**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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Anmarie Calgaro,

Plaintiff,

vs.

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 J.D.K.,

Defendants.

Court File No. 16-cv-3919 – PAM-LIB

**PLAINTIFF ANMARIE CALGARO'S REPLY MEMORANDUM IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT**

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## TABLE OF CONTENTS

## INTRODUCTION

Although recognizing the psychological turmoil associated with gender dysphoria for which Park Nicollet Health Services is presently treating E., and despite the never ending love of a mother who has not rejected a child of her family, the evidence upon which all Defendants stand upon and the facts attested to in their declarations submitted have been less than truthful.[1]

The Defendants made presumptions not entitled to and deprived Plaintiff Anmarie Calgaro of her parental rights without notice and without a hearing. Not one defendant denies that they know Ms. Calgaro has constitutionally protected parental rights. Not one defendant denies that Ms. Calgaro had no process prior to the termination of those rights.

### I. Both Park Nicollet and Fairview Health are state actors.

The U.S. 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.[2] Suits against private individuals under §1983 may be brought if their conduct is deemed to be "state action."[3] And, a private party will be deemed a

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[1] Second Calgaro Decl. (Jan. 12, 2017). To the extent necessary, Calgaro will respond only to new arguments conveyed by the numerous opposition memoranda submitted in opposition to her motion for summary judgment. No argument is waived.
[2] *Lugar v. Edmondson Oil Co., Inc.,* 457 U.S. 922 (1982).
[3] *Id.*

state actor where it performs a traditional public function.[4] Likewise, where the government delegates official functions that implicate statutory or constitutional duties, state action will be found.[5]

Here, the state, using Minnesota Statute §144.341 as a genesis, authorized Park Nicollet and Fairview Health to determine the emancipation

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[4] *E.g., Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629, 636-40 (6th Cir. 2005) (although private security guards who exercise some police-like powers may not always be viewed as state actors, where guards are endowed by state law with plenary police powers, they qualify as state actors under the public function test; casino's private security police officers were licensed by the state and had the authority to make arrests and thus were afforded power traditionally reserved to the state alone such that guard's conduct on duty on the casino's premises would be considered state action); *Belbachir v. County of McHenry*, 726 F.3d 975, 978 (7th Cir. 2013) (although employees of private firm hired to provide medical services at jail were not public employees, they were performing a public function and thus were acting under color of state law); *Lee v. Katz*, 276 F.3d 550, 554-557 (9th Cir. 2002) (under *Brentwood*, it suffices that a nominally private party satisfy a single state action test and here private lessee of public outdoor area owned by city performed a traditional sovereign function when it sought to regulate free speech activity on city-owned land; although not everyone who leases or obtains a permit to use a state-owned public forum will necessarily become a state actor, here the city retained little, if any, power over the private entity and thus its policing of free speech in the public forum was a traditional and exclusive function of government).

[5] *E.g. Frazier v. Bailey*, 957 F.2d 920, 928 (1st Cir. 1992); *Fabrikant v. French*, 691 F.3d 193, 207–11 (2d Cir. 2012); *Conner v. Donnelly*, 42 F.3d 220, 225, 226 (4th Cir. 1994); *Rosborough v. Management & Training Corp.*, 350 F.3d 459, 460-461 (5th Cir. 2003); *Carl v. Muskegon County*, 763 F.3d 592, 595–98 (6th Cir. 2014); *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); *Lopez v. Department of Health Services*, 939 F.2d 881, 883 (9th Cir. 1991); *Smith v. Cochran*, 339 F.3d 1205, 1213-1215 (10th Cir. 2003); *Craig v. Floyd County, Ga.*, 643 F.3d 1306, 1310 (11th Cir. 2011).

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 mother. Both determinations are traditionally and exclusively those of the judiciary.[6] Both had the option, under the statute, to refuse to make that adjudication, but once accepting to make the adjudication they received statutory and common law immunity. Moreover, their acceptance to make the adjudication also required them to extend to the parent the attendant constitutional protections of due process.

Indeed the word "emancipation" is not in the statute; however, Minnesota common law, found under the Minnesota Supreme Court decision in *Lufkin v. Harvey,* illustrates that the statutory inquiries reflect the court's expectation of a trial court's factual adjudication necessary to determine whether a child is emancipated, in whole or in part.[7]

Park Nicollet and Fairview are state actors acting "under the color of state law" for purposes of §1983 because Minnesota Statute §144.341

[6] *E.g., In re Welfare of Child of W.L.P.,* 678 N.W.2d 703, 709 (Minn. App. 2004) ("The legislature has established nine criteria that support involuntary termination of parental rights. Minn. Stat. §260C.301, subd. 1(b) (2002). The trial court may also voluntarily terminate parental rights if the parent provides written consent establishing good cause to terminate parental rights. Minn. Stat. §260C.301, subd. 1(a) (2002). While a trial court may involuntarily terminate parental rights when only one criterion is proven, the primary consideration in every termination case is the child's best interests. Minn. Stat. §260C.301, subds. 1(b), 7 (2002)."); *Lufkin v. Harvey,* 131 Minn. 238, 154 N.W. 1097 (Minn. 1915).

[7] *Lufkin,* 131 Minn. 238, 154 N.W. 1097.

authorizes medical service providers to perform a traditional public function of adjudicating the facts of emancipation – specifically terminating parental rights concerning a minor child's health care decisions. The medical service providers and the government also have a symbiotic relationship based on the statutes because the government has immunized the medical service providers from lawsuits based on their emancipation decisions under Minnesota Statute § 144.341.

Under Minnesota Statute §144.341, Park Nicollet and Fairview performed a traditional public function by their determination of E.'s emancipation terminating Calgaro's constitutionally protected parental rights.[8] As the Minnesota judicial website confirms:

> Minnesota Statutes do not specifically define a process by which a minor can become emancipated.
>
> Courts will review "Petitions for Emancipation" and decide

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[8] Relying on the public function doctrine, lower courts have ruled that volunteer firefighters should be viewed as state actors. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1144-1148 (3d Cir. 1995); *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 343-348, 16 I.E.R. Cas. (BNA) 843 (4th Cir. 2000). Also, private parties who assist the police in carrying out their investigative functions will be bound by constitutional nor *Burke v. Town Of Walpole*, 405 F.3d 66, 88 (1st Cir. 2005); *Camilo-Robles v. Hoyos*, 151 F.3d 1, 10 (1st Cir. 1998); *Rodriques v. Furtado*, 950 F.2d 805, 814 (1st Cir. 1991); *Kach v. Hose*, 589 F.3d 626, 647-49 (3d Cir. 2009); *Horton v. Flenory*, 889 F.2d 454, 458 (3d Cir. 1989); *Rodriguez v. Smithfield Packing Co., Inc.*, 338 F.3d 348, 355 (4th Cir. 2003); *Payton v. Rush-Presbyterian-St. Luke's Medical Center*, 184 F.3d 623, 627-630 (7th Cir. 1999); *Brunette v. Humane Society of Ventura County*, 294 F.3d 1205, 1208 (9th Cir. 2002); *Warner v. Grand County,* 57 F.3d 962, 964 (10th Cir. 1995).

> on a case-by-case basis if there is sufficient evidence to find that a minor may live "independently" of his/her parents or guardian.[9]

The issue of emancipation is a question of fact:[10] "emancipation is not, however, to be presumed. It must be proved....[11] It is a question of fact."[12] Moreover, under Minnesota common law, emancipation may be "complete, partial, conditional, absolute or limited as to time or purpose."[13] These determinations have been exclusively that of the judiciary. Fairview asserts that it is now the parent who emancipates the minor.[14] But that argument changes nothing; a judicial adjudication is required to make the inquiry and the determination because the termination of parental rights are involved.

## II. Park Nicollet admits to the denial of due process in terminating parental rights of Calgaro.

At first, Park Nicollet makes the presumption that Calgaro has no parental rights at stake when Park Nicollet makes a determination of E.'s emancipation and when it later determines E. could give effective consent

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[9] Verified Complaint ¶16; *see also* http://www.mncourts.gov/Help-Topics/Emancipation.aspx.
[10] *Lufkin,* 131 Minn. 238, 154 N.W. 1097 (Minn. 1915).
[11] *Id.* 154 N.W. at 1098.
[12] *Clay v. Shirley,* 23 A. 521, 522 (N.H. 1874).
[13] *In re Sonnenberg,* 256 Minn. 571, 576, 99 N.W.2d 444, 447-48 (1959) (footnote omitted).
[14] Fairview Health Opp. Memo. at 10 (Jan. 5, 2017).

under Minnesota Statute §144.341.[15] Park Nicollet later qualifies the statement with its acknowledgement of parental rights in "degrees" — from "strongest" to "'no more weighty' than a competent minor's constitutional rights…."[16] Hence, Park Nicollet does not deny Calgaro has parental rights; rather, it concedes they cannot be terminated without some process. Meanwhile, Park Nicollet does not deny that it undertakes a quasi-judicial determination on emancipation effectively terminating Calgaro's parental rights without a parental post-deprivation process to restore or reinstate in whole or in part those rights. Park Nicollet merely presumes all parental rights can be terminated when it engages in the traditional public function of adjudicator — without the attendant rights of due process — even when there is no common law or statutory law to support Park Nicollet's legal position. Further, Park Nicollet ignores that the issue of emancipation is a question of fact:

> Emancipation is not, however, to be presumed …. It is a question of fact.[17]

Park Nicollet took the historical role of the judiciary in its determination of the minor's emancipation because it is a factual

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[15] Park Nicollet Opp. Memo. to Plt.'s S.J. at 5 (Jan. 5, 2017) ("Plaintiff has no constitutional right… to any additional process."). Park Nicollet, in this statement, also begs the question of what process Calgaro was afforded to claim the lack of 'any *additional process?*"). (Emphasis added).
[16] *Id.* at 7-8.
[17] *Lufkin,* 154 N.W. at 1098 *citing Clay v. Shirely,* 23A. 521, 522 (N.H. 1874).

determination with legal consequences. It is Park Nicollet's position that its determination gave the minor child legal authority to act — by terminating existing parental rights Park Nicollet's determination extinguished without process. Yet, nowhere does Park Nicollet investigate, confirm, or affirm the representations of the minor; nor does Park Nicollet determine the credibility of the minor regarding material representations of fact. Perhaps, Park Nicollet does not question the credibility of the minor because it is statutorily immune from liability as long as it does not ask too many questions.[18]

As Calgaro's declaration attests, E.D.K.'s declaration is riddled with inaccuracies — dare we say, misrepresentations of fact made by a very bright minor child acting out and recognizing the psychological issues associated with gender dysphoria and, as a disgruntled teenager who manipulated the system and facts with less than the truth.[19] E.D.K.'s inaccurate declaration emphasizes the caution necessary and the absolute need of due process when decisions are made to terminate parental rights through a determination of emancipation *administratively* as each Defendant has done here.

Likewise, Park Nicollet admits it must determine the answer to the question of whether under the statute's second inquiry a minor child has the capacity to give "effective consent." Troubling is Park Nicollet's cavalier

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[18] Minn. Stat. §144.345.
[19] Sec. Calgaro Decl.

attitude to "effective consent: "'In general, patients who *declare themselves able to give* consent are taken *at face value* unless circumstances warrant further investigation….'"[20] Park Nicollet makes no attempt to dispute that it took E.'s statement of emancipation at "face value," despite the treatment Park Nicollet is providing for, here, "gender dysphoria,"[21] Park Nicollet downplays its emancipation determination terminating parental rights to provide psychologically-dependent treatment to the minor child.

Park Nicollet does not dispute that it terminated Calgaro's full panoply of parental rights *without knowing* whether any degree of her rights remained intact. Regardless, the issue here is the lack of process for Calgaro to assert her rights after the quasi-judicial administrative decision of Park Nicollet of E.'s emancipation.

Meanwhile, gender dysphoria treatment includes anything from "counseling, cross-sex hormones, puberty suppression and gender reassignment surgery…" where "a child's treatment typically involves a multi-disciplinary team of health care professionals, which may include a pediatrician, a psychiatrist, other mental health professionals, a pediatric endocrinologist (specialists in hormone conditions in children) and an

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[20] Park Nicollet Opp. Memo. to Plt.'s S.J. at 6 (emphasis added).
[21] *Id.* at 3.

advocate…..”[22] Here, under Minnesota Statute §144.341, Park Nicollet merely took the word of E. that he lived apart from a parent — for *any length of time* be it a day, week, month, or year — which of itself should give parties pause — due to the statute's vagueness of terms[23] — and that E. could pay for medical treatment regardless of the money source.[24] This sets the statutory stage for Park Nicollet's quasi-judicial emancipation determination.

Notably, Park Nicollet does not disagree that the minor child must have the “capacity” to give “effective consent.”[25] Thus, it admits a second inquiry is made as to the minor's “capacity” as Park Nicollet relies upon the Restatement (Second) of Torts at §892A:

> (2) To be effective, consent must be
>
> (a) by one who has the capacity to consent or by a person empowered to consent for him, and
>
> (b) to the particular conduct, or to substantially the same conduct.[26]

Hence, “capacity” is a different inquiry than “consent.” As the same

[22] “What is Gender Dysphoria,” American Psychiatric Association, reviewed by Ranna Parekh, M.D., M.P.H. (Feb. 2016); www.psychiatry.org/patients-families/gender-dysphoria/waht-is-gender-dysphoria (last visited Jan. 11, 2017); Kaardal Decl. Ex. E (Jan. 12, 2017).
[23] Minn. Stat. §144.341: “[A]ny 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 ….”
[24] *Id.* “[W]ho is managing personal financial affairs, regardless of the source or extent of the minor's income….”
[25] Park Nicollet Opp. Memo. to Plt.'s S.J. at 6.
[26] Restatement (Second) of Torts §892A(2), at 362 (1965).

Restatement (Second) of Torts Park Nicollet relies upon finds, "consent" must be given by a person who possesses the legal capacity to consent, which like an emancipation determination can be a contested issue of fact.[27]

Park Nicollet also contends that to give Calgaro notice and an opportunity for a hearing under §144.341 would mean the applicability of process to "every medical encounter in Minnesota and radically change medical care."[28] Not only is the statement creative hyperbole without supporting declarations, but a misrepresentation of the underlying action.

Park Nicollet asserts that "nothing in §144.341 "suggests that medical care providers must hold a hearing or develop a legal process…."[29] Yet, as Park Nicollet has chosen to perform a traditional function of determining emancipation under §144.341, it must provide a process or otherwise it has exceeded constitutional authority.[30]

**III. E.J.K.'s declaration raises issues of the minor's credibility.**

E. makes a number of misrepresentations of fact, as do others that

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[27] *Id.*
[28] Park Nicollet Opp. Memo. to Plt.'s S.J. at 6.
[29] *Id.*
[30] *See* Plt.'s Resp. Memo. to Defs. Mot. Jdgmt on Pleadings, to Dismiss, & S.J. at 33-46 (Jan. 5, 2017). *Cf. In re Timothy Leslie,* A16-0283 (Minn. Sup. Ct. Jan. 11, 2017) (District court exceeded its lawful authority when, in a criminal proceeding and without the authorization of any rule or statute, it granted a motion and issued an order to restrain a non-party to that proceeding.).

undermine the creditability of the declarations made.[31] For instance, E. was not homeless. E. was not rejected from living at home – although his biological father was incarcerated, it was only for two days, unbeknownst to Calgaro.

**IV. The School District admits to denying Calgaro due process.**

The declaration of Scott Hall and the School District have admitted to violating Calgaro's due process rights by terminating her constitutionally protected parental rights without process. The violations are egregious.

Gender dysphoria is a serious matter. However, E. is a disgruntled teenager — but still a minor child — that has manipulated the system and others with facts that are less then truthful.[32] He essentially ran-away because of a perceived conflict with his mother.[33] E. has a home and that home has always been open to him.[34] E.'s mother may not like E.'s change of lifestyle, but E. was never rejected. E. is not homeless and was not homeless.[35]

Nevertheless, the Cherry School principal, confirmed and affirmed by the School District, now declares that E.'s enrollment was based upon the

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[31] *See* Calgaro Decl.
[32] Sec. Calgaro Decl.
[33] *Id.*
[34] *Id.*
[35] *Id.*

School District's final determination that (a) E. was homeless[36] and (b) was emancipated.[37]

As for their decision of "homelessness," the documentation provided by Hall[38] reflects that the minor "student is not w/ parents as unsupporting of life style. *Is trying to legally sever relationship with family."*[39] The statement does not assert that the child is homeless. E. was not. Notably, no one asked Ms. Calgaro about E.'s homelessness.[40]

Regardless, the School District and principal, by their determination of E.'s "homelessness," were "required to follow the federal McKinney-Vento Homeless Assistance Act…."[41] It would appear, because of Calgaro's complaints to Cherry School's principal and the School District regarding E.'s placement, that in accordance with state procedures they were to follow 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…."[42]

There is no evidence the principal or School District processed

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[36] *Id.* ¶3.
[37] *Id.* ¶11.
[38] Hall Decl. Ex. 1.
[39] *Id.* (Emphasis added).
[40] Sec. Calgaro Decl.
[41] Hall Decl. ¶3.
[42] Minnesota State Procedures – Dispute Resolution under McKinney-Vento Act, Kaardal Decl. Ex. F.

Calgaro's complaint to the proper authorities or directed her accordingly. They simply refused her access to documents or to any information regarding E.'s education based on his "emancipation."

Moreover, they admit to determining E. as emancipated, recognizing the legal aid letter, albeit not as a court order.[43] Having also admitted that there is no policy regarding "emancipated minors," it admits by omission the lack of process as it pertains to the termination of parental rights with no notice or hearing in the 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 parents.[44]

### V. Michael Johnson is a necessary party as is St. Louis County Linnea Mirsch.

The Defendant Michael Johnson and Linnea Mirsch are necessary parties under Rule 19 of the Federal Rules of Civil Procedure.[45]

Notably, St. Louis County does offer any argument not otherwise

[43] Hall Decl. ¶¶11 and 7.
[44] *See* Kaardal Decl. Ex. E, requiring schools to establish homeless liaison and outreach to parents.
[45] *See also* Calgaro Resp. Memo. to Defs. Mot. to Dismiss and for S.J. at 47-49.

addressed in our previous submissions.[46]

## CONCLUSION

Summary judgment should be granted for Calgaro.

Dated: January 12, 2017

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[46] *See.* St. Louis Cty. Opp. Memo. to Calgaro S.J.

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**LR 7.1(c) WORD COUNT COMPLIANCE CERTIFICATE**

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I, Erick G. Kaardal, certify that Plaintiff Anmarie Calgaro's Reply Memorandum in Support of Summary Judgment complies with Local Rule 7.1(c).

I further certify that, in preparation of this memorandum, I used Microsoft Word 2007, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 3,177 words.

Dated: January 12, 2017.

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