

**United States Court of Appeals**  
*for the*  
**Eleventh Circuit**

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DREW ADAMS, a minor, by and through his next friend and mother,  
ERICA ADAMS KASPER,

*Plaintiff-Appellee,*

– v. –

SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

*Defendant-Appellant,*

TIM FORSON, *et al.*,

*Defendants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION  
DISTRICT COURT CASE NO. 3:17-CV-00739-TJC-JBT

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**BRIEF OF *AMICI CURIAE* SCHOOL ADMINISTRATORS  
IN SUPPORT OF APPELLEE AND AFFIRMANCE**

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*Adams v. The School Board of St. Johns County, Florida*  
Appeal No. 18-13592-EE

**AMICI'S CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Except for the following, all parties appearing before the district court and this Court are listed in the Brief for Appellants, Appellees, and Amici:

- Steven W. Davis—Counsel for Amici School Administrators

The undersigned certifies that no publicly-traded company or corporation has an interest in the outcome of the case or appeal. The undersigned has previously entered this information into the web-based stock ticker symbol CIP, indicating that there is nothing to declare, and that web-based certification remains accurate as of the submission of this brief.

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## IDENTITY OF *AMICI CURIAE*<sup>1</sup>

Below is a list of *amici* who join in this brief of the School Administrators:

Thomas A. Aberli, Ed.D., Principal, J.M. Atherton High School, Louisville, Kentucky

Roger Bourgeois, Retired Superintendent-Director, Greater Lowell Technical Regional School District, Massachusetts

Karen Carney, Head of School, Chicago Friends School, Chicago, Illinois

Heidi Carter, Former Chair, Durham Public Schools Board of Education, Durham, North Carolina

Sherri Cyra, Assistant Superintendent, Middleton-Cross Plains Area School District, Middleton, Wisconsin

Lizbeth DeSelm, Member, Melrose School Committee, Melrose, Massachusetts

Mary Doran, Former School Board Chair, Saint Paul Public Schools Board of Education, St. Paul, Minnesota

Gregory Ewing, Ed.D., Superintendent, Las Cruces Public Schools, Las Cruces, New Mexico

Eldridge Greer, Ph.D., Associate Chief, Student Equity and Opportunity, Denver

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<sup>1</sup>Counsel for *amici*, Boies Schiller Flexner LLP (“BSF”), has prepared and filed this brief, with no participation by counsel for any party. This brief on behalf of *amici* is based upon similar briefs submitted in other cases regarding policies toward transgender students, which were prepared and filed by Pillsbury Winthrop Shaw Pittman LLP and Lambda Legal Defense and Education Fund, Inc.

No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Public Schools, Denver, Colorado

Adelita Grijalva, Board Member, Tucson Unified School District, Tucson, Arizona

Jill Gurtner, Principal, Clark Street Community School, Middleton, Wisconsin

Matthew Haney, Principal, Mount Desert Island High School, Bar Harbor, Maine

Kellie M. Hargis, Ed.D., Executive Principal, Hume-Fogg Magnet High School, Nashville, Tennessee

Sherie Hohs, Social Worker, Madison Metropolitan School District, Madison, Wisconsin

Tim Kenney, Principal, Shorewood High School, Shorewood, Wisconsin

Ken Kunin, Superintendent, South Portland Public Schools, South Portland, Maine

Las Cruces Public Schools, Las Cruces, New Mexico

Laura H. Love, Director of Teaching and Learning for Secondary Education, Middleton-Cross Plains Area School District, Middleton, Wisconsin

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Jeremy Majeski, Former Principal, Komensky Elementary School, Berwyn, Illinois

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Ziad W. Munson, Ph.D., Member, School Board, East Penn School District, Emmaus, Pennsylvania

John O'Reilly, Principal, Academy of Arts and Letters, Public School/Middle School 492, Brooklyn, New York

Denise Palazzo, Statewide Safe Schools Director, Equality Florida; Former Instructional Facilitator and Diversity and LGBTQ Coordinator, Broward County, Florida Public Schools

Lindsey Pollock, Ed.D., Principal, Garden Oaks Montessori Magnet School, Houston, Texas

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Pamela Retzlaff, Ed.D., Former Associate Principal, Hixson Middle School, Webster Groves, Missouri. Principal, The Biome School St. Louis, Missouri

Rachel Santa, Ed.D., Director of Special Education, Cumberland, Rhode Island Schools

Brian Schaffer, Principal, Lamoille Union High School, Hyde Park, Vermont

Monica Schommer, Principal, Park Elementary School, Middleton-Cross Plains Area School District, Middleton, Wisconsin

Paru Shah, Ph.D., President, Board of Education, Shorewood School District, Shorewood, Wisconsin

Sarah Shirk, Clerk of the Board of Trustees, Chicago Friends School, Chicago, Illinois

Cyndy Taymore, Superintendent of Schools, Melrose Public Schools, Melrose, Massachusetts

David Vannasdall, Ed.D., Superintendent, Arcadia Unified School District, Arcadia, California

Craig Vaughn, Superintendent/Principal, Springfield Township School District, Springfield Township, New Jersey

Washoe County School District, Reno, Nevada

Thomas Weber, Head of School, Scattergood Friends School & Farm, West Branch, Iowa

## **STATEMENT OF ISSUES**

Whether this Court should affirm the opinion of the district court, which held:

1. The policy of the Defendant school board, which prohibited transgender students such as Plaintiff Drew Adams from accessing the school restroom that corresponds to their gender identity, violates the equal protection guarantees of the Fourteenth Amendment to the United States Constitution.

2. The policy of the Defendant school board, which prohibited transgender students such as Plaintiff Drew Adams from accessing the school restroom that corresponds to their gender identity, violates Title IX of the Education Amendments of 1972.

## **SUMMARY OF THE ARGUMENT**

School districts across the country have grappled with issues regarding the treatment of transgender students—whether those students will be viewed in accord with their gender identity or whether the students will be characterized by their birth or so-called “biological” sex; whether transgender students will be treated with equal dignity and respect as their peers or whether they will be singled out for disparate treatment; or whether transgender students will be afforded the same access to school facilities and programs as other students of their sex or whether they will be barred from access, which stigmatizes and demoralizes them.

The Defendant here has defended its years-long denial of different treatment to Plaintiff Drew Adams on the basis of fear—fear that accommodating a transgender student would create division within the school and community, fear that permitting Drew to use the boys’ restroom in accordance with his gender identity will destroy privacy for others; and fear that openness towards transgender students will harm others.

The experiences and reflections of *Amici Curiae* School Administrators illustrates that those fears are not reality, and that district after district has seen improvement in the educational experience of all students after implementation of inclusive policies towards transgender students. *Amici* are school districts, superintendents, principals, past and present, and other officials and educators from schools and school districts across the country that have adopted inclusive policies and practices for their transgender students. Together, *amici* represent a broad cross-section of schools and districts from around the country. Their experience shows that inclusive policies are compatible with protection of privacy and safety for all students; that when school districts act in the best interest of transgender students, other students feel secure that they too would be protected when necessary; and that students themselves generally lead the way toward equality and mutual respect.

## ARGUMENT

### I. *AMICI'S* EXPERIENCE SHOWS THAT INCLUSIVE POLICIES TOWARD TRANSGENDER STUDENTS BENEFIT ALL STUDENTS

Educators, school administrators, and school districts throughout the country have developed and implemented inclusive, student-focused policies regarding the treatment of transgender students. These policies are based on recognition that transgender students—like all students—are deserving of equal respect and equal treatment in their educational experiences. Pursuant to these policies, transgender students across the country are afforded equal access to all school facilities and programs provided to other students of their sex—including the right to utilize bathrooms that correspond to their gender identities.

*Amici* are current or former educators, administrators, and school districts which have developed and implemented such inclusive policies. Their collective experience is that inclusive policies, first and foremost, fulfill the “solemn obligation” of school districts “to guard the well-being of the children in their charge.” Doc. 192 at 1. By safeguarding the rights of transgender students and treating them with the same degree of respect as provided to other students, school districts demonstrate to all students that they are welcome and will be protected. “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.” Dr. Rachel Santa Interview, May 27, 2016 (“Santa Interview”). “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.” Dr. David Vannasdall Interview, Sept. 9, 2016 (“Vannasdall Interview II”).

In contrast, Defendant barred Plaintiff-Appellee Drew Adams (“Drew”) from using the boys’ restrooms at his high school, Allen D. Nease High School, and limited him instead to the few gender-neutral restrooms on campus. Doc. 192 at 25.

At the time, the Defendant’s policy towards public school bathroom access was

that “biological boys” may only use boys’ restrooms or gender-neutral single-stall bathrooms and “biological girls” may only use girls’ restrooms or gender-neutral single-stall bathrooms, with the terms “biological boy” and “biological girl” being defined by the student’s sex assigned at birth, as reflected on the student’s enrollment documents.

Doc. 192 at 19. Drew’s birth certificate listed him as “female” and he been listed as “female” when entering the school system in fourth grade. *Id.* at 10, 24. At the end of his eighth grade year he realized he was transgender and came out to his parents; consultation with his therapist confirmed that Drew was transgender. *Id.* at 10. He began transitioning, both socially and medically. *Id.* at 10-12. Following established procedures, Drew also changed his Florida birth certificate and driver’s license to

list him as male. *Id.* at 11-12.<sup>2</sup>

Drew had used the boys' restrooms during his first weeks at high school without incident—until unnamed students complained because they observed Drew entering the boys' bathroom. Doc. 192 at 25. Drew

testified that he feels alienated and humiliated, and it causes him anxiety and depression to walk past the boys' restroom on his way to a gender-neutral bathroom, knowing every other boy is permitted to use it but him.

*Id.* at 27. His need to monitor his fluid intake throughout the day, and his resultant worry about restroom access, adversely affected his school experience. *Id.* at 26-27.

Despite the fact that “[t]here were no reported instances of privacy breaches during the time [Drew] used the boys' restroom at Nease” (Doc. 192 at 27), Defendant presented its restrictive policy before the court below as “involv[ing] concerns for privacy and safety.” *Id.* at 20. Defendant's witnesses testified that the restrictive policy respected the privacy of “the other” students, as well as avoiding “opportunities for students ‘with untoward intentions to do things they ought not to

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<sup>2</sup> The court below held that: “The parties disagree over whether Drew Adams is a boy. I can only answer that question with the evidence given to me at trial. Drew Adams says he is a boy and has undergone extensive surgery to conform his body to his gender identity; medical science says he is a boy; the State of Florida says so (both Adams' Florida birth certificate and Florida driver's license say he is a male); and the Florida High School Athletic Association says so. . . . When it comes to his use of the bathroom, the law requires that he be treated like any other boy.” Doc. 192 at 2-3.

do.” *Id.* at 20. Similarly, the Defendant’s witnesses expressed concerns about the possibility that “a student—a football player for example—could pose as being gender-fluid for the purpose of gaining access to the girls’ restroom,” even though the school board “task force’s research did not reveal any actual situations where a problem like that occurred.” *Id.* at 20-21.

In contrast to the speculative harms raised by Defendant and its administrators in response to the request that Drew continue to use the restroom corresponding to his gender identity, the experiences related herein by *amici* show that adverse consequences have not resulted from inclusive policies. Instead, *amici*’s experiences show that educational decisions based on actual results, rather than speculation, benefit transgender students, and inclusive, respectful policies can have a strong positive effect on the broader student population. The results have been overwhelmingly successful, not only for transgender students, but for all students, faculty, administrators, and communities as a whole.

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.

Dr. David Vannasdall Interview, Sept. 23, 2015 (“Vannasdall Interview I.”)

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<sup>3</sup> Testimony to the California Senate Education Committee on A.B. 1266 (June 12, 2013) (“Chiasson Testimony”)<sup>4</sup>.

**A. Students’ Experiences in Schools with Inclusive Policies Have Been Positive.**

Although the Defendant has portrayed its restrictive policies as aimed at protecting students, *amici*'s professional experience shows that educational policies—particularly those that bear on the fair and equitable treatment of vulnerable students—should be driven by fact and evidence, not fear. Dr. Chiasson, with more than a decade of experience working with the inclusive policies of the Los Angeles Unified School District (“LAUSD”), the second-largest school district in the country, stressed that the fears were unfounded:

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

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<sup>3</sup> Dr. Chiasson is the Program Coordinator for the Office of Human Relations, Diversity and Equity, Los Angeles Unified School District, which is a signatory to this brief.

<sup>4</sup> Available at <https://www.youtube.com/watch?v=Xmq9dIQdsNE> (last visited Feb. 24, 2019).

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").

As *amici* relate, in many instances opposition to inclusive policies seems to spring from adults' personal beliefs or fears of the unknown. In their day to day experience, *amici* have found that often students are quicker to understand that their transgender peers deserve equal respect and treatment. "Most of the problem is with the adults; the students are pretty accepting of these issues." Roger Bourgeois Interview, Oct. 8, 2015 ("Bourgeois Interview"). *See also* Dr. Eldridge Greer Interview, Oct. 14, 2016 ("Greer Interview") ("Students are much more resilient and forward-thinking than we as adults are."); Santa Interview ("Adults have more issues than the students do."); Vannasdall Interview II (with students, "there hasn't been a problem at all."); Sherie Hohs Interview, Oct. 15, 2015 ("This isn't a kid issue. It's an adult issue.").

Several *amici* have experienced their district first considering and then adopting inclusive policies towards transgender students. Their experience shows that although the process at times raises fears about the unknown or possible, unfamiliar effects, those fears did not come to pass. When Dr. Vannasdall's district considered inclusive policies, some within the school district were afraid that the change would be

burdensome and disruptive. Vannasdall Interview I. Discussions with one transgender student and his family made it “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.*

Dr. Vannasdall’s district reached a voluntary resolution agreement in 2013 that included permitting the student at issue access to all sex-specific facilities consistent with the student’s gender identity, as well as adopting a comprehensive policy respecting students’ gender identity, including recognition that gender-based discrimination includes discrimination based on a student’s gender identity or transgender status.<sup>5</sup> The outcome has been “very positive for the school, the district,

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<sup>5</sup> The settlement was reached after an investigation into policies regarding a transgender student conducted by the U.S. Department of Justice (“DOJ”) and the U.S. Department of Education, Office for Civil Rights (“OCR”). *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 Feb. 24, 2019). *See also Letter from DOJ and OCR to Arcadia School District* (July 24, 2013), available at

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).<sup>6</sup> 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 dealing with transgender students are “overthinking this issue. This doesn’t need to be as tough as some people make it. It

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<http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf>  
(last visited Feb. 24, 2019).

<sup>6</sup> A version of this article is available online at:  
<https://www.nytimes.com/2015/11/04/us/as-transgender-students-make-gains-schools-hesitate-at-bathrooms.html>  
(last visited Feb. 24, 2019).

can be a good experience for that student and other students as well.” Vannasdall Interview II.

Similarly, Dr. Thomas Aberli of Louisville, Kentucky had concerns about possible disruptions or privacy issues when his district first considered policies regarding transgender students. 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.<sup>7</sup> Some in the community expressed the view that inclusive policies might be fine for schools in Los Angeles, but not in their own Kentucky community. As Dr. Aberli pointed out in his testimony to the Kentucky Senate Education Committee, however, empathy and equality are not limited by geography:

The value of human life is the same in Kentucky as it is anywhere else in this nation. And when we’re talking

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<sup>7</sup> 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 Feb. 24, 2019). The materials Dr. Aberli references as having been posted online are available at <http://schools.jefferson.kyschools.us/High/Atherton/SBDM.html> (last visited Feb. 24, 2019).

about an issue of civil rights, we're talking about the value we put on human individuals.

Aberli Testimony. Framing the issue as a matter of civil rights, and avoiding discrimination, changed the focus of the discussions.

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.*

**B. In *Amici's* Experience, the Feared Negative Consequences of Inclusive Policies Did Not Materialize.**

As is true of the Defendant school district in the case before the Court, in *amici's* experience, at times community members, parents, and even other school administrators or staff raised concerns about possible negative consequences of an inclusive policy toward transgender students that would permit the use of the bathroom corresponding to the student's gender identity. But *amici* report that those feared consequences did not materialize. Instead, their experience showed that all students—transgender or not—were interested in a safe, accessible learning environment. As Dr. Aberli of Kentucky described his district's experience:

[There have been] 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")<sup>8</sup>

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<sup>8</sup> Available at <https://www.genderspectrum.org/blog/gender-inclusive-leadership-in-action-episode-1/> (last visited Feb. 24, 2019).

(“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.”).

**1. Increased Emphasis on Privacy Can Increase the Comfort of All Students.**

Although this case focuses on restroom policies, *amici*’s experiences with inclusive locker room policies have also been positive. Transgender students often have their own sense of modesty, particularly about differences in 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.

Indeed, in the rare instances that *amici* have needed to address locker room 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 risk is to people who identify as transgender, or gay, or just ‘other.’”). And even there, “[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.

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.

## **2. Students Have Not “Posed” as Transgender to Gain Improper Access to Facilities.**

In this case, the school board defended its policies in part based on a fear that, *e.g.*, an inclusive policy might permit a student “with untoward intentions to do things they ought not to do,” or that a football player might falsely claim to be “gender-fluid” in order to improperly obtain access to the girls’ locker room. Doc. 192 at 20-21. The record below shows that the school board’s own research yielded no instances of such manipulations (*id.* at 21), and neither have the experiences of *amici*.

*Amici* have noted that policies permit 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").<sup>9</sup> Similarly, as Mr. Bourgeois explains, an opportunistic attempt to fake one's way into the opposite-sex locker room would not be permitted.

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. None of *amici*'s schools have reported students maliciously attempting to circumvent the policy for improper purposes.

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

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<sup>9</sup> A copy of Dr. Chiasson's letter to Dr. Aberli is included among the materials posted by Atherton. *See* footnote 7, *supra*.

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.”).

As educators with often decades of experience with teenagers, *amici* are adept at disciplining students for infractions of school rules. It should be no surprise that students can misbehave, but neither should it be surprising that schools can and do react to such misbehavior. Existing rules against in-school disruptive or even dangerous behavior such as bullying or even assault can and should be enforced to protect all students. *See* 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—*amici* “would have a problem” with any student actively violating another student’s privacy, 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 policy respecting transgender students is far more likely to thwart misbehavior in these spaces than to cause it.

## **II. SCHOOL DISTRICTS WITH INCLUSIVE POLICIES CAN, AND DO, MAKE RESPECT FOR THE PRIVACY OF ALL STUDENTS A PARAMOUNT CONCERN**

To the extent that Defendant or its administrators are worried that the presence

of transgender students will violate the privacy or comfort of other students, the experiences of *amici* show that districts can and should address specific concerns of students without discriminating against transgender students. A student who has concerns about sharing facilities with transgender students should have his or her concerns addressed, but school boards can, and must, help that student in a manner that does not infringe other students' rights to equal treatment.

Most of *amici*'s schools offer private facilities that may be used by persons of either gender, in addition to gender-segregated facilities. These facilities are available to all students, for any reason, without the need to provide an explanation. This would apply as well in the event that a student did not want to share a space with a transgender student—he or she could avail themselves of alternate, gender-neutral facilities. The difference between these and the rules applied to Drew by the Defendant is clear—Drew was not given a choice but was required to segregate himself from other students.

[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.

What I have clearly communicated in public is that 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.").<sup>10</sup>

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<sup>10</sup> Available at [http://www.mlive.com/news/annarbor/index.ssf/2016/04/schools\\_take\\_steps\\_to\\_address.html](http://www.mlive.com/news/annarbor/index.ssf/2016/04/schools_take_steps_to_address.html) (last visited Feb. 24, 2019).

Addressing the concerns and well-being of a student who might express discomfort with sharing facilities with a transgender student does not require denying access to the transgender student. 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. 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.

Policies like that of the Defendant school board single out and create a serious dilemma for transgender students like Drew, requiring him either to use a separate restroom simply because he is transgender, or to use facilities that are inconsistent with his gender. Having to navigate this problem daily seriously interferes with transgender students' education, impairs their ability to learn and socialize, and can result in real physical and emotional harm. "A school day is too long a time to wait to use the restroom because one is uncomfortable with the

options.” Kunin Interview. 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 “making transgender students use the nurse’s room” 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, 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. In contrast, all *amici* maintain gender-segregated facilities in their schools where appropriate. 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,

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; *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.

Transgender students (like Drew) have not sought 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

*Amici* School Administrators respectfully request that this Court affirm the district court's judgment.

Dated: February 28, 2019

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2019, seven copies of the brief were dispatched for delivery to the Clerk's Office of the United States Court of Appeals for the Eleventh Circuit by third-party commercial carrier for overnight delivery at the following address:

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