

No. 17-3113

In the
United States Court of Appeals
for the
Third Circuit

JOEL DOE, a Minor, by and through his Guardians John Doe and Jane Doe;
MACY ROE; MARY SMITH; JACK JONES, a Minor, by and through his
Parents John Jones and Jane Jones

Appellants,

v.

BOYERTOWN AREA SCHOOL DISTRICT; DR. BRETT COOPER, in his
official capacity as Principal; DR. E. WAYNE FOLEY, in this official capacity
as Assistant Principal; DAVID KREM, Acting Superintendent,

Appellees,

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,

Intervenor-Appellee.

**ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 5:17-CV-01249,
HONORABLE EDWARD G. SMITH, U.S. DISTRICT JUDGE**

***AMICI CURIAE* BRIEF OF SCHOOL ADMINISTRATORS FROM
THIRTY STATES AND THE DISTRICT OF COLUMBIA
IN SUPPORT OF APPELLEES AND INTERVENOR-APPELLEE**

CYNTHIA COOK ROBERTSON
PILLSBURY WINTHROP SHAW PITTMAN
LLP
1200 Seventeenth Street NW
Washington, DC 20036
(202) 663-8000
cynthia.robertson@pillsburylaw.com

OMAR GONZALEZ-PAGAN
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, New York 10005
(212) 809-8585
ogonzalez-pagan@lambdalegal.org

ADDITIONAL COUNSEL FOR AMICI CURIAE LISTED ON FOLLOWING PAGE

ON BRIEF:

RICHARD M. SEGAL
NATHANIEL R. SMITH
KATHRYN A. NYCE
PILLSBURY WINTHROP SHAW PITTMAN
LLP
501 W. Broadway, Suite 1100
San Diego, CA 92101
(619) 234-5000

ROBERT C.K. BOYD
WILLIAM C. MILLER
PILLSBURY WINTHROP SHAW PITTMAN
LLP
1200 Seventeenth Street NW
Washington, DC 20036
(202) 663-8000

TARA L. BORELLI
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308
(404) 897-1880

KYLE A. PALAZZOLO
SALVATORE PRESCOTT & PORTER,
PLLC
1010 Davis Street
Evanston, IL 60201
(312) 283-5711

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*¹

Amici are school districts, superintendents, principals, school board members, general counsel, social workers, and other officials from schools and school districts that have adopted, or are in the process of adopting, inclusive policies and practices for their transgender students.² Together, *amici* represent a broad cross-section of schools and districts from thirty States plus the District of

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

² Individual *amici* are Leah Fregulia, Adelita Grijalva, David Vannasdall, Ed.D., Los Angeles Unified School District, The School Board of Los Angeles Unified School District, Judy Chiasson, Ph.D., Vivian Ekchian, Mónica García, Julie Vitale, Ph.D., San Diego Cooperative Charter Schools, Eldridge Greer, Ph.D., Achievement First Public Charter Schools, Emily Banks, Morgan Barth, Gregory R. Meece, Diana K. Bruce, Denise Palazzo, Jeremy Majeski, Karen Carney, Sarah Shirk, Beth Bazer, Ed.D., Thomas Weber, Thomas A. Aberli, Ed.D., Howard Colter, Matthew Haney, Ken Kunin, Robert A. Motley, Catherine From, Roger Bourgeois, Cyndy Taymore, Lizbeth DeSelm, DeLois Cooke Spryszak, Craig McCalla, Mary Doran, Pamela Retzlaff, Ed.D., Washoe County School District, James C. Morse, Sr., Ed.D., School District of South Orange and Maplewood, Thomas Smith, Ed.D., Craig Vaughn, Arthur DiBenedetto, John O'Reilly, Heidi Carter, Eric Doss, Peyton Chapman, Ziad W. Munson, Ph.D., Suzanne Vincent, Rachel Santa, Ed.D., Kellie M. Hargis, Ed.D., Lindsey Pollock, Ed.D., Emily Sutherland, Brian Schaffer, Lisa Love, Dylan Pauly, Sherie Hohs, Sherri Cyra, Laura H. Love, Jill Gurtner, Monica Schommer, Bryan Davis, Ph.D., Paru Shah, Ph.D., and Tim Kenney. With the exception of *amici* Los Angeles Unified School District, the School Board of Los Angeles Unified School District, San Diego Cooperative Charter Schools, Achievement First Public Charter Schools, School District of South Orange and Maplewood, and Washoe County School District, *amici* join this brief in their individual capacities based on their experiences as school administrators and not as representatives of their respective schools or districts.

Columbia, collectively responsible for educating approximately 1.5 million students annually. *Amici* offer valuable perspectives on a number of the issues in this case, based on their broad collective experience with adopting, implementing, and enforcing such policies in their schools. Counsel for *amici* conducted interviews with certain individual *amici* to obtain their input for this or earlier versions of this brief; synopses of *amici* interviews are on file with *amici*'s counsel Pillsbury Winthrop Shaw Pittman LLP. *Amici* who were not interviewed or are not quoted in this brief have experiences consistent with those expressed herein.

The appendix submitted in conjunction with this brief includes information on the background and relevant experience of each *amicus*.

Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). Appellees and Intervenor-Appellee consent to the filing of this brief. Appellants do not.

SUMMARY OF ARGUMENT

Thousands of transgender students attend American schools every day, many of whom have come forward to request from their schools the same support and respect for their gender identity that all other students receive as a matter of course. In *amici*'s view, it is both the legal and professional obligation of all educators to provide that support and respect to *all* students.

Amici's collective experiences rebut frequently-raised concerns that allowing all students to use sex-specific facilities and amenities that match their gender identity will lead to general disruption; will violate the privacy or "comfort" of other students; or will lead to the abolition of gender-segregated facilities and activities for all students. *Amici* have addressed and in some cases personally grappled with many of the same fears and concerns in their own schools and districts. However, in *amici*'s professional experience, none of those fears and concerns has materialized in the form of actual problems in their schools. Instead, inclusive policies not only fully support the reality of transgender students' circumstances but also foster a safer and more welcoming learning environment for all students.

To the extent that the *amici* have received complaints from cisgender students similar to those raised by Plaintiffs-Appellants here – although in *amici*'s experience such cases have been very rare – they address those concerns in the same way that they would address any privacy-related concern raised by a student: by offering alternatives to the complaining student. The *amici* stress that the answer can never be to forcibly segregate transgender students from other students, or to require transgender students to use sex-specific facilities that do not correspond to their gender, a situation that only creates more problems while solving none.

ARGUMENT

I. Policies Respectful of Every Student’s Gender Identity Ultimately Minimize Disruptions and Help to Create a Safe, Welcoming, and Productive Learning Environment for All Students.

At first, we had our concerns – would letting students participate in activities and facilities that were consistent with their gender identity create problems? What would happen?

Ultimately, we decided that we as the adults needed to manage our fears and give students the respect and dignity that they deserved. And I’m pleased to say that none of our fears has materialized.

Dr. Judy Chiasson Testimony to the California Senate Education Committee on A.B. 1266 (June 12, 2013) (“Chiasson Testimony”).³

As educators who have devoted much of their lives to young people, *amici* recognize that all students deserve the equal respect of, and equal treatment by, their educators. *Amici*’s schools and districts allow transgender students to use the same facilities and opportunities as other students of the same sex. *Amici*’s collective experience is that inclusive policies are necessary for a learning environment that is accessible, safe, and welcoming, which in turn enhances the educational experience for all students. Respecting students’ gender identity eliminates the disruption that results from singling out, stigmatizing, and discriminating against transgender students, and avoids disrupting the normal social interactions involved in use of communal facilities. By contrast, refusing to

³ Available at <https://www.youtube.com/watch?v=Xmq9dIQdsNE> (last visited Jan. 19, 2018).

respect a student's gender identity is "toxic for the student – it says 'you are not welcome,' every day." Robert Motley Interview, Oct. 11, 2016.

Many *amici* initially had concerns over the imagined consequences of fully integrating transgender students into the school community, but *amici*'s experiences over time have revealed that these fears are unfounded. *Amici*'s experiences with the inclusive policies in place in their schools – some for more than a decade – have instead been overwhelmingly positive. Far from being disruptive, invasive, or potentially unsafe, inclusive policies have *minimized* these concerns. The only disruption is caused by an initial lack of clarity about how to support transgender students. As Ms. Bruce of the District of Columbia observes, "A policy that requires equal treatment is not difficult to implement. Beyond sorting it out at the beginning, it's not an ongoing, lingering issue[.]" Diana Bruce Interview, Oct. 5, 2015 ("Bruce Interview"). As educators, "[o]ur goal is to make sure that every young person is as present and as able to engage in academic work as possible. Promoting a safe and welcoming environment is a way to promote education." *Id.* The results have been overwhelmingly successful, not only for transgender students, but for all students, faculty, administrators, and communities as a whole.

A. Students' Experiences in Schools with Inclusive Policies Have Typically Been Positive.

The concerns raised by Plaintiffs-Appellants are unfounded, based on *amici's* years of collective professional experience. Indeed, not only are specific complaints by students very rare, but fears and concerns about inclusive policies are often driven by adults, not students. Most frequently, the students set a leading example recognizing transgender students' rightful place in school facilities that match their gender identity. *E.g.*, Howard Colter Interview, June 6, 2016 ("As to the students, I am most impressed. They are very understanding and accepting of their classmates. It feels like the adult community is struggling with it more."); Bruce Interview ("Young people are pretty savvy and comfortable, and can understand and empathize with someone who just wants to use the bathroom."); Roger Bourgeois Interview, Oct. 8, 2015 ("Bourgeois Interview") ("Most of the problem is with the adults; the students are pretty accepting of these issues."); Dr. Eldridge Greer Interview, Oct. 14, 2016 ("Greer Interview") ("Students are much more resilient and forward-thinking than we as adults are."); Dr. Rachel Santa Interview, May 27, 2016 ("Santa Interview") ("Adults have more issues than the students do."); Dr. David Vannasdall Interview, Sept. 9, 2016 ("Vannasdall Interview II") ("With the kids, there hasn't been a problem at all."); Kathy Canavan, *Transgender bathrooms already happening in Delaware*, DELAWARE BUSINESS TIMES, May 13, 2016 ("Meece Interview") (quoting Gregory Meece)

(“We had a few parents ask some questions, and we’ve had some express thoughts on it, but the students are 100% accepting.”)⁴; Sherie Hohs Interview, Oct. 15, 2015 (“This isn’t a kid issue. It’s an adult issue.”). Based on her more than ten years’ experience working with the inclusive policies in place at Los Angeles Unified School District (“LAUSD”), the second-largest school district in the country, Dr. Judy Chiasson recounts:

Our experience has been that the fears of the adults rarely play out. The students are very affirming and respectful of their classmates. Most of the reaction that I’ve ever encountered has been in response to people’s fears, not the students’ experiences. The students’ experiences have been overwhelmingly positive. I have yet to be called into a situation to respond to an actual incident; I’ve only had to respond to fears, and the fears are unfounded.

Dr. Judy Chiasson Interview, Sept. 23, 2015 (“Chiasson Interview”).

Several *amici* have themselves wrestled with many of the same concerns that Plaintiffs-Appellants raise here, when they were first faced with the need to adopt an inclusive policy. Indeed, Dr. Vannasdall’s district’s initial experience with a transgender student resulted in a complaint and investigation by the U.S. Department of Justice (“DOJ”) and the U.S. Department of Education, Office for Civil Rights (“OCR”). He well understands what it is like to grapple with the actual and anticipated negative reactions from some school community members.

⁴ Available at <http://www.delawarebusinesstimes.com/transgender-bathrooms-already-happening-delaware/> (last visited Jan. 19, 2018).

Dr. Vannasdall recalls that administrators and others within the school district were concerned that respecting the transgender student's gender identity by treating him like any other boy would be disruptive and burdensome. Dr. David Vannasdall Interview, Sept. 23, 2015 ("Vannasdall Interview I").

A simple, open conversation between administrators and the transgender student and his family revealed their concerns to be erroneous assumptions. *Id.* In that conversation, it became "obvious that this student had no intentions of creating a disruption – he just wanted a home and a place to learn, and not worry about which restroom to use." *Id.* Once the administrators understood that the student was simply asking to be treated like any other boy, their obligation as educators became clear: to help this student, and all of their students, "come to school ready to learn." *Id.*

If they're worrying about the restroom, they're not fully there to learn, but instead just trying to navigate their day. Give students the opportunity to just be a kid, to use the bathroom, and know that it's not a disruption, it just makes sense.

Id. Dr. Vannasdall's district reached a voluntary resolution agreement in 2013 with the DOJ and OCR. The resolution agreement included adopting a comprehensive policy respecting students' gender identity covering, among other things, an equal ability to use sex-segregated restrooms and locker rooms

consistent with gender identity.⁵ The outcome over the past three years has been “very positive for the school, the district, and the students.” *Id.*

Dr. Vannasdall now regularly consults with educators across the country, giving informal advice and guidance on inclusive policies for transgender students. *Id.* He understands what it is like to grapple with the actual and anticipated concerns from parents and the community, but when those are the primary concern, “you have people making decisions from the basis of fear and extremes, and that’s never good for kids.” Julie Bosman & Motoko Rich, *As Transgender Students Make Gains, Schools Hesitate Over Bathroom Policies*, N.Y. TIMES, Nov. 4, 2015, at A14 (quoting Dr. Vannasdall).⁶ The “game-changer” for Dr. Vannasdall’s district and for other districts with which he has consulted is when educators “remember what we are here to do,” *i.e.*, to help kids learn. Vannasdall Interview I. Dr. Vannasdall believes that generally school administrators new to

⁵ See Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Office of Civil Rights, OCR Case No. 09-12-1020/DOJ Case No. 09-12-1020 (July 24, 2013), *available at* <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf> (last visited Jan. 19, 2018). See also Letter from DOJ and OCR to Arcadia School District (July 24, 2013), *available at* <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf> (last visited Jan. 19, 2018).

⁶ A version of this article is available online at: <http://www.nytimes.com/2015/11/04/us/as-transgender-students-make-gains-schools-hesitate-at-bathrooms.html> (last visited Jan. 19, 2018).

dealing with transgender students are “overthinking this issue. This doesn’t need to be as tough as some people make it. It can be a good experience for that student and other students as well.” *Id.*

Similarly, Dr. Thomas Aberli of Louisville, Kentucky was unfamiliar with this issue when it first arose, and had concerns about possible disruptions or privacy issues. But Dr. Aberli tried to understand the student’s request on both a personal level and in terms of the legal obligations of the schools. Dr. Thomas Aberli Interview, Oct. 7, 2015 (“Aberli Interview”). He then developed a policy through an extensive collaborative effort with a panel of school administrators, teachers and parents, in which “[w]e considered the issue very carefully and thoughtfully, and posted all of the evidence we reviewed online.” Aberli Interview.⁷ Some in the community expressed the view that inclusive policies might be fine for schools in Los Angeles, but not in their own community (Kentucky). As Dr. Aberli pointed out in his testimony to the Kentucky Senate Education Committee, however, empathy and equality do not stop at state borders:

⁷ See also Dr. Thomas Aberli Testimony before the Kentucky Senate Education Committee on S.B. 76 (Feb. 19, 2015) (“Aberli Testimony”), video excerpt available at <https://www.youtube.com/watch?v=QodplMWsEvQ> (last visited Jan. 19, 2018). The materials Dr. Aberli references as having been posted online are available at <http://schools.jefferson.kyschools.us/High/Atherton/SBDM.html> (last visited Jan. 19, 2018).

The value of human life is the same in Kentucky as it is anywhere else in this nation. And when we're talking about an issue of civil rights, we're talking about the value we put on human individuals.

Aberli Testimony. Understanding that the policy is about protecting students' basic civil rights helped clarify the issue.

It helped people to understand that this wasn't about providing a special accommodation or "special rights" – this is about eliminating discrimination. When you tell a person you will do something that makes them stand out from everyone else, *that's* when you start discriminating against them.

Aberli Interview. When the issue was unfamiliar to many in the community, adults and a handful of students questioned the new policy.

I respect that some people may disagree or even feel uncomfortable with the policy, because honestly, for many people – including myself until a few months ago – they simply weren't knowledgeable, or it wasn't a close enough personal issue in terms of interacting with openly LGBT people to have a comfort level. I acknowledge and respect that. But I am not going to use someone's discomfort as a means for discriminating against a protected population.

Id. Despite the initial opposition, in practice Dr. Aberli "received zero complaints regarding a specific incident of concern for a violation of privacy. The concerns raised by individuals have all been philosophical." *Id.*

Indeed, in *amici's* experience, "an affirming policy has a positive effect on other students as well. If everyone is taken care of, students see that and they value that." Denise Palazzo Interview, Oct. 3, 2015 ("Palazzo Interview"). "When kids see that you are respecting all students, then they know that they will be respected. We are showing them how to treat people respectfully and know they

will be treated the same.” Santa Interview. As Principal Peyton Chapman of Oregon relates:

Students have high integrity radars – if some youth are made fun of, then they know it could happen to them. These fears keep all students in small boxes. They don’t try things out, engage their creativity and figure out who they are and can be. If schools define “who” students need to be and how they should behave, then they are less free to explore themselves, cultures and communities.

Peyton Chapman Interview, May 27, 2016. Respecting every student’s gender identity, by contrast, fosters mutual respect and “creates open and innovative environments.” *Id.*; see also Meece Interview (“I’m really proud of the students who see a student as a human being before they see gender or disability or race.”)

B. Frequently-Raised, Hypothetical Concerns About Disruptions in Restrooms and Locker Rooms Have Not Materialized.

There have not been any issues regarding this policy in locker rooms or bathrooms. But it has brought greater awareness of how we can increase privacy for all students.

Aberli Interview.

No student should be denied use of any gender-specific facilities that are available to other students of the same gender identity solely because he or she is transgender. *Amici* have experience with the hypothetical fears and concerns commonly raised when schools integrate transgender students into gender-specific facilities, including the fear that some individuals might use an inclusive practice to gain access to the facilities designed for use by the other gender for an improper

purpose. *Amici* have found such fears and concerns to be wholly unfounded in practice.⁸

1. Concerns about disruptions in restrooms have not materialized.

“Questions about bathrooms come up in every staff training, and it’s an important thing that school staff want to understand. I think there’s an assumption that there will be disruption around restrooms.” Bruce Interview. But all schools routinely “deal[] with many more adolescent behavior issues than just who’s using the bathroom based on gender identity,” and are adept at addressing those issues.

Id. As with any behavior issue, “oftentimes disruption in our experience has been around inconsistency by staff – and that’s why clear guidance for schools is important[.] . . . Our transgender students just want to use the restroom and be safe when they do it, and that’s all they’re trying to do.” *Id.*

Dr. Aberli of Kentucky similarly reports that Atherton has

⁸ Boyertown’s real-world experience appears to have been no different than *amici*’s real-world experience in this regard. As the district court found (J.A. vol I, 129-130 (Op. 124-125)):

There is no evidence that [Boyertown’s transgender] students have committed any lewd acts in the locker room or bathrooms or that they have even interacted with the plaintiffs in any way whatsoever. There is no evidence that the transgender students have harassed the plaintiffs or any other student. All the evidence showed was that the transgender students were in the facilities for their intended purposes and they conducted themselves appropriately while in those areas.

multiple transgender individuals in our school, and restroom access has not been an issue. . . . [T]here has not been any issue at all with respect to the implementation. It's not a big deal when you look at it from a standpoint of, we're dealing with real people, we're dealing with children. Even at the high school level we're dealing with people who have had a hard enough time as it is, and they're just looking for reasonable support from the school in a very challenging social context, or during a very difficult process, as it is for many of them.

Aberli Interview; *see also Gender Inclusive Leadership in Action*, Video Interview by Gender Spectrum with Dr. Pamela Retzlaff, Nov. 17, 2016 (“Retzlaff Interview”)⁹ (“He’s interested in using the toilet, that’s it. Not looking at anybody’s genitals. Not doing anything else in the bathroom. It’s just using the toilet.”).

2. Concerns about disruptions in locker rooms have not materialized.

Similarly, *amici*'s experiences with inclusive locker room policies have also been positive. As with bathroom use, *amici* related that their transgender students have only sought to use locker room facilities for their intended purpose and without incident. Diana Bruce explains that “our transgender students are not interested in walking around the locker rooms and checking out anatomy. They’re just trying to get through P.E. safely.” Bruce Interview. Similarly, transgender students often have their own sense of modesty, particularly about differences in

⁹ Available at <https://www.genderspectrum.org/blog/gender-inclusive-leadership-in-action-episode-1/> (last visited Jan. 19, 2018).

their bodies that do not match their gender identity. As Dr. Vannasdall explains, “Transgender [s]tudents dealing with this are very discreet. . . . The student’s goal is just not to stand out.” Vannasdall Interview I. Mary Doran of Minnesota concurs: “[W]hen the *coaches* tell me ‘this [transgender policy] isn’t an issue, isn’t a big deal,’ that really says something.” Mary Doran Interview, Oct. 16, 2015.

Educators are already well-equipped to deal with individual students’ requests for additional privacy beyond that afforded by common spaces, because students make such requests for many reasons, most of them having nothing to do with gender identity. As Denise Palazzo explains, “[l]ocker rooms aren’t a [special] concern because we are already accustomed to dealing with students who have unique or special needs in the locker room context. This is just one more type of student that may need additional support in that space.” Palazzo Interview.

Dylan Pauly, of the Madison, Wisconsin Metropolitan School District, concurs:

It’s our goal to have every student comfortable in their learning environment. But if we had a student with a health condition that wasn’t comfortable changing in a locker room with everyone else, we wouldn’t have a “health condition locker room” and a “non-health condition locker room.” This is the same thing. This allows us to offer the same accommodation to every student to allow them to be comfortable.

Dylan Pauly Interview, October 15, 2015 (“Pauly Interview”).

In the rare instances that *amici* have needed to address locker room misbehavior issues, it has been to ensure the safety of the transgender students. “The sad truth is that our transgender children are significantly more likely to be the targets of student misconduct, rather than the perpetrators of it.” Chiasson Interview; *see also* Ken Kunin Interview, June 10, 2016 (“Kunin Interview”) (“The real risk is to people who identify as transgender, or gay, or just ‘other.’”).

3. Concerns about students “posing” as transgender to use facilities improperly have not materialized.

Amici have also frequently addressed the concern that transgender students might just be “confused” or likely to change their minds often about their gender identity, or that non-transgender students might falsely claim to be transgender for some nefarious purpose. Those concerns have not materialized either. Moreover, *amici*’s policies allow schools to make reasonable assessments of individual requests for accommodation. As Dr. Chiasson explained in a letter to Dr. Aberli:

It is reasonable to expect that a student will exercise consistency with respect to their identity and access to facilities. Students cannot switch their identity arbitrarily or opportunistically. [. . .]

If the school strongly suspects that the request is not legitimate, they should provide accommodation for the student while continuing the conversation to better understand the student’s motivation for the request. Being transgender is a deeply rooted identity. . . . It is not subject to arbitrary whims.

Letter from Dr. Judy Chiasson to Dr. Thomas Aberli, May 29, 2014 (“Chiasson Letter”).¹⁰ Similarly, Mr. Bourgeois explains that at his school in Massachusetts,

A student can’t just show up and say, “I’m a male, but I want to start using the girls’ locker room today.” People worry some football player will show up and want to get into the girls’ locker room, but we would not allow that. There’s a process we go through to work with them and their families, and verify their identity.

Bourgeois Interview. All *amici*’s schools follow a similar practice, and as a general matter, it is easy to identify genuine requests.

Some people fear someone will masquerade . . . as transgender to be predatory. . . . I’ve never had that happen, where someone has pretended to be transgender for nefarious reasons. It’s just plain silly to think that [a male student] is going to come to school for months on end, wear female attire, present as female to all of his friends and teachers, just so he can go into the female locker room.

Chiasson Interview; *see also* Santa Interview (“The hysteria is from misunderstanding. The concern is that the policy will allow a typical high school boy to say he is transgender so he can go peek at girls in the bathroom. I haven’t seen it[.]”). Indeed, schools are very adept at dealing with instances of misbehavior in restrooms and locker rooms precisely because it is not particularly difficult for a student to gain access to another gender’s facilities.

Adolescents can be impulsive, and we have had boys and girls dart into the other bathroom. We find them and deal with them. They

¹⁰ A copy of Dr. Chiasson’s letter to Dr. Aberli is included among the materials posted by Atherton. *See* footnote 7, *supra*.

certainly don't need to masquerade as transgender to engage in that misconduct.

Id.; *see also* Greer Interview (“There are easier ways to get into the girls’ bathroom [than posing as transgender] – and we have policies and consequences to address that.”).

In other words, schools routinely deal with all sorts of behavioral problems – and *amici* would of course “have a problem” with any student actively violating another student’s privacy for any reason, and would deal with that misconduct as it arises. Brian Schaffer Interview, June 1, 2016. Parents, teachers, and administrators alike are always looking out for the safety of *all* students. A practice of respecting transgender students is far more likely to thwart misbehavior in these spaces than to cause it. Notably, Plaintiffs-Appellants offered no evidence of any misbehavior by transgender students in Boyertown schools, and instead “[a]ll the evidence showed was that the transgender students were in the facilities for their intended purposes and they conducted themselves appropriately while in those areas.” (J.A. vol I, 129-130 (Op. 124-125)); *see also* note 8 *supra*.

II. Schools Can and Should Fully Respect Both the Gender Identity and the Privacy Concerns of All Students.

As is the case with Plaintiffs-Appellants here, many of the concerns raised with regard to inclusive policies for transgender students involve perceived threats to the “privacy” or “comfort” of other students. As educators, *amici* are respectful

of the needs and concerns of all of their students. But *amici* strongly disagree that a school should discriminate against transgender students in order to accommodate complaints that *other* students are “uncomfortable” with sharing restroom or locker room facilities with a transgender person. That is simply not how educators deal with students’ discomfort with others or with themselves. To the extent that a student has concerns about sharing facilities with transgender students, schools must help the student deal with that discomfort in a way that does not impinge upon other students’ rights to equal treatment.

Amici agree that one simple solution is to offer private facilities to the student who does not want to use the same facilities as a transgender student. Most of *amici*’s schools offer private facilities similar to Boyertown’s that may be used by persons of either gender, in addition to gender-segregated facilities. Ms. Bruce recounts that, in her schools,

[a]ccording to our policy guidance, if a student has a problem, we can make another bathroom available to that student. I haven’t heard from our schools, however, of students that have asked to use a different restroom in that circumstance. When I train our school staff, some want to ask hypotheticals, but in our experience, this has not been an issue.

Bruce Interview. Indeed, some students may prefer to use these private facilities for any number of reasons, and are permitted to do so without the need to provide an explanation – including in the rare circumstance that a student might not want to use the same facility as a transgender student.

[A]ny student who, for whatever reason, feels uncomfortable in a communal setting – whether because of weight, personal comfort, body image, social anxiety, or other reasons – we will accommodate that without the need for explanation, and they can use a private setting such as a nurse’s room.

Chiasson Interview. Likewise, Dr. Aberli’s school allows any student who wants to use a private restroom to do so.

Any student may use the front office restroom. We don’t ask why. There’s a thousand reasons that a student needs privacy, so it’s our responsibility to accommodate any student for any reason. It could be shyness, or trauma.

Aberli Interview.

When separate facilities are not available or practical to meet student requests for additional privacy, there are other means of providing extra privacy to students when needed, such as using a curtain to create a separate area, or allowing a student to use the locker room before or after other students. Matthew Haney Interview, June 6, 2016. Accommodating individual students’ needs is “something educators do every day,” and educators have proven themselves “very flexible and adaptable in adopting new policies for their students” in order to meet their needs.

Vannasdall Interview II. Providing transgender students what they need to thrive in school is no different. Lauren Slager, *Schools Take Steps to Address Needs of LGBTQ Students*, mLIVE Michigan, Apr. 21, 2016 (quoting Craig McCalla) (“We

make accommodations for all kids in all different ways. We always have, and there's no reason not to for a specific group of people.”).¹¹

Even where a student might express discomfort with sharing facilities with a transgender student, the solution is not to deny the transgender student's use of those facilities. Any student expressing such discomfort should be offered alternative facilities or arrangements to address their concerns. As Mr. Bourgeois explains:

[W]e're not going to tell the transgender student they can't go where they're comfortable. I can still remember the remnants of white people being uncomfortable with black people being in same locker rooms and restrooms, so it's not about whether everyone is “comfortable.” Just because some people were uncomfortable didn't mean you treated people as second-class citizens.

Bourgeois Interview; *see also* Arthur DiBenedetto Interview, Nov. 29, 2016 (“The outcry will be similar to the arguments put forth by those who were faced with black students in white schools when desegregation became the law.”). Mr. Kunin of Maine agrees that “being uncomfortable doesn't overrule someone's rights,” but he also emphasizes that “there are also ways to support the person who is uncomfortable – we would want that person to feel safe and participate, too.” Kunin Interview. Although schools should accommodate requests for extra privacy from any student, no transgender student should ever be *forced* to use

¹¹ Available at http://www.mlive.com/news/ann-arbor/index.ssf/2016/04/schools_take_steps_to_address.html (last visited Jan. 19, 2018).

segregated facilities in order to accommodate the actual or anticipated discomfort of other students.

Particularly in the educational context, policies like those that Plaintiffs-Appellants advocate single out transgender students and require them either to use facilities that are patently inconsistent with their gender, which is not a viable option for many transgender students, or to use a separate restroom – which no other student is required to use – simply because they are transgender. Having to navigate this problem daily seriously interferes with transgender students’ education, impairs their ability to learn and socialize, and results in real physical and emotional harm. Ms. Bruce explains that when transgender students “have reported worrying about whether they can use the restroom that matches their gender identity, they have said they just don’t go to the bathroom at school. That can’t possibly help them learn.” Bruce Interview.

We don’t want them preoccupied with trying not to use the bathroom when they’re supposed to pay attention to trigonometry. . . . We want them to know where they can use the restroom, so they can feel more like anyone else in their school and not like an outsider.

Id.; *see also* Kunin Interview (“A school day is too long a time to wait to use the restroom because one is uncomfortable with the options.”). Although, as noted above, *amici* routinely offer separate facilities to any student requesting additional privacy for any reason (including but certainly not limited to transgender students), no student should ever be forced to use a separate facility simply because they are

transgender. Dr. Aberli agrees that forcing transgender students to use separate facilities is no answer at all:

Tell me what we would say to that child – that there’s something so freakish about you, and so many people are uncomfortable with you, that you have to use a completely separate restroom than the one you feel like you should be using?

Aberli Interview. Instead, in *amici*’s experience, all students’ needs are best served when educators can treat all students equally.

III. Gender-Segregated Spaces and Activities Are Fully Consistent with School Policies Respecting Every Student’s Gender Identity.

Amici have also addressed the lurking hypothetical concern that permitting individuals to use facilities consistent with their gender identity will lead to the abolition of gender-specific facilities. Contrary to that “slippery slope” argument, however, all *amici* continue to maintain gender-segregated facilities in their schools. In fact, respecting the gender identity of transgender students *reinforces* the concept of separate facilities for girls and boys; requiring a girl who is transgender to use the boys’ restroom or a boy who is transgender to use the girls’ restroom *undermines* the notion of gender-specific spaces.

Dr. Chiasson offers an example from her own district, in which a new male student who was transgender had been using the female facilities, incorrectly assuming that, because he was assigned a female sex at birth, that he would be required to do so.

It was equally uncomfortable for him to use the girls' facilities as it was for the girls themselves. When the administration learned of the situation, they told the young man that he could use the boys' facilities. Everyone was relieved.

Chiasson Letter (emphasis added); *see also* Retzlaff Interview (“[H]is classmates were also somewhat relieved because they knew, too, something’s not right [about a boy who is transgender being forced to use the girls’ restroom].”). Mr. O’Reilly similarly commented that, until he considered the effect of forcing a transgender student to use a restroom inconsistent with gender identity, he “hadn’t really understood the literal meaning of the word ‘misfit.’ When forced to use the restroom for the gender they do not associate with, a student literally becomes a *misfit*: someone being forced into a place they don’t belong.” John O’Reilly Interview, Sept. 20, 2015.

In *amici*’s experience, transgender students do not seek to eliminate gender-specific facilities – they merely want to use the facilities that correspond with their gender identity. “Far from being disruptive, our experience has been that those students just want to blend in.” Bourgeois Interview. “Transgender-affirming policies solve problems, not create them. Even if the law allowed it, forcing a transgender boy to use the female facilities would be extremely uncomfortable for all parties involved.” Chiasson Interview.

CONCLUSION

Plaintiffs-Appellants argue that respecting an individual's gender identity is disruptive and impinges upon the rights and well-being of non-transgender individuals. *Amici's* experience as school administrators has proven otherwise: showing respect for each student's gender identity supports the dignity and worth of all students by affording them equal opportunities to participate and learn. Moreover, such policies have not been disruptive – either to the academic climate or to the maintenance of gender-specific facilities – and instead protect the safety and privacy of all youth. *Amici* respectfully request that the Court affirm the District Court's denial of Plaintiffs-Appellants' motion for preliminary injunction.

Respectfully submitted,

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/s/Cynthia Cook Robertson
CYNTHIA COOK ROBERTSON
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street NW
Washington, DC 20036
(202) 663-8000
cynthia.robertson@pillsburylaw.com

OMAR GONZALEZ-PAGAN
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
120 Wall Street, 19th Floor
New York, New York 10005
(212) 809-8585
ogonzalez-pagan@lambdalegal.org

ON BRIEF:

RICHARD M. SEGAL
NATHANIEL R. SMITH
KATHRYN A. NYCE
PILLSBURY WINTHROP SHAW
PITTMAN LLP
501 W. Broadway, Suite 1100
San Diego, CA 92101
(619) 234-5000

ROBERT C.K. BOYD
WILLIAM C. MILLER
PILLSBURY WINTHROP SHAW
PITTMAN LLP
1200 Seventeenth Street NW
Washington, DC 20036
(202) 663-8000

TARA L. BORELLI
LAMBDA LEGAL DEFENSE AND EDUCATION
FUND, INC.
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308-1210
(404) 897-1880

KYLE A. PALAZZOLO
SALVATORE PRESCOTT & PORTER, PLLC
1010 Davis Street
Evanston, IL 60201
(312) 283-5711

Counsel for Amici Curiae

CERTIFICATES

Cynthia Cook-Robertson, counsel for *amici curiae* school administrators, hereby certifies that:

1. Pursuant to L.A.R. 28.3(d), I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.
2. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,966 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman style, with 14-point font.
4. On this date, the foregoing *Amici Curiae* Brief of School Administrators from Thirty States and the District of Columbia in Support of Appellees and Intervenor-Appellee with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.
5. Pursuant to L.A.R. 31.1(c), I hereby certify that the text of the electronic *Amici Curiae* Brief of School Administrators from Thirty States and the

District of Columbia in Support of Appellees and Intervenor-Appellee has been filed with the Court in both electronic and paper form, and that the text of the electronic brief is identical to the text in the paper copies.

6. Pursuant to L.A.R. 31.1(c), I hereby certify that a computer virus detection program was run on the electronic version of this *Amici Curiae* Brief of School Administrators from Thirty States and the District of Columbia in Support of Appellees and Intervenor-Appellee and that no virus was detected. The virus detection program utilized was Symantec Endpoint Protection.

DATED: January 23, 2018

/s/ Cynthia Cook Robertson
Cynthia Cook Robertson