.K.'s sex from a male to a female—all accomplished under the color of state law.

Nevertheless, Calgaro retains her unconditional love for E.J.K.; however, she finds it unconscionable that a county, a school district and medical service providers gave her no notice nor a hearing to allow her as a mother to either assert or restore her parental rights regarding decisions they made without her input. Likewise, as Calgaro alleged in her complaint and as the arguments are made below, the absence of a process, even in the post-deprivation context, to restore her parental rights highlights the imbalance of due process between clashing interests between the government and parent and presumably also the child.

A. A "letter of emancipation" is obtained from the legal aid clinic without an investigation of the alleged facts asserted.

E.J.K., at the time of the judgment was 17,[9] and is one of four children of Calgaro.[10] Calgaro is E.J.K.'s mother.[11] Calgaro believes, as a fit parent (there is no contrary evidence), she has a fundamental right to make decisions concerning the care, custody and control of her children.[12] Calgaro has always offered a home to E.J.K.[13] She has also communicated with E.J.K. about how E.J.K. is always welcome in their home and always made efforts to ensure a connection between her and E.J.K., never willingly or implicitly giving up control nor custody of her child or any of her other children.[14]

Just a week before his 16th birthday, on June 29, 2015, E.J.K. obtained a "to whom it may concern"[15] "letter of emancipation" from the Mid-Minnesota Legal Aid Clinic.[16] The "letter of emancipation" is neither an administrative order nor a court order, and the letter does not adjudicate any findings of fact[17] since the letter reflects only E.J.K.'s alleged "facts."[18] The Legal Aid Clinic did not contact Calgaro to

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[9] Plt.'s Compl. ¶23, Dckt. 1, App.20.
[10] *Id.*¶3;App.14.
[11] *Id.* ¶¶19, 20; App.19.
[12] *Id.* ¶46; App.24.
[13] *Id.* ¶50.
[14] *Id.* ¶¶50-52.,
[15] *Id.* ¶¶ 56-57; 66; Ex. A. App.25-26; Dckt.1.
[16] *Id.* Ex. A; ¶56; App.25.
[17] *Id.* ¶¶60-65; App.26.
[18] *Id.* ¶58; App.25.

investigate, question, confirm, nor affirm the alleged facts asserted by E.J.K.[19] Had the Clinic done so, it would have found something different from what the letter asserted as described above regarding Calgaro's relationship as a parent and mother to E.J.K., including a court order adjudicating her right to have joint legal custody over E.J.K. "Legal custody" means the right to determine the child's upbringing, including education, health care and religious training.[20]

Moreover, we note the "letter of emancipation," a letter Calgaro received by chance when filed by E.J.K. in state district court in support of an unsuccessful name change application, is not notarized and does not present a declaratory statement of its truth on pain of perjury.[21] The letter does not state the person's statements are true, made on personal knowledge nor that the person is competent to make the allegations asserted.[22]

[19] *Id.* ¶ 59: App.25; Calgaro Decl. Dckt.66.
[20] Minn. Stat. § 518.003 (a).
[21] Compl. Ex. A; Dckt.1. *See e.g.* Minn. R. Civ. P. 56.05: "Affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein…."
[22] *Id.*

B. E.J.K. uses the letter of emancipation to deny his mother the right to review E.J.K.'s school records and to be involved in E.J.K.'s educational decisions.

1. The School and School District know of Calgaro's parental rights, but effectively terminate them, without supporting statutory law nor notice or opportunity to be heard to assert or restore those parental rights.

Soon after obtaining the letter of emancipation from the Legal Aid Clinic, E.J.K. produced it to Cherry School officials, a high school located in St. Louis School District.[23] The School, through its principal Michael Johnson, legally acknowledged the letter of emancipation.[24] Hence, Johnson determined that E.J.K. was emancipated–per the school's custom and policy of emancipation.[25] At that moment, Johnson effectively terminated the parental rights of Calgaro; yet, Johnson did not provide her notice of his legal determination of emancipation.[26] Meanwhile, Calgaro made repeated attempts to Johnson to obtain access to school records. Johnson refused to communicate with Calgaro regarding educational matters affecting E.J.K.[27]

As the principal of Cherry School, and due to his position and interaction between parents, their children, and the School and School District, Johnson understood that parents have clearly-established parental rights to the care, custody

[23] Compl. ¶¶16; App.19.
[24] *Id.* ¶¶ 138; 159; App.40, 42.
[25] *Id.* ¶¶143; 159, 162; App.40-41, 42.
[26] *Id.* ¶¶159-61; App.42.
[27] *Id.* ¶76-79; App.28-29; Calgaro Decl.; Dckt.66.

and control of their unemancipated minor children.[28] Further, School District policy also allows autonomy to Johnson as a principal in final decision-making consistent with District policy obligating him to act within constitutional limitations as noted later below:

> "[T]he school board also recognizes the direct responsibility of principals for educational results and effective administration, supervisory, and instructional leadership at the school building level."[29]

Notably, the school district has not identified any statute that recognizes a "letter of emancipation" as a *legally binding document* that would allow Johnson, as principal of Cherry School to refuse a parent access to school records or to refuse a parent an opportunity to participate in the decision-making of the educational opportunities of E.J.K. as an unemancipated minor child.[30] Moreover, E.J.K. did not present Johnson with a court order nor any other judicial adjudication that E.J.K. was emancipated.[31] Nevertheless, Johnson determined that E.J.K. was "emancipated" and provided no notice of hearing nor opportunity for Calgaro to assert or restore her parental rights even after Johnson's determination of E.J.K.'s emancipation.[32] Finally, Cherry School does not have a post-deprivation process in which a parent may seek

[28] *Id.* ¶¶156-58; App.42.
[29] St. Louis Sch. ISD 2142, Policy 301 § II.D., Kaardal Decl. Ex. 4; Dckt.67.
[30] Compl. ¶165; App.43; Kaardal Decl.; Dckt.67.
[31] Compl. ¶167; App.43.
[32] *Id.* ¶¶159-61, 163-64; 166; App.42-43.

to restore parental rights after the school district administratively determines "emancipation" of a minor child without a court order of emancipation.[33]

2. School District policies are limited by constitutional restrictions, yet support the Cherry School's principal's action to legally recognize a "letter of emancipation" and deny Calgaro her parental rights.

Cherry School and Johnson are under the control and supervision of the St. Louis School District. Johnson is responsible for policies and decisions made at Cherry School which recognizes such policies or decisions cannot violate the constitution:

> The school district is a public corporation subject to the control of the legislature, *limited only by constitutional restrictions*….[34]

After Johnson's "emancipation" decision in 2016, Calgaro then asked St. Louis County School District officials to participate in E.J.K.'s educational decisions and to have access to E.J.K.'s educational records.[35] Her requests were denied.[36] Calgaro received neither notice nor an opportunity to be heard from the School District regarding Johnson's decision to legally acknowledge the "letter of emancipation" that

[33] *Id.* ¶163-64, 166; App.43.
[34] St. Louis Sch. ISD 2142, Policy 101 § II.A., Kaardal Decl. Ex. 2 (emphasis added); Dckt.67.
[35] Compl.; ¶¶ 134-38; App.40-41;Calgaro Decl. Dckt. 66.
[36] *Id.* ¶¶ 135, 137-38; App. 40-41.

cut off her parental rights.[37] The School District was aware of Calgaro's clearly-established parental rights, but cut them off anyway.[38]

Importantly, under the School District's policy governing the privacy of school records, the District recognizes the right of a parent to have access to the child's educational documents, here, Calgaro:

> "Parent" means a parent of a student and includes a natural parent….The school district may presume the parent has the authority to exercise the rights provided herein, unless it is provided with evidence that there is a state law or court order governing such matters as marriage dissolution, separation or child custody, or a legally binding instrument which provides to the contrary.[39]

Nevertheless, like Johnson, School District officials did not provide Calgaro with a court order nor any other adjudication that declared E.J.K. emancipated.[40] Like Johnson, School District officials legally acknowledged the "letter of emanpermcipation" as if it were a legally binding instrument. At best, the "letter of emancipation" is legally dubious as one state district court found as to E.J.K. Meanwhile, Calgaro made repeated attempts to School District officials to obtain access to school records. In response, the school district refused to communicate with her regarding educational matters affecting E.J.K.[41]

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[37] *Id.* ¶¶ 138-40, 159-64, App.40, 42.
[38] *Id.* ¶¶138,140-42, 157-59, 161; App.40, 42.
[39] St. Louis Sch. ISD 2142, Policy 515 § III.J., Kaardal Decl.; Dckt.66.
[40] Compl. ¶149, 164; App. 41, 43.
[41] *Id.* ¶76, App.28; Calgaro Decl.; Dckt.67.

C. As E.J.K. attempted to have a name change, a state district court recognized the questionable legal basis to assert emancipation.

A St. Louis County district court order was issued on April 15, 2016 regarding an application by E.J.K.—E.J.K.'s second attempt[42]—for a name change from J.D.K. to E.J.K.[43] The order is illuminating in several respects including the court's doubt of the legality of the "letter of emancipation:"[44]

> A legal issue exists as to whether the juvenile Petitioner herein has a legal basis to assert emancipation ….
>
> * * *
>
> On the present record, including … *the lack of any Minnesota trial court adjudication* relate to emancipation…this court cannot consider the Application on the merits as to whether or not it is in the best interests of the Petitioner to achieve the desired relief of a legal change of name.[45]

The court denied E.J.K.'s application because E.J.K. had no court order of emancipation.[46]

Meanwhile, as the court order revealed, E.J.K. filed a notarized letter with the court from Minneapolis Gender Services at Park Nicollet dated January 15, 2016, indicating that E.J.K. was being treated for transgender medical treatments for gender

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[42] The first application for a name change was filed in Stearns County but dismissed because E.J.K. failed to comply with the statutory requirements of Minnesota Statutes § 259.10 requiring an application to be brought on behalf of the minor child by the parent or guardian. Compl. Ex. B, Dckt.1.
[43] Compl. ¶¶67-68; Ex.B; App.26-27; Dckt.1.
[44] *See* Compl. Ex. B, Dckt.1.
[45] *Id.* Emphasis added.
[46] *Id.*

transition from male to female.[47] At the time of January 2016 Park Nicollet letter, E.J.K. was 16 and one-half years old. Calgaro had no idea E.J.K. had obtained medical services for gender transition. She had no notice of E.J.K.'s attempt to obtain gender transition medical services nor an opportunity to be heard regarding Park Nicollet's and Fairview Hospital's decisions to accept the "letter of emancipation" that effectively denied her parental rights to the care, custody, and control of E.J.K.

D. Fairview Hospital and Park Nicollet provide E.J.K. with gender transition medical treatment and other medical services without parental consent and without notice and opportunity to be heard.

Gender transition medical treatment is not an emergency procedure, but an elective procedure. Certainly, gender transition is a life-changing event and decision for a minor child.[48] Here, E.J.K. has received and continues to receive medical treatment from Park Nicollet Health Services and from the Fairview Range Hospital (Fairview Health Services) for gender transition treatments and other medical services.[49] Specifically, Park Nicollet Health Services has provided E.J.K. with medical services which include "permanent clinical treatment for gender transition to the new female gender."[50]

Despite these life-changing decisions and events, Park Nicollet and Fairview have refused to provide access to E.J.K.'s medical records or to other records

[47] *Id.*¶¶67-68; Exs. B, C; App.26-27; Dckt.1.
[48] *Id.*¶¶106-07; App.35.
[49] *Id.*¶¶6-12; 101, 104-05; 116; Ex. C; App.15-17, 34-35, 36, Dckt.1.
[50] *Id.* Ex. C.

regarding her minor child's medical treatment.[51] Moreover, for such major and permanent elective procedures, neither of these defendants have any process to provide Calgaro, even in the post-deprivation context; no notice nor opportunity to restore her parental rights is provided.

E. St. Louis County provides general assistance benefits to E.J.K. as an unemancipated minor without parental notice and opportunity to be heard.

St. Louis County operating under Minnesota Statutes § 256D.05, subd. 1(a)(9)[52] determines whether parental consent is required for dealings with the County based on "[a] child under the age of 18 who is not living with a parent … if: the child is legally emancipated." The statute provides that "legally emancipated" includes either emancipated by "a court of competent jurisdiction" or administratively "otherwise considered emancipated under Minnesota law." *Id.* Based on Minnesota Statutes § 256D.05, subd. 1(a)(9), the County administratively determined that E.J.K. is "emancipated" to make decisions with the County without Calgaro's consent even though Calgaro is a "fit parent."[53] St. Louis County provided general assistance benefits to E.J.K. over Calgaro's objection.[54] The County's custom and policy is to make its determination under Minnesota Statutes § 256D.05, subd. 1(a)(9) that

[51] *Id.* ¶¶105, 112-14, 118; App.35-36, 37.
[52] Minn. Stat. § 256D.05, subd. 1(a)(10) numbering was amended in the 2017 legislative session to 1(a)(9). No wording in the subdivision was changed.
[53] *Id.* 122-125; App.37-38.
[54] Compl. ¶¶122-126, 131 App.37-38.

parental consent was not required for general assistance payments without parental notice and opportunity to be heard.

Notably, there is nothing in the record that reflects *any evidence* or other *determination* that Calgaro is anything but *a fit parent*.

SUMMARY OF THE ARGUMENT

Calgaro has identified three sets of violations of her substantive and procedural rights under the Fourteenth Amendment's Due Process Clause which protects parental rights of "fit parents" regarding unemancipated minor children decision-making with county officials, medical service providers and school district officials. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000). Calgaro is a "fit parent" who objects to her unemancipated child receiving county general assistance payments, sex-change medical services, or educational services without her knowledge or opportunity to withhold parental consent and, beyond that, without notice and opportunity to be heard. First, the County's customs and policies relating to implementation of Minnesota Statutes § 256D.05, subd. 1(a)(9) violate Calgaro's substantive and procedural due process rights as a "fit parent." Second, the medical service providers' customs and policies relating to implementation of Minnesota Statutes § 144.341 violate Calgaro's substantive and procedural due process rights as a "fit parent." Third, the school district's customs and policies relating to its determination of emancipation of unemancipated minors violate Calgaro's substantive and procedural due process rights as a "fit parent."

LEGAL ARGUMENT

I. The standard of review for a grant of dismissal and summary judgment is de novo.

This court reviews de novo a grant of dismissal or summary judgment.[55] "This court affirms where there are no genuine issues of material fact, and judgment is appropriate as a matter of law."[56]

II. Calgaro is a "fit parent."

Calgaro is a "fit parent." No court nor administrative agency has even had proceedings regarding Calgaro's fitness as a parent. No Appellee has disputed that Calgaro is a "fit parent." Here, it is constitutionally presumed under *Troxel* that when a fit parent acts to protect parental rights that the parent is doing so in the best interests of the child. Under *Troxel,* Calgaro is a fit parent and can pursue decisions in the best interests of the child. Any suggestion by Defendants otherwise is scandalous.[57]

III. Calgaro is entitled to summary judgment on her substantive due process claims based on violations of her parental rights.

To successfully state a claim under § 1983, a plaintiff must plead: (1) the existence of a constitutional right; and (2) deprivation of that right, (3) by state action

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[55] *Iowa Right To Life Comm., Inc. v. Tooker*, 717 F.3d 576, 583 (8th Cir. 2013) *cert. denied,* 134 S. Ct. 1787 (2014) *citing Minnesota Citizens Concerned for Life, Inc. v. Kelley,* 427 F.3d 1106, 1109 (8th Cir.2005).

[56] *Id.*

[57] *See* Federal Rules of Civil Procedure R. 12(f) states, "The court may strike from a pleading an insufficient defense or any … scandalous matter."

or by an individual acting under the color of state law. 42 U.S.C. § 1983; *see also Roe v. Humke*, 128 F.3d 1213, 1215 (8th Cir. 1997) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)). As explained below, Calgaro has met these requirements as to her substantive Due Process Clause claims. Since there are no genuine issues of material fact, summary judgment in favor of Calgaro is appropriate as a matter of law.

A. Calgaro as a "fit parent" has substantive due process rights under the constitutional "presumption that fit parents act in the best interests of their children."

Calgaro as a "fit parent" has substantive due process rights under the U.S. Supreme Court precedents–particularly *Troxel*—which recognize the constitutional "presumption that fit parents act in the best interests of their children." In *Troxel,* the U.S. Supreme Court summarized that parental rights have for more than seventy-five years been given substantive protection under the Fourteenth Amendment's Due Process Clause. *Troxel*, 530 U.S. 57, 65 (2000)(plurality). The Seventh Circuit, relying on *Troxel*, stated there is no reason for the state to be involved when there is a "fit parent" in the parent-child relationship:

> In assessing the reasonableness of the defendants' actions in this case, we begin with the constitutional presumption that "fit parents act in the best interests of their children," *Troxel,* 530 U.S. at 68, 120 S.Ct. 2054, and stress that unless government officials have evidence calling into question the fitness of a parent, there is "no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68–69, 120 S.Ct. 2054.

Doe v. Heck, 327 F.3d 492, 521 (7th Cir. 2003). More recently, in 2013, the U.S. Supreme Court in *Adoptive Couple v. Baby Girl* re-stated the constitutional "presumption that fits parents act in the best interest of their children." 133 S.Ct. 2552, 2582 (2013) (citation omitted).

Specifically, the U.S. Supreme Court in *Troxel* determined that Washington Statute § 26.10.160(3)(1994), regarding visitation rights to children, as applied to Granville and her family, violated her due process right to make decisions concerning the care, custody, and control of her daughters. *Troxel,* 530 U.S. at 67, 73. First, the Court stated that the Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," including parents' fundamental right to make decisions concerning the care, custody, and control of their children. *Id.* at 65 (citations omitted).

Second, the Supreme Court held that Washington's breathtakingly broad statute regarding court-ordered visitation to children effectively permits a court to disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interest. *Id.* at 67. A parent's estimation of the child's best interest was accorded no deference. *Id.* at 69-70.

Third, the Supreme Court noted that a combination of factors compelled the conclusion that § 26.10.160(3), as applied in that case, exceeded the bounds of the Due Process Clause. *Troxel* at 67-73.

Importantly, the four-justice plurality opinion in *Troxel* is supported by two concurring opinions. Under the *Marks*[58] analysis, the narrowest holding that can be supported by five justices would include Justice Thomas' opinion in *Troxel.* This means that, implicitly, strict scrutiny would be applied regarding parental rights as "fundamental" and, hence, applicable to substantive due process analysis. To be sure, the four-judge plurality did not reference "strict scrutiny" which Justice Thomas acknowledged. *Troxel,* 530 U.S. at 80 (Thomas, J. concurring). Although not necessary to decide this case, the Appellants request the Court apply strict scrutiny because the government's statutes, customs, and policies, in this case like *Troxel's* visitation statute, directly target the parental rights of fit parents.

Additionally, this Court has articulated formulations of parental due process rights. *See, e.g., Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 927 (8th Cir. 1987) (finding parental interest in "companionship" with the child); *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir. 1987) (parental interest in "familial relations" with a

[58] In *Marks v. United States*, 430 U.S. 188 (1977), the Supreme Court explained how the holding of a case should be viewed where there is no majority supporting the rationale of any opinion: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193.

child), *abrogated on other grounds by Burns v. Reed*, 500 U.S. 478, 486 (1991). *See also Helleloid v. Independent School Dist. No. 361*, 149 F. Supp. 2d 863, 874 (D. Minn. 2001) (parental interest in "creation and maintenance of the parent-child relationship"). Irrespective of the precise framing employed, it is clear that both the U.S. Supreme Court and the Eight Circuit have recognized constitutionally-protected rights of parents. *Harpole*, 820 F.2d at 927 (citing *Lehr v. Robertson*, 463 U.S. 248, 258 (1983)).

Moreover, this Court has held that to properly state a parental rights claim under § 1983, a plaintiff must allege that the state action complained of was directed at the parent-child relationship. *See Harpole*, 820 F.2d at 927–28 (explaining that "[p]rotecting familial relationships does not necessarily entail compensating relatives who suffer a loss as a result of wrongful state conduct, especially when the loss is an indirect result of that conduct.") (emphasis added). The majority of other Circuits that have considered the issue have also required a parent seeking to maintain a § 1983 claim to demonstrate that the objectionable state action was aimed directly at the parent-child relationship. *Pittsley v. Warish*, 927 F.2d 3, 8 (1st Cir. 1991), *abrogated on other grounds by County of Sacramento v. Lewis,* 523 U.S. 833 (1998); *McCurdy v. Dodd*, 352 F.3d 820, 827-28 (3d Cir. 2003); *Shaw v. Stroud*, 13 F.3d 791, 804 (4th Cir. 1994); *Russ v. Watts*, 414 F.3d 783, 789-91 (7th Cir. 2005) (expressly overruling *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984)); *Trujillo v. Board of Cnty. Comm'rs,* 768 F.2d 1186, 1190 (10th Cir. 1985); *But see Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir.

1985) (indicating that a plaintiff may proceed on a § 1983 claim where the alleged injury is an incidental result of the contested state action).

In this case, Calgaro's claimed rights are within the subject areas where the constitutional "presumption that fit parents act in the best interests of their children" applies *and* the Defendants' actions regarding "emancipation" or "determining parental consent is not required" directly target the parent-child relationship.

There could be no better examples of governmental policies targeting the rights of "fit parents" over their unemancipated minor children than those government policies that exist in this case. Put another way, fit parents' legal problems with the Appellees would not be the same if the government's statutes, customs and policies only applied to minors with court orders of emancipation. Unfortunately, in this case, the government's statutes, customs and policies are not so narrowly tailored.

First, Calgaro as a "fit parent" claims parental rights in her unemancipated child's decision-making by St. Louis County to receive general assistance payments. St. Louis County determined that E.J.K. was emancipated under Minnesota Statutes § 256D.05, subd. 1(a)(9). Minnesota Statutes § 256D.05, subd. 1(a)(9) is directed at unemancipated minor's "emancipation" for the purpose of general assistance payments. St. Louis County's decision under Minnesota Statutes § 256D.05, subd. 1(a)(9) directly resulted in termination of Calgaro's constitutionally-protected parental consent requirement of the "fit parent"-child relationship recognized in *Troxel*.

Second, Calgaro as a "fit parent" claims parental rights in her unemancipated child's decision-making with the medical service providers. *See, e.g., Parham v. J. R.,* 442 U.S. 584, 602-17 (generally upholding constitutionality of Georgia statute permitting parents to commit children to mental hospitals). The medical service providers determined that Calgaro's parental consent was not required under Minnesota Statutes § 144.341. Minnesota Statutes § 144.341 is directed at the unemancipated minor's decision-making without parental consent. The medical service providers decisions under Minnesota Statutes § 144.341 directly resulted in termination of Calgaro's constitutionally-protected parental consent requirement of the "fit parent"-child relationship recognized in *Troxel.*

Third, Calgaro as a "fit parent" claims parental rights in her unemancipated child's decision-making with the school district. The school district, legally acknowledging the "letter of emancipation," determined that Calgaro's parental consent was not required for the E.J.K's educational decision-making. See, *e.g., Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925) (strikes down an Oregon compulsory education law which, in effect, required attendance of all children between ages eight and sixteen at *public* schools.). The school district's custom and policy in legally acknowledging the "letter of emancipation" is directed at the unemancipated minor's "emancipation." The school district's "emancipation" decision directly resulted in termination of Calgaro's constitutionally-protected parental consent requirement of the "fit parent"-child relationship recognized in *Troxel.*

B. Calgaro was deprived of her parental rights by Appellees determining "emancipation" or "parental consent was no longer required" for the unemancipated minor's decision-making.

1. The County operating under Minnesota Statutes § 256D.05, subd. 1(a)(9) in determining whether parental consent is required based on "[a] child under the age of 18 who is not living with a parent .. if: the child is legally emancipated" deprives Calgaro of her substantive due process rights as a "fit parent."

The County operating under Minnesota Statutes § 256D.05, subd. 1(a)(9) in determining whether parental consent is required based on "[a] child under the age of 18 who is not living with a parent … if: the child is legally emancipated" deprives Calgaro of her constitutional rights in violation of Calgaro's substantive due process rights. The same subdivision provides that "emancipation" can be determined either by court order or administratively under the law of Minnesota. Minnesota Statutes § 256D.05, subd. 1(a) permits the County to make administrative emancipation decisions without a court order of emancipation:

> 256D.05 ELIGIBILITY FOR GENERAL ASSISTANCE.
> Subdivision 1. Eligibility.
> (a) Each assistance unit with income and resources less than the standard of assistance established by the commissioner and with a member who is a resident of the state shall be eligible for and entitled to general assistance if the assistance unit is:
> …
> (9) *a child under the age of 18 who is not living with a parent, stepparent, or legal custodian, and only if: the child is legally emancipated* or living with an adult with the consent of an agency acting as a legal custodian; the child is at least 16 years of age and the general assistance grant is approved by the director of the county agency or a designated representative as a component of a social services case plan for

> the child; or the child is living with an adult with the consent of the child's legal custodian and the county agency**.** *For purposes of this clause, "legally emancipated" means a person under the age of 18 years who***:** (i) has been married; (ii) is on active duty in the uniformed services of the United States; (iii) has been emancipated by a court of competent jurisdiction; or (iv) *is otherwise considered emancipated under Minnesota law, and for whom county social services has not determined that a social services case plan is necessary, for reasons other than the child has failed or refuses to cooperate with the county agency in developing the plan;*

(Emphasis added.)

First, the statute allows the government-authorized County to administratively determine whether the child is otherwise emancipated—that is, whether parental consent is required—for the minor's decisions with the County. Meanwhile, Minnesota law fails to provide a corresponding parental private cause of action against the County. Minnesota Statutes Chapter 260C[59] child protection litigation is limited to where the County denies benefits; so, Chapter 260C child protection litigation does not cover when a "fit parent" objects to the County providing general assistance benefits to an unemancipated minor.

Second, the statute is not narrowly tailored to meet a compelling state interest; that is Minnesota Statutes § 256D.05, subd. 1(a)(9) does not match the constitutional presumption that "fit parents" make decisions in the best interests of the children. Whether the parent is fit or not is completely disregarded in the County's emancipation determination under Minnesota Statutes § 256D.05, subd. 1(a)(9).

[59] Minn. Stat. §260C.01, et seq. ("Chapter 260C").

Third, Minnesota Statutes § 256D.05, subd. 1(a)(9) authorizes the County to conduct a third-party administrative, non-judicial procedure to determine emancipation without parental notice and opportunity to be heard.

In Calgaro's case, the County, without notifying Calgaro, found that the child was "otherwise emancipated without a court order" under Minnesota Statutes § 256D.05, subd. 1(a)(9). The County never considered Calgaro's rights as a "fit parent" to be involved in her child's decision-making. Consequently, the child received general assistance over Calgaro's objection. Calgaro's objections were never received by the County under Minnesota Statutes § 256D.05, subd. 1(a)(9). Therefore, the County's actions under Minnesota Statutes § 256D.05, subd. 1(a)(9) deprived Calgaro of her substantive due process rights as a "fit parent."

2. The medical service providers operating under Minnesota Statute § 144.341 when determining whether parental consent is required based on "any minor who is living separate and apart from parents or legal guardian…and managing personal financial affairs" deprives Calgaro of her substantive due process rights as a "fit parent."

The medical service providers operating under Minnesota Statute § 144.341 affect the constitutional rights of parents when they essentially adjudicate a child is partially emancipated. The medical service providers' decisions unreasonably negate the constitutional presumption of the fitness of a parent to make decisions for an unemancipated minor.

Section 144.341 allows the medical service provider to make an adjudication of a partial emancipation by the minor's representation of "living separate and apart from parents…" and "who is managing personal financial affairs…." As we previously noted, Minnesota common law finds the adjudication of emancipation, whether complete, partial, or conditional, as factually intensive requiring judicial review of such determinations.

The medical service provider's decision, under § 144.341, runs directly through the heart of the parent-child relationship as it results in a full deprivation of parental rights as the partial emancipation decision allows for "effective consent" regarding *any type of medical procedure:*

> "any minor …may give effective consent to personal medical, dental, mental and other health services."

Importantly, the resulting loss to the parent of rights to the care, custody, and welfare of the child is made by the medical service provider without first determining that the parent is unfit to make decisions on behalf of the unemancipated minor.

Again, as previously explained, constitutionally protected parental rights embody the *Troxel "*constitutional presumption" of a parent as fit "to act in the best interests of their children." Until the medical providers under this statute make a determination the parent is "unfit," they cannot constitutionally deprive the parent of any protected constitutional right afforded to a parent *because* the parent is a parent. Under *Troxel,* being a "parent" means being presumptively "fit" to "act in the best

interests of the parent's child." Here, the presumption may be rebuttable by a court order showing a lack of fitness; but until that court order issues, the fully panoply of parental rights remains intact. Further, those parental rights cannot be removed without a judicial act.

Thus, a court adjudication holding a parent is unfit (which we propose can also be partially, conditionally, or completely[60]) and the medical service provider's partial emancipation determination are both constitutionally required before the lone consent of the unemancipated minor is legally sufficient for a non-emergency medical care decision. This interpretation is consistent with the statute in allowing a minor to "effective[ly give] consent" and "the consent of no other person is required." Moreover, the fitness of the parent and protected parental rights remain intact to the degree adjudicated.

However, as the medical providers use § 144.31, they do not recognize either the presumptive constitutional fitness of a parent nor the protectable parental rights embodied within the constitutional presumption of "fitness" given to every parent. In determining whether parental consent is required based on "any minor who is living separate and apart from parents or legal guardian…and managing personal financial affairs," the medical service provider deprives Calgaro of her substantive due process rights as a "fit parent." Minnesota Statute § 144.341 provides:

[60] For instance, in custody proceedings, a court can impose conditions regarding custody or legal determinations between the parents for "paramount concern of the children."

> 144.341 LIVING APART FROM PARENTS AND MANAGING FINANCIAL AFFAIRS.
>
> Notwithstanding any other provision of law, any minor who is living separate and apart from parents or legal guardian, whether with or without the consent of a parent or guardian and regardless of the duration of such separate residence, and who is managing personal financial affairs, regardless of the source or extent of the minor's income, may give effective consent to personal medical, dental, mental and other health services, and the consent of no other person is required.

(Emphasis added.)

First, the statute allows the government-authorized medical service provider to determine whether parental consent is required for the minor's decisions with the medical service provider. Meanwhile, Minnesota law fails to provide a corresponding parental private cause of action against the medical service provider. Quite to the contrary, Minnesota Statute § 144.345 immunizes medical service providers by providing a "good faith" defense for medical providers to rely on the unemancipated minor's representations:

> 144.345 REPRESENTATIONS TO PERSONS RENDERING SERVICE.
>
> The consent of a minor who claims to be able to give effective consent for the purpose of receiving medical, dental, mental or other health services but who may not in fact do so, shall be deemed effective without the consent of the minor's parent or legal guardian, if the person rendering the service relied in good faith upon the representations of the minor.

As mentioned above, Chapter 260C child protection litigation is also limited to where the County denies benefits; so, Chapter 260C child protection litigation does not

cover when a "fit parent" objects to the medical service provider providing services to an unemancipated minor.

Second, Minnesota Statute § 144.341 is not narrowly tailored to meet a compelling state interest; that is Minnesota Statute § 144.341 does not match the constitutional presumption that "fit parents" make decisions in the best interests of the children. Whether the parent is fit or not is completely disregarded in the medical service provider's determination under Minnesota Statute § 144.341 whether parental consent is required for the unemancipated minor's decision-making with the medical service provider.

Third, Minnesota Statute § 144.341 authorizes a third-party non-judicial procedure to determine whether parental consent from a "fit" parent is required without parental notice and opportunity to be heard.

In Calgaro's case, the medical service providers, without notifying Calgaro, found under Minnesota Statute § 144.341 that parental consent was not required because the child was "living separate and apart from parents or legal guardian…and managing personal financial affairs." The medical service provider never considered Calgaro's rights as a "fit parent" to be involved in her child's decision-making. Consequently, the child received gender-transitioning medical care over Calgaro's objection. Calgaro's objections were never received by the medical service providers under Minnesota Statute § 144.341. Therefore, the medical service providers' actions

under Minnesota Statute § 144.341 deprived Calgaro of her substantive due process rights as a "fit parent."

3. The school district's custom and policy of "emancipation" decision-making deprives Calgaro of her substantive due process rights as a "fit parent."

The school district's custom and policy of "emancipation" decision-making deprives Calgaro of her substantive due process rights as a "fit parent." Claims brought against municipalities, inclusive of school districts, under 42 U.S.C. § 1983, must prove that an express or implied policy or custom of the municipality caused the alleged injury.[61] The Court notes that "[a]n unconstitutional governmental policy can be inferred from a single decision taken by the highest official responsible for setting policy in that area of the government's business."[62] "Once those officials who have the power to make official policy on a particular issue have been identified, it is for

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[61] *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 403–04 (1997); *Reasonover v. St. Louis Cnty.,* Mo., 447 F.3d 569, 584 (8th Cir. 2006) (district court properly dismissed a claim for failure to show an unconstitutional custom or practice); *Manuele v. City of Jennings,* No. 4:12 CV 1655 JAR, 2012 WL 113538, at *8–9 (E.D. Mo. Jan. 13, 2012) (summary judgment denied upon showing through words and deeds of high ranking city officials an implied policy).

[62] *Angarita v. St. Louis County,* 981 F.2d 1537, 1546 (8th Cir.1992); *Pembaur v. Cincinnati,* 475 U.S. 469, 484–85 (1986) (the Supreme Court upheld a finding of municipal liability for the violation of plaintiffs' constitutional rights where deputy sheriffs acted on the express instruction of the county prosecutor. Because the county prosecutor was acting as a final decision maker at the time, the Court concluded that the county could be held liable under § 1983); *but see Bd. of the County Comm'rs v. Brown,* 520 U.S. 397, 415–16 (1997)("Bryan County is not liable for Sheriff Moore's isolated decision to hire Burns without adequate screening, because respondent has not demonstrated that his decision reflected a conscious disregard for a high risk that Burns would use excessive force in violation of respondent's federally protected right").

the jury to determine whether their 'decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur.'"[63] The principal of Cherry School, as the school district's final decision-maker at Cherry School, determined the "emancipation" policy and custom as applied to Calgaro's parent-child relationship as subsequently supported by the School District.

To be sure, there is no state statute that defines "emancipation" in the context of education, educational records or educational institutions. We have found no state statute that recognizes a "letter of emancipation" as *legally binding* to be used as a means to deprive a fit parent of their parental rights regarding the unemancipated minor child's education. Further, we have found no state statute that a School District or a school principal can deny a fit parent a right to control the education of his or her unemancipated children. Moreover, we have found no policy of the School District that provides for a fit parent notice and opportunity to be heard after district officials make an emancipation determination without a court order of emancipation.

Clearly, the school district does recognize the right of a fit parent to have access to the unemancipated child's educational documents:

> "Parent" means a parent of a student and includes a natural parent….The school district may presume the parent has the authority to exercise the rights provided herein, unless it is provided with evidence that there is a state law or court order governing such matters as marriage dissolution, separation or

[63] *Angarita,* 981 F.2d at 1546 (quoting *Jett v. Dallas Independent School District,* 491 U.S. 701, 737 (1989)).

> child custody, or a legally binding instrument which provides to the contrary.[64]

Yet, after the principal of Cherry School and the School District determination of emancipation, they refused Calgaro's repeated requests to access E.J.K.'s records and to have parental input on E.J.K.'s educational decisions.

Notably, Calgaro can not make a claim under Minnesota's Uniform Declaratory Judgment Act as the government in the lower court suggested.[65] That Act "gives courts within their respective jurisdictions the power to declare rights, status, and other legal relations," but the Act "cannot create a cause of action that does not otherwise exist."[66] "A party seeking a declaratory judgment must have an independent, underlying cause of action based on a common-law or statutory right."[67] But, there is no state private cause of action against the government for the constitutional claims asserted here. Further, "there is no private cause of action for violations of the Minnesota Constitution." [68] Accordingly, Calgaro has no cause of action in state court against the government's emancipation decisions.

Specifically, the school district's "emancipation" custom and policy established by the Cherry School Principal for Calgaro's parent-child relationship violated

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[64] St. Louis Sch. ISD 2142, Policy 515 § III.J., Kaardal Decl. Ex. C, Dckt. 66.
[65] Memo. and Or. at 17; ADD.17.
[66] *Hoeft v. Hennepin Cnty.,* 754 N.W.2d 717, 722 (Minn. App. 2008) (quotations omitted), *review denied* (Minn. Nov. 18, 2008).
[67] *Alliance for Metro. Stability v. Metro. Council,* 671 N.W.2d 905, 916 (Minn. App. 2003).
[68] *Eggenberger v. W. Albany Tp.,* 820 F.3d 938, 941 (8th Cir. 2016) (*citing Guite v. Wright,* 976 F.Supp. 866, 871 (D. Minn. 1997), *aff'd on other grounds*, 147 F.3d 747 (8th Cir. 1998)), *cert. denied,* 137 S. Ct. 200 (2016).

Calgaro's substantive due process rights. First, the school's emancipation policy determination was made without a corresponding parental private cause of action against the school district. Meanwhile, Minnesota law fails to provide a corresponding parental private cause of action against school. Chapter 260C child protection litigation is limited to where the County denies benefits; so, Chapter 260C child protection litigation does not cover when a "fit parent" objects to the school providing services to an unemancipated minor without input from the parent.

Second, the school's custom and policy is not narrowly tailored to match the constitutional presumption that "fit parents" make decisions in the best interests of the children. Whether the parent is fit or not is completely disregarded in the school district's emancipation custom and policy determination for the unemancipated minor's decision-making with the school.

Third, the school's emancipation custom and policy authorizes a third-party non-judicial procedure to determine whether parental consent from a "fit" parent is required without parental notice and opportunity to be heard.

In Calgaro's case, the school, without notifying Calgaro, found under its "emancipation" custom and policy that parental consent was not required because the child was emancipated. The school never considered Calgaro's rights as a "fit parent" to be involved in her child's decision-making. Consequently, the child received educational services without Calgaro's input. Calgaro's objections were never received by the school under its "emancipation" custom and policy. Therefore, the school's

actions under its "emancipation" custom and policy deprived Calgaro of her substantive due process rights as a "fit parent."

C. Each defendant undertook state action or is a "person" acting under the color of state law.

Each defendant undertook state action or is a "person" acting under color of state law. St. Louis County and the St. Louis School District concede they are state actors as they must. *See Slaven v. Engstrom,* 710 F.3d 772, 780 (8th Cir. 2013) ("Hennepin County is a unit of local government that is a "person" within the meaning of Section 1983."); *Keckeisen v. Indep. Sch. Dist.,* 509 F.2d 1062, 1065 (8th Cir. 1975) (a school district may be considered a "person" for purposes of § 1983 liability.)

But, Park Nicollet and Fairview erroneously contest that they are "persons" acting under color of state law. Under the circumstances of this case, because of the state statutes under which each operated—by making a determination of partial emancipation and, thus, essentially finding Ms. Calgaro an unfit parent—the Appellees were delegated a "public function" which is, normally, under Minnesota law, exclusively for the judiciary to decide.

Park Nicollet and Fairview are state actors acting "under the color of state law" for purposes of § 1983 because Minnesota Statutes § 144.341 authorizes medical service providers to perform a traditional public function of determining emancipation – specifically terminating parental rights concerning a minor child's health care decisions.

Long ago, the Minnesota Supreme Court understood the effect on the parent-child relationship regarding determinations of emancipation:

> When we consider that complete emancipation involves *an absolute destruction of the filial relation,* it is quite clear that it should not be inferred from the fact alone that the parent gives the child the right to hire out and collect and disburse his earnings.[69]

In *Lufkin v. Harvey,* a case involving liability for medical and surgical services furnished to a minor son, the Minnesota Supreme Court also stated that

> Emancipation is not, however, to be presumed. It must be proved. * * * A minor may be emancipated by an instrument in writing, by verbal agreement, or by implication from the conduct of the parties. * * * There may be complete emancipation, even though the minor continues to reside with his parents. … [or] Emancipation may, however, be partial.

In Minnesota, it is the court that must consider all of the facts and circumstances of the case:

> This court is satisfied that the trial court, as sole arbiter of the facts and circumstances, committed no error ….

In re Fiihr, 184 N.W.2d 22, 25 (Minn. 1971).

Here, the federal district court in its memorandum and order did not disagree:

> Whether a child has been emancipated *must be determined* largely upon the particular facts and circumstances of each case and is ordinarily *a question for the jury.*[70]

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[69] *Lufkin v. Harvey,* 154 N.W. 1097, 1098 (Minn. 1915) (emphasis added) (involving liability for medical and surgical services furnished to a minor son.).

[70] *In re Fiihr*, 184 N.W.2d 22, 25 (Minn. 1971). *See also* Memo. and Or. at 4; ADD. 4 (emphasis added).

Notably, the federal district court also noted that only a court order can terminate parental rights.[71] However, as we see in the Minnesota Supreme Court decisions, a determination of emancipation goes to the heart of the *filial relationship*. Therefore, when private entities make a determination of partial or complete emancipation under any statutory scheme, they do so as fact finders acting in a judicial function, making both a *legal* determination of emancipation directly affecting the parent-child relationship and an implicit determination that the parents are unfit terminating parental rights.

To be sure, when *Lufkin v* Harvey was decided in 1915, the United States Supreme Court had not explicitly recognized the *Troxel* constitutional presumption of a "fit parent" and "parental rights" concerning the care, custody, and welfare of a minor child; however, in the context expressed under common law, procedurally, the determination of emancipation must necessarily be a function of the court when it affects the filial relationship as it presently exists involving *Troxel* constitutionally protected parental rights.

Therefore, here, the private entities *acted* and *were delegated* (as each has proclaimed to have acted in accordance with state statutory law) a public function—that of the judiciary. *West v. Atkins,* 487 U.S. 42, 56 (1988) (When a private entity has been delegated a public function by the state); *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 627-28 (1991) (when a private entity is "entwinded with

[71] Memo. and Or. at 5; ADD. 5.

governmental policies."). Here, the acts of Nicollet and Fairview as private parties are fairly attributed to the State so as to be deemed under "color of state law" for §1983 purposes.

Conversely, the same legal effect, but with a constitutional process, can be reached under Minnesota Statute § 144.341 if the teenager first brings a petition for emancipation in state court; under court rules for emancipation, the parents would receive notice and an opportunity to be heard. As the Minnesota judicial website confirms:

> Minnesota Statutes define who is a minor and who is an adult at MN Statutes § 645.451. Generally, being "emancipated" means that a *minor has the same legal responsibilities as an adult.* Minnesota Statutes do not specifically define a process by which a minor can become emancipated.
>
> Courts will review "Petitions for Emancipation" and decide on a case-by-case basis if there is sufficient evidence to find that a minor may live "independently" of his/her parents or guardian. However, the courts *do not* publish forms or instructions to petition for "emancipation." The Legal Fact Sheet on Emancipation published by Mid-Minnesota Legal Aid explains the basics on this area of law. To get legal advice on your situation, you should talk with a lawyer.[72]

In sharp contrast, under Minnesota Statute § 144.341, it is the medical service providers alone – not the state court – who determine whether the parental rights regarding a minor child's health care decisions are terminated. It is the medical

[72] Compl. ¶ 16; Dckt. 1; website: http://www.mncourts.gov/Help-Topics/Emancipation.aspx.

service providers – not the state courts–who adjudicate the facts as to emancipation and implicitly the "unfitness" of the parents to make decisions for the child.

While there are other categories under which a private entity may act to be deemed under the "color of state law," those categories need not be considered here.[73] Here, the "public function" test is sufficient under the circumstances of this case to show the medical service providers are potentially liable under § 1983.

IV. Calgaro is entitled to summary judgment on her procedural Due Process Clause claims based on violations of her parental rights.

Again, to successfully state a claim under § 1983, a plaintiff must plead: (1) the existence of a constitutional right; and (2) deprivation of that right, (3) by state action or by an individual acting under the color of state law. 42 U.S.C. § 1983; *Roe v. Humke*, 128 F.3d 1213, 1215 (8th Cir. 1997) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)). As

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[73] The U.S. Supreme Court noted that the criteria for determining whether state action is present "lack rigid simplicity," but the Court identified the following factors that bear on the question:

> We have, for example, held that a challenged activity may be state action when it results from the State's exercise of "coercive power," [*Blum v. Yaretsky,* 457 U.S. 991 … (1982)], when the State provides "significant encouragement, either overt or covert," *ibid.,* or when a private actor operates as a "willful participant in joint activity with the State or its agents," [*Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 941 …. (1982)] (Internal quotation marks omitted). We have treated a nominally private entity as a state actor when it is controlled by an "agency of the State," *Pennsylvania v. Board of Directors of City Trusts of Philadelphia,* 353 U.S. 230, 231 …(1957)….

Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001).

explained below, Calgaro has met these requirements as to her procedural Due Process Clause claims. Since there are no genuine issues of material fact, judgment in favor of Calgaro is appropriate as a matter of law.

A. Calgaro as a "fit parent" has procedural due process rights before the state diminishes her parental rights.

Calgaro as a "fit parent" has procedural due process rights before the Appellees under color of state law diminish her parental rights. "The Due Process Clause provides that '[n]o State shall ... deprive any person of life, liberty, or property, without due process of law.'" *Lind v. Midland Funding, L.L.C.,* 688 F.3d 402, 405 (8th Cir. 2012) (alterations in original) (quoting U.S. Const. amend. XIV, § 1). Even though "[d]ue process is a flexible concept, requiring only such procedural protections as the particular situation demands," *id.* (quotations and citations omitted), "procedural due process has [a] clear [meaning]: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified," *id.* at 405–06 (quotations and citations omitted). "[T]he opportunity to be heard must come 'at a meaningful time and in a meaningful manner.' " *Id.* at 406 (quoting *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976)). A party "need not receive actual notice, but only notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Id.* (quotation and citation omitted).

Moreover, "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel,* 530 U.S. at 66. "That liberty interest is limited by the compelling governmental interest in protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves." *Whisman Through Whisman v. Rinehart,* 119 F.3d 1303, 1309 (8th Cir. 1997) (quotation and citation omitted); *see also Dornheim v. Sholes,* 430 F.3d 919, 925–26 (8th Cir. 2005)("However, the right to family integrity clearly does not include a constitutional right to be free from child abuse investigations, as the state has a strong interest in protecting the safety and welfare of minor children, particularly where protection is considered necessary as against the parents themselves." (quotation, alteration, and citation omitted)).

In Calgaro's case, Calgaro was subject to diminishment of her parental rights without notice or opportunity to be heard, akin to an ex parte court proceeding in a parental rights termination proceeding. Nevertheless, even in other contexts in which the state seeks to terminate parental rights and the process is challenged, courts will consider the nature of the process due. It turns on a balancing of the "three distinct factors" specified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976): the private interests affected by the proceeding; the risk of error created by the governmental entities

chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.[74]

The extent to which procedural due process must be afforded a recipient is influenced by the extent to which the recipient may be "'condemned to suffer grievous loss.'"[75] The Supreme Court decision in *Santosky v. Kramer* is instructive: "Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the fact-finder turns on both the nature of the private interest threatened and the permanency of the threatened loss."[76] Here, "a natural parent's desire for and right to 'the companionship, care, custody, and management of his or her children is an interest far more precious than any property right."[77]

Moreover, the Supreme Court has mandated a much higher standard of proof—"clear and convincing evidence"—when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money."[78] "Notwithstanding the state's civil labels or good intentions, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved

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[74] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
[75] *Goldberg v. Kelly*, 397 U.S. 254, 262-263 (1970) quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).
[76] *Santosky,* 455 U.S. at 758.
[77] *Id.*
[78] *Addington v. Texas*, 441 U.S. 418, 424 (1979).

with 'a significant deprivation of liberty' or 'stigma.'"[79] The termination of parental rights falls within that category of significant deprivation of a liberty interest.

B. The Appellees' respective policies and customs of determining "emancipation" or "no parental consent is required" diminish parental rights without parental notice and opportunity to be heard.

Claims brought against government officials and other persons, under 42 U.S.C. § 1983, must prove that an express or implied policy or custom of the municipality caused the alleged injury.[80] This Court ruled that "[a]n unconstitutional governmental policy can be inferred from a single decision taken by the highest official responsible for setting policy in that area of the government's business."[81] "Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether their 'decisions have

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[79] *Santosky v. Kramer,* 455 U.S.745, 756-58 (1982).

[80] *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 403–04 (1997); *Reasonover v. St. Louis Cnty.,* 447 F.3d 569, 584 (8th Cir. 2006) (district court properly dismissed a claim for failure to show an unconstitutional custom or practice); *Manuele v. City of Jennings,* No. 4:12 CV 1655 JAR, 2012 WL 113538, at *8–9 (E.D. Mo. Jan. 13, 2012) (summary judgment denied upon showing through words and deeds of high ranking city officials an implied policy).

[81] *Angarita v. St. Louis County,* 981 F.2d 1537, 1546 (8th Cir.1992); *Pembaur v. Cincinnati,* 475 U.S. 469, 484–85 (1986) (upholding a finding of municipal liability for the violation of plaintiffs' constitutional rights where deputy sheriffs acted on the express instruction of the county prosecutor. Because the county prosecutor was acting as a final decision maker at the time, the Court concluded that the county could be held liable under § 1983); *but see Bd. of the County Comm'rs v. Brown,* 520 U.S. 397, 415–16 (1997)("Bryan County is not liable for Sheriff Moore's isolated decision to hire Burns without adequate screening, because respondent has not demonstrated that his decision reflected a conscious disregard for a high risk that Burns would use excessive force in violation of respondent's federally protected right").

caused the deprivation of rights at issue by policies which affirmatively command that it occur.'"[82]

1. The County's custom and policy do not provide parental notice and opportunity to be heard to "fit parents" when operating under Minnesota Statutes § 256D.05, subd. 1(a)(9) to determine whether parental consent is required based on "[a] child under the age of 18 who is not living with a parent … if: the child is legally emancipated."

The County has a policy or custom: when operating under Minnesota Statutes § 256D.05, subd. 1(a)(9) to determine whether parental consent is required based on "[a] child under the age of 18 who is not living with a parent … if: the child is legally emancipated", the County do not provide constitutionally-required notice and opportunity to be heard to "fit parents."

The County when operating in this manner under Minnesota Statutes § 256D.05, subd. 1(a)(9), without procedures of notice and opportunity to be heard by "fit parent", act in violation of Calgaro's procedural due process rights. The same subdivision also provides that "emancipation" can be determined either by court order or under the law of Minnesota. Minnesota Statutes § 256D.05, subd. 1(a), in relevant part, is quoted above. §Minnesota Statutes § 256D.05, subd. 1(a) neither requires nor prohibits parental notice and opportunity to be heard; the county's

[82] *Angarita,* 981 F.2d at 1546 (quoting *Jett v. Dallas Independent School District,* 491 U.S. 701, 737 (1989)).

custom and policy, when choosing to operate under Minnesota Statutes § 256D.05, subd. 1(a), is to provide no parental notice and opportunity to be heard. If there were a court order of emancipation, then the court would have provided parental notice and opportunity to be heard. But, without a court order, the County makes the determination, without parental notice and opportunity to be heard, whether the unemancipated child "is others considered emancipated under Minnesota law. Since parental rights are involved, the County must provide due process–notice and an opportunity to be heard.

Minnesota Statutes § 256D.05, subd. 1(a)(9) allows the government-authorized County to determine whether the child is "otherwise emancipated under Minnesota law"–that is, whether parental consent is required -- for the minor's decisions with the County. The County determines when an unemancipated child is "otherwise emancipated under Minnesota law" without providing "fit parents" with notice and opportunity to be heard. Furthermore, Minnesota law fails to provide a corresponding parental private cause of action against the County. Chapter 260C child protection litigation is limited to where the County denies benefits; so, Chapter 260C child protection litigation does not cover when a "fit parent" objects to the County providing general assistance benefits to an unemancipated minor.

In Calgaro's case, the County, without notifying Calgaro and providing her an opportunity to be heard, found that the child was "otherwise emancipated without a court order" under Minnesota Statutes § 256D.05, subd. 1(a)(9). The County's policy

and custom never gave Calgaro's rights as a "fit parent" to assert her parental rights. Consequently, the child received general assistance over Calgaro's objection. In absence of parental notice and opportunity to be heard, Calgaro's objections were never received by the County under Minnesota Statutes § 256D.05, subd. 1(a)(9). Therefore, the County's policy and custom under Minnesota Statutes § 256D.05, subd. 1(a)(9) deprived Calgaro of her procedural due process rights as a "fit parent."

2. The medical service providers' customs and policies do not provide parental notice and opportunity to be heard to "fit parents" under Minnesota Statutes § 144.341 to determine whether parental consent is required based on "any minor who is living separate and apart from parents or legal guardian…and managing personal financial affairs."

The medical service providers do not provide parental notice and opportunity to be heard to "fit parents" when operating under Minnesota Statutes § 144.341 to determine whether parental consent is required based on "any minor who is living separate and apart from parents or legal guardian…and managing personal financial affairs."

The medical service providers operating under Minnesota Statutes § 144.341 determine whether parental consent is required based on "any minor who is living separate and apart from parents or legal guardian…and managing personal financial affairs." When doing so, the medical service providers' custom and policy is to provide no parental notice and opportunity to be heard to "fit parents" depriving

Calgaro of her procedural due process rights as a "fit parent." Minnesota Statutes § 144.341, in relevant part, is quoted above. First, the statute allows the government-authorized medical service provider to determine whether parental consent is required for the minor's decisions with the medical service provider. Minnesota Statutes § 144.341 nether requires nor prohibits parental notice and opportunity to be heard; the medical service providers' custom and policy, when choosing to operate under Minnesota Statutes § 144.341, is to provide no parental notice and opportunity to be heard.

Meanwhile, Minnesota law fails to provide a corresponding parental private cause of action against the medical service provider. Quite to the contrary, Minnesota Statutes § 144.345, quoted above, immunizes medical service providers by providing a "good faith" defense for medical providers to rely on the unemancipated minor's representations. Chapter 260C child protection litigation is limited to where the County denies benefits; so, Chapter 260C child protection litigation does not cover when a "fit parent" objects to the medical service provider providing services to an unemancipated minor.

In Calgaro's case, the medical service providers' custom and policy of no parental notice and opportunity in its Minnesota Statutes § 144.341 determinations that parental consent was not required because the child was "living separate and apart from parents or legal guardian…and managing personal financial affairs" violated Calgaro's procedural due process rights. In the absence of notice and

opportunity to be heard, the medical service providers never considered Calgaro's rights as a "fit parent" to be involved in her child's decision-making. Consequently, the child received gender-transitioning medical care over Calgaro's objection. Calgaro's objections were never received by the medical service providers under Minnesota Statutes § 144.341 because of the medical service provider's customs and policies that provided no parental notice nor opportunity to be heard. Therefore, the medical service providers' actions under Minnesota Statutes § 144.341 deprived Calgaro of her procedural due process rights as a "fit parent."

3. The school district's custom and policy of "emancipation" decision-making without parental notice and opportunity to be heard deprives Calgaro of her procedural due process rights as a "fit parent."

The school district's custom and policy of "emancipation" decision-making deprives Calgaro of her procedural due process rights as a "fit parent." The Defendant School District admits that Minnesota does not have a statutory process for emancipation.[83] Yet, like the County described above, the school district, without parental notice or opportunity to be heard, determines unemancipated children, without court orders of emancipation, as emancipated anyway.

Because of the school district's emancipation custom and policy is without parental notice and opportunity to be heard, Calgaro, as the mother and parent of her

[83] St. Louis Cty. School Distr. Memo. to Dismiss 5 n.4; Dckt.44.

minor child E.J.K., was denied her ability to participate in E.J.K.'s educational decisions and to have access to his educational records.[84] Contrary to the District's position, Calgaro asserted that the District and the principal, severally and jointly, without parental notice and opportunity to be heard, refused her right as a parent to assist in her minor child's needs because the school district had deemed the child emancipated.[85]

The school's "emancipation" policy and custom established by the Cherry School Principal for Calgaro's parent-child relationship violated Calgaro's procedural due process rights. In Calgaro's case, the school, without notifying Calgaro, found under its emancipation custom and policy that parental consent was not required because the child was emancipated. Because of the school's custom and policy of no parental notice or opportunity to be heard is to be provided in its emancipation decisions, the school never considered Calgaro's rights as a "fit parent" to be involved in her child's decision-making. Consequently, the child received educational services without Calgaro's input. Calgaro's objections were never received by the school under its "emancipation" custom and policy. Therefore, the school's actions under its "emancipation" custom and policy which include no provision of parental notice and opportunity to be heard deprived Calgaro of her procedural due process rights as a "fit parent."

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[84] Compl. ¶134; App.38.
[85] *Id.* at ¶¶134–37; App. 38-39; St. Louis Cty. School Distr. Memo. to Dismiss 5; Dckt.44.

C. Each defendant undertook state action or is a "person" acting under the color of state law.

Each defendant undertook state action or is a "person" acting under color of state law. The County and school district concede they are state actors as they must. But, Park Nicollet and Fairview erroneously contest that they are "persons" acting under color of state law. Calgaro's responsive arguments to Appellees' arguments are provided above in section III and are incorporated herein by reference.

V. The Appellees are not entitled to qualified immunity because parental rights over unemancipated minors are clearly established and the legal aid clinic's "letter of emancipation" was not legally binding.

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). The qualified-immunity inquiry is two-fold: (1) whether the plaintiff has asserted facts that demonstrate the violation of a constitutional right and (2) whether that right was clearly established at the time of the defendant's alleged conduct. *Winslow v. Smith*, 696 F.3d 716, 731 (8th Cir. 2012). District courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Pearson*, 555 U.S. at 236. "Qualified immunity is an affirmative defense for which the defendant carries the

burden of proof. The plaintiff, however, must demonstrate that the law is clearly established." *Sparr v. Ward*, 306 F.3d 589, 593 (8th Cir. 2002).

When performing the qualified immunity analysis, a district court assesses the facts as they appeared to the state actors. *Greiner v. City of Champlin*, 27 F.3d 1346, 1354 (8th Cir. 1994). When determining whether a right is clearly established, the district court must determine whether a reasonable officer would know that the officer's conduct was unlawful in the circumstances presented. *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *overruled in part on other grounds by Pearson*, 555 U.S. at 236–42; *accord Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004) ("Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." (internal quotation marks omitted)). Qualified immunity provides government officials "breathing room to make reasonable but mistaken judgments." *Messerschmidt*, 565 U.S. at 546 (internal quotation marks omitted). As such, qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Id.* (internal quotation marks omitted). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Id.* (internal quotation marks omitted).

Calgaro, under these legal standards, has shown qualified immunity does not apply. So, the lower court erred in its summary judgment analysis. First, the plaintiff

has asserted facts that demonstrate the violation of a constitutional right as explained above. Second, Calgaro's parental rights over her unemancipated child were "clearly established" at the time of the Appellees' alleged misconduct. Under *Troxel,* a U.S. Supreme Court decision made in 2000, a constitutional presumption exists that Calgaro as a fit parent makes the decision for her unemancipated child. Instead, the Appellees relied on the legal aid clinic's "letter of emancipation" which was obviously not legally binding because it was not a court order of emancipation. When the Appellees relied on the "letter of emancipation," they violated clearly-established law under the Fourteenth Amendment's Due Process Clause.

CONCLUSION

For the foregoing reasons, the lower court's decision should be reversed. Also, summary judgment should be granted to Calgaro on the claims against the Appellees identified above.

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CERTIFICATE OF COMPLIANCE

WITH FED. R. APP. P. 32 (a)(7)

The undersigned certifies that the Brief submitted herein contains 12,953 words and complies with the type/volume limitations of the Federal Rules of Appellate Procedure 32(a)(7). This Brief was prepared using a proportionally spaced typeface of 14-point. The word count is stated in reliance on Microsoft Word 2010, the word processing system used to prepare this Brief.

/s/Erick G. Kaardal
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