

United States Court Of Appeals For The Eighth Circuit

No. 17-2279

Anmarie Calgato,

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.

APPELLANT'S REPLY BRIEF

Erick G. Kaardal, 229647
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
Telephone: 612 341-1074
Facsimile: 612-341-1076
Email: kaardal@mklaw.com
Attorneys for the Plaintiff-Appellant

Attorneys for St. Louis County and Mirsch
Nick D. Campanario
COUNTY ATTORNEY'S OFFICE
100 N. Fifth Avenue, W., Room 501
Duluth, MN 55802-2322

Attorneys for Park Nicollet Health Services
Stephanie Chandler
David M. Wilk
LARSON & KING
30 E. Seventh Street, Suite 2800
Saint Paul, MN 55101

Dated: October 17, 2017

*Attorneys for Amicus Curiae World
Professional Association for
Transgender Health in Support of
Affirmance (WPATH)*

Maureen Alger
COOLEY LLP
3175 Hanover Street
Palo Alto, California 94304
Phone: (650) 843-5201
Email: malger@cooley.com

Reed A. Smith
COOLEY LLP
1114 Avenue of the Americas
New York, New York 10036
Phone: (212) 479-6207
Email: reed.smith@cooley.com

Adam Gershenson
COOLEY LLP
500 Boylston Street
Boston, Massachusetts 02116
Phone: (617) 937-2379
Email: agershenson@cooley.com

Attorneys for Fairview Health Services
William Lawrence Davidson
Paul C. Peterson
LIND & JENSEN
901 Marquette Avenue, S., Suite 1300
Minneapolis, MN 55402

Attorneys for School and Johnson
Trevor S. Helmers
Elizabeth Jill Vieira
RUPP & ANDERSON
333 S. Seventh Street, Suite 2800
Minneapolis, MN 55402

Attorneys for E.J.K.
Michael A. Ponto
Martin S. Chester
Emily E. Chow
FAEGRE & BAKER
90 S. Seventh Street, Suite 2200
Minneapolis, MN 55402-3901
and
Asaf Orr
Christopher F. Stoll
NATIONAL CENTER FOR LESBIAN
RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102-0000

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. The Appellees’ arguments that their actions under section 144.341 are constitutional are unpersuasive.....	1
A. The Appellees’ arguments that section 144.341 is constitutional as a “mature minor” statute are unpersuasive.....	1
1. The Supreme Court recognizes parental rights as constitutionally protected.....	1
2. Section 144.341 as Minnesota’s mature minor statute is unconstitutional because it is not narrowly tailored to meet a compelling state interest and is fatally underinclusive.....	3
3. Section 144.341 is unconstitutional because it authorizes a deprivation of a fit parent’s parental rights over the minor’s medical decisions without notice and opportunity to be heard.....	5
4. Section 144.341 is not about whether a minor is mature; instead, the statute authorizes an administrative adjudication of emancipation.....	6
B. The claim of E.J.K. that Calgaro had other processes to assert parental rights over her child is not relevant to the issues on appeal.....	9
C. Section 1983’s state action requirement is met for Park Nicollet and Fairview.....	11
II. The County is liable for a section 1983 violation.....	15
III. The school district is liable for a section 1983 violation.....	18
IV. The present appeal is not moot because the adjudication is about the prospective violation of Calgaro’s constitutional rights and because the complaint seeks monetary damages.....	25

V. The brief of amicus curiae WPATH is limited to a few issues. 26

VI. E.J.K. was an interested party, not a defendant, in the trial court proceeding..... 27

TABLE OF AUTHORITIES

Cases

<i>Alliance for Metro. Stability v. Metro. Council</i> , 671 N.W.2d 905 (Minn. App. 2003)	11
<i>Bellotti v. Baird</i> , 443 U.S. 622 (1979)	8
<i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986)	2
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833 (1998).....	18
<i>Crowley v. McKinney</i> , 400 F.3d 965 (7th Cir. 2005)	19
<i>Culhane v. Aurora Loan Services of Nebraska</i> , 826 F.Supp.2nd 352 (2011).....	22
<i>Eggenberger v. W. Albany Tp.</i> , 820 F.3d 938 (8th Cir. 2016).....	11
<i>Eggenberger v. W. Albany Tp., Minn.</i> , 137 S. Ct. 200 (2016).....	11
<i>Flagg Bros. v. Brooks</i> , 436 U.S. 149 (1978)	1, 14
<i>Garner v. Memphis Police Dep't</i> , 8 F.3d 358 (6th Cir. 1993).....	17
<i>Genesis Healthcare Corp. v. Symczyk</i> , 569 U.S. 66 (2013)	25
<i>Gomez v. Toledo</i> , 446 U.S. 635 (1980).....	1, 25
<i>Guite v. Wright</i> , 976 F.Supp. 866 (D.Minn.1997)	11
<i>Hoelt v. Hennepin Cnty.</i> , 754 N.W.2d 717 (Minn. App. 2008)	11
<i>In re Fiibr</i> , 184 N.W. 2d 22 (Minn. 1971)	13, 16
<i>In re Osweiler</i> , 346 F.2d 617 (C.C.P.A. 1965)	21
<i>In re Welfare of Child of W.L.P.</i> , 678 N.W.2d 703 (Minn. App. 2004)	12
<i>Keup v. Hopkins</i> , 596 F.3d 899 (8th Cir. 2010)	25
<i>Lufkin v. Harvey</i> , 154 N.W. 1097 (Minn. 1915).....	12, 16
<i>Lugar v. Edmondson Oil Co., Inc.</i> , 457 U.S. 922 (1982).....	11

<i>Minn. Ctr. for Envtl. Advocacy v. Metro. Council</i> , 587 N.W.2d 838 (Minn. 1999).....	14
<i>Pollard v. The GEO Group, Inc.</i> , 629 F.3d 843 (9th Cir. 2010).....	12
<i>Ramsey County v. X.L.</i> , 853 N.W.2d 813 (Minn. App. 2014)	9
<i>Republican Party of Minn. v. White</i> , 536 U.S. 765 (2002).....	2
<i>Rice ex rel. Rice v. Correctional Medical Services</i> , 675 F.3d 650 (7th Cir. 2012).....	12
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982)	18, 21
<i>Schmidt v. Des Moines Pub. Schools</i> , 655 F.3d 811 (8th Cir. 2011)	19, 20
<i>Slaven v. Engstrom</i> , 710 F.3d 772 (8th Cir. 2013).....	17
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972)	2
<i>Stevenson v. Blytheville Sch. Dist. #5</i> , 800 F.3d 955 (8th Cir. 2015).....	18
<i>Terrell v. Larson</i> , 396 F.3d 975 (8th Cir. 2005).....	18
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000)	18, 21, 25
<i>Universal Title Ins. Co. v. U.S.</i> , 942 F.2d 1311 (8th Cir. 1991).....	21
<i>Vives v. City of New York</i> , 524 F.3d 346 (2d Cir. 2008)	17, 18
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	1
<i>West v. Atkins</i> , 487 U.S. 42 (1988).....	1

Statutes

Minnesota Statutes § 144.341.....	passim
Minnesota Statutes § 144.345.....	7
Minnesota Statutes § 256D.01	17
Minnesota Statutes § 256D.05	15, 17
Minnesota Statutes § 260C.007.....	10
Minnesota Statutes § 260C.301.....	12

Other Authorities

“Gender Dysphoria, Transsexual Attractions, Sexual Reassignment
Surgery and Informed Consent, Child Healing: Strengthening Families
<http://www.childhealing.com/articles/transsexualIssues.php> (last
visited Dec. 13, 2016)..... 9, 26

Minnesota State Procedures–Dispute Resolution under McKinney-
Vento Act..... 24

This reply brief is filed in response to the five briefs of the Appellees and the brief of the amicus curiae WPATH.

I. The Appellees’ arguments that their actions under section 144.341 are constitutional are unpersuasive.

A. The Appellees’ arguments that section 144.341 is constitutional as a “mature minor” statute are unpersuasive.

1. The Supreme Court recognizes parental rights as constitutionally protected.

The Supreme Court has identified two elements for a plaintiff’s prima facie case in § 1983 litigation. The plaintiff must allege both (1) a deprivation of a federal right and (2) that the person who deprived the plaintiff of that right acted under color of state law.¹

As to Calgaro’s parental rights, the Supreme Court has stated that these are protected by the substantive and procedural components of the Fourteenth Amendment’s Due Process Clause. First, parental rights are protected under the substantive component of due process:

The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests... *to direct the education and upbringing of one’s children...*

Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997) (emphasis added) (citations omitted). As argued in the principal brief, strict scrutiny should be applied to section 144.341. If strict scrutiny applies, the constitutionality of Section 144.341 turns on

¹*West v. Atkins*, 487 U.S. 42, 48 (1988); *Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

whether it is narrowly tailored to meet a compelling state interest.² Further, substantial evidence of the statute’s underinclusiveness as to its alleged purpose would be constitutionally fatal.³

Second, parental rights are protected under the procedural component of due process:

We think the Due Process Clause mandates a similar result here. The State's interest in caring for Stanley's children is de minimis if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. *Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.*

Stanley v. Illinois, 405 U.S. 645, 657–58 (1972) (emphasis added). Pre-deprivation notice and hearing is constitutionally required whenever the state modifies parental rights.

The Appellees’ briefs fail to reconcile these precedents. For example, E.J.K.’s brief contains statements which are legally or factually inaccurate or both. First, “[The statute] does not deprive Calgaro of any constitutionally-protected liberty or property interest.” E.J.K. Br. 10. Yet, the Supreme Court cases cited above state otherwise. Second, “[A] parent does not have a constitutional right to override the medical decision-making of a mature minor.” E.J.K. Br. 10–17. The Supreme Court cases cited above state that a parent has constitutionally-protected rights to raise their

² *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986).

³ *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

children. Third, “Defendant-Appellees have done nothing to compel or coerce any conduct by Calgaro or by E.J.K., or to inhibit Calgaro’s exercise of her parental rights in any way.” E.J.K. Br. 10. To the contrary, section 144.341 interferes with Calgaro’s constitutionally-protected rights to raise her children. Fourth, Calgaro did not allege government constraint or compulsion as required to establish a due process violation. E.J.K. Br. 10–17. To the contrary, Calgaro has shown that the medical providers operating under section 144.341 unconstitutionally interfere with parental rights.

2. Section 144.341 as Minnesota’s mature minor statute is unconstitutional because it is not narrowly tailored to meet a compelling state interest and is fatally underinclusive.

Section 144.341 is unconstitutional because is not narrowly tailored to meet a compelling state interest. First, the statute does not distinguish between children of “fit parents” as opposed to children of “unfit parents.” Fit parents constitutionally have decision-making responsibility for minor children. Unfit parents may not. The statute does not attempt any tailoring for the constitutionally-protected parental rights of “fit parents.”

Second, the statute does not contain a minimum age for the children involved; so children who are not mature are covered. Typically, a mature minor statute would have a “triggering age.” This statute is not a typical mature minor statute because there isn’t a minimum age such as age 16 or 17. Some minors who are not mature will be covered.

Third, the statute covers children who are living apart from parents and

managing their own financial affairs regardless of parental consent. The statute does not attempt any tailoring for fit parents who have consented to their minor children living apart from them and managing their own affairs – e.g., boarding high schools. Fit parents may consent to their minor children living apart from them and making financial decisions, but still retain control over the minor child’s medical care decisions.

Fourth, the statute covers elective procedures which are not medically necessary. The statute does not attempt any tailoring for fit parents who would want to be involved in their minor children’s decision-making for elective medical procedures.

Fifth, the statute is not limited to elective medical procedures which may implicate the constitutional rights of a minor child such as the right to abortion or the right to contraception. The statute does not attempt any tailoring for fit parents who would want to be involved in their minor children’s decision-making which do not involve abortions and contraception.

Sixth, the statute is not limited to emergency situations where a parent could not be practically located and notified. The statute does not attempt any tailoring for non-emergency situations where the parent(s) could be located to be involved in the non-emergency, elective, medical-decision making.

As to a compelling state purpose, because the statute is not limited in any way and does not distinguish between the rights of fit and unfit parents, it is unclear what

the compelling state purpose of the statute is. By lumping together a statute without limitation and a statute without distinguishing between fit and unfit parents, the statute's effect is to terminate the rights of fit parents whenever minor children are living apart from their parents and managing their own financial affairs. The statute, at least facially, is not about providing medical care to mature minors. If that were the goal, then a statute could be drafted covering all mature minors without violating parental rights.

In turn, the underinclusiveness of Section 144.341 which does not cover mature minors living with their fit parent(s) is constitutionally fatal. The Appellees argue that the purpose of the statute is to provide medical services to mature minors. However, the statute only covers minors living apart from their parents; virtually all mature minors live with their fit parents. For the Appellees' compelling state interest for the statute to be credible, mature minors living with their fit parents would have to be included. They are not. So, the underinclusiveness of the statute undermines the credibility of the purported compelling state purpose.

3. Section 144.341 is unconstitutional because it authorizes a deprivation of a fit parent's parental rights over the minor's medical decisions without notice and opportunity to be heard.

Section 144.341 is unconstitutional because it authorizes a deprivation of parental rights of a fit parent over the minor's medical decisions without notice and opportunity to be heard. The statute allows the medical provider to determine whether the minor is living apart from the parent and managing their own financial

affairs. If the medical provider affirms, the fit parent’s right to participate in the minor’s medical care decision making is denied. The statute does not provide the fit parent with notice and opportunity. The respective medical providers have a policy and custom of not providing such notice and opportunity to be heard prior to the statutory deprivation of parental rights.

4. Section 144.341 is not about whether a minor is mature; instead, the statute authorizes an administrative adjudication of emancipation.

Section 144.341 is not about whether a minor is mature; instead, the statute authorizes an administrative adjudication of emancipation. A plain reading of the statute requires the medical provider to determine facts relating to emancipation. Although there is no Minnesota statute that specifically defines a process by which a minor can become emancipated,⁴ under Minnesota Statutes § 144.341, medical treatment of any kind can be obtained by a minor’s “effective consent.”

The statute provides a two-step process of fact determinations by the medical provider before giving non-emergency medical treatment:

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,

⁴ See. Plt.’s Compl. ¶¶93-94; App.32.

- *may give effective consent* to personal medical, dental, mental and other health services, and the consent of no other person is required.⁵

The first determination is whether the minor is living separate and apart from parents and managing personal financial affairs. This fact is determined at the front door of the medical provider:

In my experience, in most medical practices, the front desk is determining who is facially responsible for payment of services rendered and obtaining consent for treatment. If a minor patient states he/she is responsible, the patient is then asked if he/she is living apart from parents and is responsible for his/her own livelihood. If the patient says yes, and has an address separate from a parent, the patient is deemed to be able to give his/her own consent.⁶

The second determination is whether the minor can give “effective consent.” As the phrase in the statute states, the minor “may give effective consent.” Prior to such phrase taking effect allowing the minor child to make medical decisions separate and apart from Calgaro, Calgaro identifies a violated procedural due process right to pre-deprivation notice and hearing.

Minnesota Statutes § 144.345 also affirms that there is a separate determination regarding “effective consent.” This statute provides immunity for providing medical treatment if the provider relied in good faith upon the “capacity” representations of the minor.

⁵ Minn. Stat. § 144.341 (emphasis added).

⁶ Kaardal Decl. Ex. D (Letter of Dr. Kenneth Crabb, Oct. 20, 2016); Dist. Ct. Dckt. No. 47.

Moreover, the statutory phrase “notwithstanding any other provision of the law” refers to the statutory waiver of the attainment of majority age — in Minnesota age 18 — or any other law relating to emancipation. Notably, the statute does not use the word “emancipation” nor requires such a judicial determination.

Accordingly, Minnesota medical providers have adopted the policy and custom that the minor, having satisfied the statutory criteria, “is able to give his/her own consent.”⁷

Importantly, Minnesota courts have not adopted the “mature minor doctrine.” That is, in addition to the emergency exception, certain minor persons under certain circumstances and in connection with specific conditions are deemed to possess capacity to consent to treatment. For instance, the Supreme Court has recognized the “mature minor” principle in relation to the parental right to veto a minor's decision to have an abortion.⁸ “Mature minors” are those who are chronological minors under applicable state law, but who are deemed to have a sufficient ability to understand their circumstances, as well as the proposed treatment.

Under section 144.341, there is no provision that allows Calgaro a legal process to assert or restore her parental rights, to protect the best interests of her minor child, to object to the capacity or competency of her child to give “effective consent,” or to

⁷ Kaardal Ex. D (Letter of Dr. Kenneth Crabb, Oct. 20, 2016).

⁸ *Bellotti v. Baird*, 443 U.S. 622, *rehearing denied*, 444 U.S. 887 (1979).

ensure her minor child appreciates the nature of the treatment and its risks or other consequences to be considered.

It should be without question that gender reassignment medical treatment, as a non-emergency medical procedure, is a major and complex medical process involving both psychological and physical consequences regardless of any positive or negative implications upon the minor.⁹

There is also the issue of “legal capacity” since the minor is contracting with here, Park Nicollet, Fairview, or St. Louis County, or all, for services. Under Minnesota law, a person under 18 generally does not have legal capacity to enter contracts.¹⁰

Finally, the statute at issue does not provide a process for a parent to raise issues of undue influence which may interfere with a minor’s determination of “effective consent” for medical decisions. For example, were independent second opinions sought before a minor made his or her major medical decision?

B. The claim of E.J.K. that Calgareo had other processes to assert parental rights over her child is not relevant to the issues on appeal.

Counsel for E.J.K. assert that if Calgareo wanted to assert her parental rights over E.J.K., she had other avenues to pursue. As E.J.K. noted, “tellingly absent from

⁹ See “Gender Dysphoria, Transsexual Attractions, Sexual Reassignment Surgery and Informed Consent, Child Healing: Strengthening Families <http://www.childhealing.com/articles/transsexualIssues.php> (last visited Dec. 13, 2016).

¹⁰ See, e.g., *Ramsey County v. X.L.*, 853 N.W.2d 813, 818 (Minn. App. 2014).

Calgaro’s brief is any mention of the numerous procedures that were available to her if she wished to exercise parental authority over E.J.K.”¹¹ The argument has no merit.

First, Calgaro, throughout this entire process has maintained that she always had parental authority over E.J.K. Moreover, Calgaro had a court custody order that had adjudicated that authority, a fact E.J.K. omits. Calgaro’s complaint is how the Appellees stripped Calgaro of her authority without notice and without a hearing. The filed declarations of Calgaro described in detail the circumstances of E.J.K. living *temporarily* outside her home, but retaining a residence with her. Under no circumstances did Calgaro believe that E.J.K. was “emancipated”—wholly or partially.

Second, determinations of E.J.K.’s emancipation occurred through the decisions of third parties under statutes which the parties assert granted them such authority. E.J.K. fails to explain how a child protection petition under Minnesota Statutes § 260C.007 provides the authority to overturn those decisions. A child protection petition under Minnesota Statutes § 260C.007 would not restore or provide the relief Calgaro now seeks through federal courts. Challenging the governmental entity decisions (here, including Park Nicollet and Fairview) in state court through a child protection petition would be an exercise of legal futility.

As also explained in district court,¹² Calgaro did not assert a claim under Minnesota’s Uniform Declaratory Judgment Act in federal court, nor could she in

¹¹ E.J.K. Resp. Br. 26.

¹² Calgaro Resp. to Mots. To Dismiss; Dist. Ct. Dckt. No. 65.

state court. Minnesota’s 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.”¹³ “A party seeking a declaratory judgment must have an independent, underlying cause of action based on a common-law or statutory right.”¹⁴

But, Minnesota law provides no remedy for the constitutional claims asserted here. “[I]here is no private cause of action for violations of the Minnesota Constitution.”¹⁵ Thus, Calgaro has no cause of action under Minnesota law to vindicate her rights.

C. Section 1983’s state action requirement is met for Park Nicollet and Fairview.

The Supreme Court has ruled that where private individuals meet the state action requirement of the Fourteenth Amendment, they will be deemed to be acting “under the color of state law” for purposes of § 1983 claims.¹⁶ Suits against private individuals under § 1983 may be brought if their conduct is deemed to be “state action.”¹⁷ A private party will be deemed a state actor where it performs a traditional public function. Likewise, where the government delegates official functions that

¹³ *Hoelt v. Hennepin Cnty.*, 754 N.W.2d 717, 722 (Minn.App.2008) (quotation marks omitted), *review denied* (Minn. Nov. 18, 2008).

¹⁴ *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 916 (Minn. App.2003).

¹⁵ *Eggenberger v. W. Albany Tp.*, 820 F.3d 938, 941 (8th Cir. 2016), *cert. denied sub nom. Eggenberger v. W. Albany Tp., Minn.*, 137 S. Ct. 200 (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).

¹⁶ *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982).

¹⁷ *Id.*

implicate statutory or constitutional duties, state action will be found.¹⁸

Here, the state, using Minnesota Statutes §144.341 as a genesis, authorized Park Nicollet and Fairview Health to determine the emancipation of a minor child to provide medical services if the child had the capacity to give effective consent, terminating the parental rights of the child's parent or parents. Both determinations are traditionally and exclusively those of the judiciary.¹⁹ The medical providers had the option, under the statute, to refuse to make that adjudication; but once accepting to make the adjudications, the medical providers receive statutory and common law immunity similar to that of the judiciary. Under these circumstances, the medical providers' acceptance of the statutory undertaking triggers constitutionally-protected parental rights.

Therefore, the medical providers are state actors because of their determinations of E.J.K.'s emancipation under section 144.341. Their determinations are acts performing a traditional public function of the courts. In Minnesota, there is no statutory procedure to determine emancipation. Because emancipation cannot be presumed, "[i]t must be proved."²⁰ Whenever the medical provider acts under section 144.341, the medical provider, expressly or implicitly, modifies parental rights.

¹⁸ *E.g. Rice ex rel. Rice v. Correctional Medical Services*, 675 F.3d 650, 670–73 (7th Cir. 2012); *Pollard v. The GEO Group, Inc.*, 629 F.3d 843, 854–58 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 2449 (2011) and *rev'd on other grounds*, 132 S. Ct. 617 (2012).

¹⁹ *E.g., In re Welfare of Child of W.L.P.*, 678 N.W.2d 703, 709 (Minn. App. 2004). *See* Minn. Stat. §260C.301, subd. 1(b) (2002).

²⁰ *Lufkin v. Harvey*, 154 N.W. 1097, 1098 (Minn. 1915).

Here, the medical providers made their own factual determinations as “sole arbiter of the facts”²¹ regarding E.J.K.’s emancipation. However, they failed to consider *all* the facts as is required under “Minnesota law” as it is inclusive of Calgaro’s rights as a parent. In other words, the medical providers exercised their legal authority as would a judicial entity. In short, each medical provider was the adjudicator in a quasi-judicial proceeding in which there was a clash of rights between those of a minor and those of the parent.

The medical providers assert that (1) they merely followed Minnesota Statutes § 144.341, (2) no one else was bound by its decision and (3) E.J.K. was not “in any way, emancipated.”²² Additionally, they argue that they did not act in a public function as an adjudicator of facts because the procedures they engaged in was codified by section 144.341.²³

As detailed above, section 144.341 required Park Nicollet and Fairview to determine two factual issues for E.J.K. as a fact-finder:

1. “living separate and apart from parents ... whether with or without the consent of a parent... *regardless of the duration* of such separate residence,” and
2. “managing personal financial affairs, *regardless of the source or extent* of the minor's income....”²⁴

²¹ *In re Fjibr*, 184 N.W. 2d 22 (Minn. 1971).

²² Park Nicollet Resp. Br. 14.

²³ Fairview Resp. Br. 19-21.

²⁴ Emphasis added.

Park Nicollet and Fairview, after it determines those two particular facts in favor of a minor, declares that the minor has capacity to make medical decisions separate and apart from the minor's parent(s).

The underlying adjudication included the “weighing of evidentiary facts.”²⁵ Under Minnesota law, emancipation cannot be presumed; it remains a factual adjudication. Thus, the medical providers act in a traditional judicial function in adjudicating facts relating to modification of parental rights over minor medical care decision making.

Additionally, Fairview relies upon *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) for the proposition that it did not act in a traditional public function or become a state actor merely by following the statute. *Flagg Bros.* provides no support to Fairview. In *Flagg Bros.*, the Supreme Court opined that the “settlement of disputes between debtors and creditors is not traditionally an exclusive public function.”²⁶ Moreover, it involved the field of private commercial transactions.²⁷ Here, the medical providers did make factual findings that emancipated E.J.K. without regard to the liberty interests of Calgaro. The conclusion reached is not within the realm of private conduct between two “contracting parties.” The offending statute establishes a

²⁵ *Id. citing Minn. Ctr. for Env'tl. Advocacy v. Metro. Council*, 587 N.W.2d 838, 842 (Minn. 1999).

²⁶ *Flagg Bros., Inc.*, 436 U.S. at 161.

²⁷ *Id.* at 162.

process for the medical providers to make a determination of rights held by the minor and by the parent.

Fairview also misconstrues Calgaro's argument that Fairview "emancipated E.J.K. by providing her with medical services when she was a minor."²⁸ As detailed above, emancipation occurred when Fairview and Park Nicollet determined it. The act of providing medical services came after Fairview's and Park Nicollet's determination of emancipation.

II. The County is liable for a section 1983 violation.

The County does not deny its wrongdoing; nowhere does the County identify from what authority it relied upon to determine E.J.K. emancipated. The statute the County relies upon, Minnesota Statutes § 256D.05, subd. 1(a)(10)(iii), provides only two instances in which the government could recognize emancipation. First, when the minor "has been emancipated by a court of competent jurisdiction."²⁹ The County does not identify, nor can it, a court order of emancipation for E.J.K. because none exists. Second, under the same statute, the County could determine E.J.K.'s emancipation under the provision "otherwise considered emancipated under Minnesota law."³⁰

²⁸ Fairview Resp. Br. 25.

²⁹ St. Louis Cty. Resp. Br. 4, quoting Minn. Stat. § 256D.05, subd. 1(a)(10)(iii) defining "legally emancipated." Subdivisions (i) (marriage) and (ii) (military service) are not applicable to the circumstances of the present case.

³⁰ Minn. Stat. § 256D.05, subd. 1(a)(10)(iv).

What is known is Minnesota common law regarding emancipation. Minnesota common law on emancipation has not been overruled nor statutorily preempted. Minnesota courts have declared that emancipation “is not ... to be presumed. It must be proved.”³¹ The County made its own factual determination as the “sole arbiter of the facts”³² regarding E.J.K.’s emancipation; however, the County failed to consider *all* the facts as is required under “Minnesota law.” For example, Minnesota has different degrees of emancipation: “[e]mancipation may ... be partial.”³³ Even under partial emancipation, Calgaro would retain some parental rights.

As the district court noted, only a court order can terminate Calgaro’s parental rights.³⁴ No court proceeding occurred here. What is known is that Calgaro, by court order, had sole physical and joint legal custody over the minor.³⁵ For all intents and purposes, the County’s decision *amended the existing court order* without notice and a hearing. By doing so, the County avoided not only constitutional requirements, but a previous judicial ruling.

The County admits to a policy or custom of not providing notice and opportunity to be heard to a parent before determining a minor’s emancipation under

³¹ *Lufkin v. Harvey*, 154 N.W. 1097, 1098 (Minn. 1915).

³² *In re Fiihr*, 184 N.W. 2d 22 (Minn. 1971).

³³ *Id.*

³⁴ Or. 5, App.62.

³⁵ Plt.’s Compl. ¶44; App.23.

Minnesota Statutes § 256D.05, subd. 1(a)(10) for the purpose of the minor’s general assistance.³⁶ By doing so, the County violates parental rights.³⁷

The County argues that it merely followed the “commands of state law”,³⁸ therefore, the County cannot be held responsible for the injury incurred.³⁹ While the County acknowledges that this “rule” has not been adopted by this Court,⁴⁰ the County’s constitutionally offensive policy of not providing pre-deprivation notice and hearing goes beyond merely enforcing the underlying statute.⁴¹ Those statutes and rules the County relies upon provide that “[g]eneral assistance shall be administered by the county agencies according to the law and rules promulgated by the commissioner [of MnDHS].”⁴²

Minnesota Statutes § 256D.05, subd. 1(a)(10) merely authorized the County to determine the minor’s emancipation to offer general assistance under §256D.01, subd. 1⁴³ and did not mandate it;⁴⁴ but once the County chose to operate under the statute, the County was obligated to fulfill constitutionally-required due process.⁴⁵ The

³⁶ St. Louis Cty. Resp. Br. 14-15.

³⁷ St. Louis Cty. Resp. Br. 14-15.

³⁸ *Id.* 15.

³⁹ *Id.* 16.

⁴⁰ *See Slaven v. Engstrom*, 710 F.3d 772, 781 n.4 (8th Cir. 2013).

⁴¹ *Vives v. City of New York*, 524 F.3d 346, 351 (2d Cir. 2008) (and cases cited).

⁴² St. Louis Cty. Resp. Br. 15 (citations and emphasis omitted).

⁴³ *Id.* 3.

⁴⁴ *Vives*, 710 F.3d at 351 citing *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir.1993).

⁴⁵ Not only was there an existing custody order, but a Minnesota state district court also acknowledged and gave notice to E.J.K. that in order to change his name in a

County made a “conscious choice” to avoid federal constitutional law, Minnesota common law and an existing custody court order.⁴⁶ The County’s policies and customs of circumventing fit parents’ due process rights are shocking.⁴⁷

III. The school district is liable for a section 1983 violation.

Parents have a fundamental liberty interest in the care, custody, and management of their children.⁴⁸ Thus, Calgato has the fundamental right to direct the education of E.J.K. The School District agrees.⁴⁹ Calgato does not need to plead specifically as to which decision was interfered with as it would be futile. The School District determined E.J.K. emancipated, cutting Calgato off from all essential and basic information about her child to which every other parent would have access to. In this regard, Calgato did not plead inconsistent allegations regarding her parental rights⁵⁰ as the School District made decisions that prevented her from gaining *basic* information about her child *to allow her to direct her child’s education*.

To this end, the School District has not denied that it refused to provide Calgato with information she sought. In order to exercise the fundamental right to

court proceeding, E.J.K. required a “trial court adjudication relative to emancipation.” Plt.’s Compl. ¶73; App.28.

⁴⁶ *Vives*, 524 F.3d at 353 (Where state laws mandating enforcement is not a “conscious choice” and thus, a municipality cannot be held liable.) (Original emphasis).

⁴⁷ *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n. 8 (1998); *Terrell v. Larson*, 396 F.3d 975, 978 n. 1 (8th Cir.2005) (en banc).

⁴⁸ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also Troxel v. Granville*, 530 U.S. 57, 65–66(2000) (plurality opinion).

⁴⁹ Sch. Dist. Resp. Br. 16 *citing Stevenson v. Blytheville Sch. Dist. #5*, 800 F.3d 955, 966 (8th Cir. 2015).

⁵⁰ *Id.* 18-19.

direct her child's education, Calgaro required information about the status of E.J.K. at the school. For instance, a failing student may need tutorial assistance; a successful student may need to customize an educational path. A parent needs basic information from the school to determine the child's educational direction.

The School District has listed a litany of case law regarding the limitations of the scope of the right to direct a child's education.⁵¹ However, the scope is not the issue. The School District's decision of emancipating E.J.K. which precluded Calgaro from all school information about E.J.K. directly interfered with Calgaro's exercise of her parental rights.

The School District argued that Calgaro has no constitutional right of access to education records, citing this Court's dicta in *Schmidt v. Des Moines Pub. Schools*, 655 F.3d 811, 816 (8th Cir. 2011): "It is open to question whether and to what extent the fundamental liberty interest in the custody, care, and management of one's children mandates parental access to school records."⁵² However, contrary to the School District's interpretation, the appellate court in *Crowley v. McKinney*, 400 F.3d 965, 968-71 (7th Cir. 2005), did not "expressly rule[] on the question ... that a parent does not possess a constitutional right to access educational records."⁵³ The court made no such ruling: "It is one thing to say that parents have a right to enroll their children in a private school that will retain a degree of autonomy and thus be free to teach a foreign

⁵¹ See Sch. Distr. Resp. Br. 17.

⁵² *Schmidt*, 655 F.3d at 819.

⁵³ Sch. Dist. Resp. Br. 20.

language, or evolution, or human sexual biology, without prohibition by the state. It is another thing to say that they have a constitutional right to school records, or to be playground monitors, or to attend school functions.”⁵⁴ The extent to which a school may be able to refuse a parent access to school records would be dependent on the access needed to avoid interfering with a constitutionally protected parental right in the absence of any other judicial decree such as a divorce decree limiting the rights of one or the other parent. We do know that Calgaro had full physical and joint legal custody adjudicated by the state district court. Here, the School District *completely* refused Calgaro access to any of E.J.K.’s educational records, based upon the minor’s emancipation:

[Cherry School Principal Johnson] refused to provide me with any information concerning my child E. I was informed that I could not look at any record regarding E.⁵⁵

Not only did Mr. Hall [a School District representative] decide to deny me receiving a copy of the "emancipation letter" but also of all records, attendance, grades and all such information.⁵⁶

The School District asserts that “due to his confusion regarding the term ‘emancipation,’ Principal Hall inadvertently told Parent that E.J.K. was emancipated.”⁵⁷ Yet, the School District admits Hall had in his possession the legal aid

⁵⁴ *Schmidt*, 655 F.3d at 819

⁵⁵ Calgaro Decl. ¶20 (Jan. 5, 2017); Dist. Ct. Dckt. No. 66.

⁵⁶ Sec. Calgaro Decl. (Jan. 12, 2017); Dist. Ct. Dckt. No. 74.

⁵⁷ Sch. Dist. Resp. Br. 5.

clinic letter asserting E.J.K. as “emancipated.”⁵⁸ It is from this the School District acted. Whether the “term is regularly used in the field of education”⁵⁹ or not, Principal Hall, with the support of the School District, undertook actions interfering with Calgaro’s right to direct E.J.K.’s education.

As to the School District’s argument that Appellant has waived some legal arguments, we previously wrote above that “parents have a fundamental liberty interest in the care, custody, and management of their children” and cited two cases for this proposition: *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) and *Troxel v. Granville*, 530 U.S. 57, 65–66(2000) (plurality opinion). Whether a parent is “fit” is not a new “issue,” but a shift in approach:

[A]s a general rule, we do not consider issues not presented to the district court, ‘a blanket statement condemning new arguments is far too broad.’ *In re Osweiler*, 346 F.2d 617, 621 (C.C.P.A.1965).

The real question should be whether the new argument is such as to raise a new issue.... [W]e think it would be in disharmony with one of the primary purposes of appellate review were we to refuse to consider each nuance or shift in approach urged by a party simply because it was not similarly urged below.⁶⁰

As the Court knows, the fundamental issue from the beginning of this litigation has been whether the actions of the Appellees interfered with the protected parental rights

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Universal Title Ins. Co. v. U.S.*, 942 F.2d 1311, 1314–15 (8th Cir. 1991).

of Calgaro. The School District does not dispute this proposition.⁶¹ Calgaro has not presented entirely new issues, but instead has shifted in approach to assist in the judicial function.⁶²

Again, Calgaro did not seek to sue E.J.K. as a defendant, but as an interested party due to the claim for prospective relief:

E. is a necessary party to afford the injunctive relief Calgaro seeks under Rule 19 of the Federal Rules of Civil Procedure. Nevertheless, as Calgaro notes in her declaration, E. did make misrepresentations to the Mid-Minnesota Legal Clinic.⁶³ However, the essence of the underlying Complaint is not his misrepresentations, but that of those Defendants regarding what they determined and the subsequent lack of notice and due process Calgaro experienced.⁶⁴

Notably, in response, the School District shifted its arguments regarding its determination that E.J.K. was “emancipated” to “homeless.” As we argued in district court, the filed declaration of Scott Hall (for the School District)⁶⁵ admitted to the facts relating to the alleged violations of Calgaro’s due process rights. These violations were egregious.

E.J.K. was a disgruntled teenager—but still a minor child—that manipulated the

⁶¹ Sch. Dist. Resp. Br. 21-22.

⁶²“A judge teaches law to people who come to court.” *Culhane v. Aurora Loan Services of Nebraska*, 826 F.Supp.2nd 352, 356 (2011), *aff’d* 708 F.3d 282 (1st Cir. 2013) (internal quotations omitted).

⁶³ E. did not sign the letter; E. did not have the “letter of emancipation” notarized; it is not an adjudicated determination by a judicial body.

⁶⁴ Calgaro Resp. to Mots. To Dismiss 47-48 (Jan. 5, 2017) Dist. Ct. Dckt. No. 65.

⁶⁵ Hall Decl. (Jan. 5, 2017); Dist. Ct. Dckt. No. 56.

system and others with facts that were less than truthful.⁶⁶ E.J.K. essentially ran away because of a perceived conflict with his mother.⁶⁷ E.J.K. had a home with his mother and that home was always been open to him.⁶⁸ Calgario may not have liked E.J.K.’s change of lifestyle, but E.J.K. was never rejected. E.J.K. was not homeless.⁶⁹

Nevertheless, the Cherry School principal, Mr. Johnson, confirmed and affirmed by the School District, declared that E.J.K.’s enrollment was based upon the School District’s final determination that (a) E. was homeless⁷⁰ and (b) E. was emancipated.⁷¹

As for their decision of “homelessness,” the documentation provided by Hall⁷² reflects that the minor “student is not w/parents as unsupporting of life style. *Is trying to legally sever relationship with family.*”⁷³ The statement does not assert that the child is homeless. E.J.K. was not. Notably, no one asked Calgario about E.J.K.’s homelessness.⁷⁴

Regardless, the School District and principal, by their determination of E.’s “homelessness,” were “required to follow the federal McKinney-Vento Homeless

⁶⁶ Sec. Calgario Decl.; Dist. Ct. Dckt. No. 74.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* ¶3.

⁷¹ *Id.* ¶11.

⁷² Hall Decl. Ex. 1; Dist. Ct. Dckt. No. 56.

⁷³ *Id.* (Emphasis added).

⁷⁴ Sec. Calgario Decl.; Dist. Ct. Dckt. No. 74.

Assistance Act...⁷⁵ It would appear, because of Calgaro’s complaints to Cherry School’s principal and the School District regarding E.’s placement, Calgaro should have received a “written explanation of the school’s decision regarding school selection or enrollment, including the rights of the parent to appeal the decision....”⁷⁶

There is no evidence the principal or School District processed Calgaro’s complaint to the proper authorities or directed her accordingly. They simply refused her access to documents or to any information regarding E.J.K.’s education based on his “emancipation.”

Moreover, the School District admitted to determining E.J.K. as emancipated, recognizing the legal aid letter, even though it was not a court order.⁷⁷ Having also admitted that there is no policy regarding “emancipated minors,” the School District admitted by omission the lack of process as it pertains to the termination of parental rights with no notice or hearing in the pre- or post-deprivation context. At least under state procedures under McKinney-Vento, a process is available; but, as stated, none was provided here because of School District’s affirmed determination of emancipation. We also note the lack of any declaration that the School or School District had any process to notify fit parents.⁷⁸

⁷⁵ Hall Decl. ¶3.

⁷⁶ Minnesota State Procedures–Dispute Resolution under McKinney-Vento Act, Kaardal Decl. Ex. F.

⁷⁷ Hall Decl. ¶¶11 and 7; Dist. Ct. Dckt. No. 56.

⁷⁸ See Kaardal Decl. Ex. E, requiring schools to establish homeless liaison and outreach to parents; Dist. Ct. Dckt. No. 75.

IV. The present appeal is not moot because the adjudication is about the prospective violation of Calgaro’s constitutional rights and because the complaint seeks monetary damages.

The School District’s argument regarding the present appeal as being moot is without merit.⁷⁹ Calgaro’s underlying Complaint is about her rights, not E.J.K.’s rights. Calgaro’s principal brief recognizes her rights as a fit parent, an argument that appears to trouble the School District. The case relied on, in part, is *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion) referenced in paragraph 47 of the underlying complaint. Expanded use of the case does not raise a new issue; Calgaro’s parental rights remain at issue.

Calgaro, who has additional minor children beyond E.J.K., seeks prospective relief including prospective declaratory relief and an injunction which are all within the court’s jurisdiction to grant.

Calgaro also seeks monetary damages. “Unlike claims for injunctive relief challenging ongoing conduct, a claim for damages cannot evade review; it remains live until it is settled, judicially resolved, or barred by a statute of limitations.”⁸⁰ At the time the School District made its decision resulting with the interference of Calgaro’s fundamental right to direct the education of E.J.K., she was harmed. Her parental rights were targeted. She was damaged.

⁷⁹ *Keup v. Hopkins*, 596 F.3d 899, 904 (8th Cir. 2010).

⁸⁰ *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 77 (2013); *cf. Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 683 (2016), *as revised* (Feb. 9, 2016).

V. The brief of amicus curiae WPATH is limited to a few issues.

The underlying appeal, contrary to amicus curiae WPATH, is not a challenge to the ability of individuals to seek medical assistance to deal with a desire of belonging to or becoming a particular gender. Further, WPATH does acknowledge the complexity of the issue and the treatment. However, WPATH does not address the legal consequences of the Minnesota statute E.J.K. utilized to obtain transgender treatment without parental consent.

Calgaro noted in district court that “[i]t should be without question that gender reassignment medical treatment, as a non-emergency medical procedure, is a major and complex medical process involving both psychological and physical consequences regardless of any positive or negative implications upon the minor. “Endocrinologists who are [providing] puberty blocking drugs and hormones to these youth, mental health professionals who are affirming the surgery and surgeons have a professional responsibility to warn parents and youth of the documented risks associated with both the drugs given and the surgery.”⁸¹ Under the existing statute at issue, regardless of how long the minor lived outside the home (a day, a week, a month, or year), if the minor is able to pay for the treatment, the minor will receive non-emergency medical procedures without parental consent of a fit parent. So, in fact, the claims before this

⁸¹ Calgaro Memo. for S.J. 35-36 (Dec. 15, 2016) citing at n.100 “Gender Dysphoria, Transsexual Attractions, Sexual Reassignment Surgery and Informed Consent, Child Healing: Strengthening Families; <http://www.childhealing.com/articles/transsexualIssues.php> (last visited Dec. 13, 2016); Dist. Ct. Dckt. No. 46.

Court go beyond transgender medical rights; they involve constitutionally-protected parental rights.

VI. E.J.K. was an interested party, not a defendant, in the trial court proceeding.

E.J.K. has misconstrued Calgaro's underlying Complaint. E.J.K. was included as a party merely because the declaratory relief sought made him an interested party. No one accused E.J.K. of acting as a state actor.⁸² Moreover, Calgaro did not seek monetary damages from E.J.K.

Dated: October 18, 2017.

/s/ Erick G. Kaardal
Erick G. Kaardal, 229647
Mohrman, Kaardal & Erickson, P.A.
150 South Fifth Street, Suite 3100
Minneapolis, Minnesota 55402
Telephone: 612 341-1074
Facsimile: 612-341-1076
Email: kaardal@mklaw.com
Attorneys for the Plaintiff-Appellant

⁸² E.J.K. Resp. Br. 8.

CERTIFICATE OF COMPLIANCE

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

The undersigned certifies that the Brief submitted herein contains 6,440 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
Erick G. Kaardal