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13 SUPERINTENDENT KELLY STALEY,
14 in her official capacity

15 IN THE UNITED STATES DISTRICT COURT
16 EASTERN DISTRICT OF CALIFORNIA

17 AURORA REGINO,

18 Plaintiff,

19 vs.

20 SUPERINTENDENT KELLY STALEY, in
21 her official capacity; CAITLIN DALBY, in her
22 official capacity; REBECCA KONKIN, in her
23 official capacity; TOM LANDO, in his official
24 capacity; EILEEN ROBINSON, in her official
25 capacity; and MATT TENNIS, in his official
26 capacity,

27 Defendants.

Case No.: 2:23-cv-00032-JAM-DMC

**DEFENDANT SUPERINTENDENT
KELLY STALEY'S NOTICE OF MOTION
AND MOTION TO DISMISS FIRST
AMENDED COMPLAINT**

(Fed. R. Civ. Proc. 12)

Date: June 27, 2023

Time: 1:30 p.m.

Crtrm.: 6

Judge: Hon. John A. Mendez

Complaint Filed: January 6, 2023

Trial Date: Not Yet Set

1 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on June 27, 2023 at 1:30 p.m., or as soon thereafter as the
3 matter may be heard in Courtroom 6 of the above-entitled court, located at 501 I Street,
4 Sacramento, California 95814, Defendant KELLY STALEY (“Superintendent Staley”) will and
5 hereby does move this Court to dismiss the following claims raised in the operative First
6 Amended Complaint filed by Plaintiff AURORA REGINO in the above-captioned matter
7 (“FAC”):

- 8 1. First Cause of Action pursuant to Federal Rule of Civil Procedure 12(b)(6) (“Rule
9 12(b)(6)”), as the FAC does not allege the deprivation of a life, liberty or property
10 right secured by the Constitution or laws of the United States;
- 11 2. First Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege an abuse
12 of power which shocks the conscience;
- 13 3. Second Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege the
14 deprivation of a life, liberty or property right secured by the Constitution or laws of
15 the United States;
- 16 4. Second Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege an
17 abuse of power which shocks the conscience;
- 18 5. Third Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege the
19 deprivation of a life, liberty or property right secured by the Constitution or laws of
20 the United States;
- 21 6. Third Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege an abuse
22 of power which shocks the conscience;
- 23 7. Third Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege facts
24 establishing an entitlement to individual notice and hearing;
- 25 8. Fourth Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege the
26 deprivation of a life, liberty or property right secured by the Constitution or laws of
27 the United States;
- 28 9. Fourth Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege an

1 abuse of power which shocks the conscience;

2 10. Fourth Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege facts
3 establishing an entitlement to individual notice and hearing;

4 11. Fifth Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege the
5 deprivation of a life, liberty or property right secured by the Constitution or laws of
6 the United States;

7 12. Fifth Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege an abuse
8 of power which shocks the conscience;

9 13. Sixth Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege the
10 deprivation of a life, liberty or property right secured by the Constitution or laws of
11 the United States; and

12 14. Sixth Cause of Action pursuant to Rule 12(b)(6), as the FAC does not allege an abuse
13 of power which shocks the conscience.

14 This motion is based on the instant Notice of Motion and Motion, the Memorandum of
15 Points and Authorities set forth below, the contemporaneously-filed request for judicial notice, all
16 pleadings in this action, as well as any evidence and arguments that may be offered in the
17 forthcoming reply briefing and hearing on the motion. This motion is made following the
18 conference of counsel pursuant to the Court's standing order which took place on April 18, 2023.

19
20 **LEONE ALBERTS & DUUS**

21 Dated: April 25, 2023

/s/ Jimmie E. Johnson

BRIAN A. DUUS, ESQ.
JIMMIE E. JOHNSON, ESQ.
Attorneys for Defendants

TABLE OF CONTENTS

	<u>Page</u>
	<u>No.</u>
PERTINENT BACKGROUND	9
ARGUMENT	11
I. THE FAC FAILS TO STATE FACTS CONSTITUTING A FACIAL VIOLATION OF PLAINTIFF’S SUBSTANTIVE DUE PROCESS RIGHTS	11
A. PLAINTIFF FAILS TO ALLEGE THE DEPRIVATION OF A RIGHT SECURED BY FEDERAL LAW.	11
i. PARENTS DO NOT HAVE A RIGHT TO IMPOSE THEIR GENDER IDENTITY PREFERENCES	11
ii. PARENTS DO NOT HAVE A RIGHT TO IMPOSE THEIR CURRICULUM PREFERENCES.....	13
iii. PARENTS DO NOT HAVE A RIGHT TO NOTICE AND CONSENT TO TREATMENT	14
B. PLAINTIFF FAILS TO ALLEGE DISTRICT CONDUCT THAT “SHOCKS THE CONSCIENCE”	15
C. PLAINTIFF CANNOT SHOW AR 5145.3 WOULD BE INVALID IN EVERY CIRCUMSTANCE.....	16
D. AR 5145.3 SATISFIES RATIONAL BASIS REVIEW	16
II. THE FAC FAILS TO STATE FACTS CONSTITUTING AN AS-APPLIED VIOLATION OF PLAINTIFF’S SUBSTANTIVE DUE PROCESS RIGHTS	17
III. THE FAC FAILS TO STATE FACTS CONSTITUTING A VIOLATION OF PLAINTIFF’S PROCEDURAL DUE PROCESS RIGHTS	20
IV. THE FAC FAILS TO STATE FACTS CONSTITUTING A FACIAL VIOLATION OF PLAINTIFF’S INTIMATE HUMAN RELATIONSHIP RIGHTS.....	21
V. THE FAC FAILS TO STATE FACTS CONSTITUTING AN AS-APPLIED VIOLATION OF PLAINTIFF’S INTIMATE HUMAN RELATIONSHIP RIGHTS.....	22

Table of Authorities

1
2
3
4
5
6
7
8
9
10
11
12
13
14
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16
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28

Agostino v. Simpson,
2012 U.S. Dist. LEXIS 207375 (S.D.N.Y. Mar. 29, 2012) 21

Am. Mfrs. Mut. Ins. Co. v. Sullivan,
526 U.S. 40 (1999) 20

Bellotti v. Baird,
443 U.S. 622 (1979) 14, 15, 16

Bi-Metallic Inv. Co. v. State Bd. of Equalization,
239 U.S. 441 (1915) 20

Bovee v. Broom,
2012 U.S. Dist. LEXIS 15314 (S.D. Ill. Feb. 7, 2012) 21

Brittain v. Hansen,
451 F.3d 982 (9th Cir. 2006) 11, 17, 22

C.N. v. Wolf,
410 F.Supp.2d 894 (C.D. Cal. 2005) 12

Cnty. of Sacramento v. Lewis,
523 U.S. 833 (1998) 15

Culinary Studios, Inc. v. Newsom,
517 F.Supp.3d 1042 (E.D. Cal. 2021) 21

Doe v. Irwin,
615 F.2d 1162 (6th Cir. 1980) 12-13, 14

Fields v. Palmdale Sch. Dist.,
427 F.3d 1197 (9th Cir. 2005) 11, 12, 13, 17

IDK, Inc. v. Cnty. of Clark,
836 F.2d 1185 (9th Cir. 1988) 21

Halverson v. Skagit Cnty,
42 F.3d 1257 (9th Cir. 1994) 20

Hameetman v. City of Chicago,
776 F.2d 636 (7th Cir. 1985) 21

Hernandez v. Cnty of Alameda,
2023 U.S. Dist. LEXIS 11260 (N.D. Cal. Jan. 23, 2023) 21

Hoye v. City of Oakland,
653 F.3d 835 (9th Cir. 2011) 17

1 *In re Gault*
 2 387 U.S. 1 (1967) 14

3 *John & Jane Parents I v. Montgomery Cnty. Bd. of Educ.*
 4 2022 U.S. Dist. LEXIS 149021 (D. Md. Aug. 18, 2022) 12, 16, 17

5 *Legal Aid Servs. of Or. v. Legal Servs. Corp.,*
 6 608 F.3d 1084 (9th Cir. 2010) 17

7 *Mueller v. Auker,*
 8 700 F.3d 1180 (9th Cir. 2012) 16

9 *Nguon v. Wolf,*
 10 517 F.Supp.2d 1177 (C.D. Cal. 2007) 12

11 *Nelson v. NASA,*
 12 568 F.3d 1028 (9th Cir. 2009) 12

13 *Nunez by Nunez v. City of San Diego,*
 14 114 F.3d 935 (9th Cir. 1997) 14, 15

15 *Parents for Privacy v. Barr,*
 16 949 F.3d 1210 (9th Cir. 2020) 13, 17

17 *Planned Parenthood of Idaho, Inc. v. Wasden,*
 18 376 F. Supp. 2d 1012 (D. Idaho 2005) 14

19 *Planned Parenthood v. Miller,*
 20 63 F.3d 1452 (8th Cir. 1995) 14

21 *Sterling v. Borough of Minersville,*
 22 232 F.3d 190 (3d Cir. 2000) 12

23 *Sylvia Landfield Trust v. City of Los Angeles,*
 24 729 F.3d 1189 (9th Cir. 2013) 15

25 *Thomas v. Evansville-Vanderburgh Sch. Corp.*
 26 258 Fed.Appx. 50 (7th Cir. 2007) 13, 14

27 *United States v. Salerno,*
 28 481 U.S. 739 (1987) 11, 16

Wallis v. Spencer,
 202 F.3d 1126 (9th Cir. 2000) 21

Washington v. Glucksberg,
 521 U.S. 702 (1997) 17

Whalen v. Roe,
 429 U.S. 589 (1977) 12

1 *Witt v. Dep't. of the Air Force,*
2 527 F.3d 806 (9th Cir. 2008) 17

3 *Roberts v. U.S. Jaycees*
4 468 U.S. 609 (1984) 21

5 **Statutes**

6 42 U.S.C. § 1983 11, 15, 20, 21

7 California Education Code § 33308.5(a) 16

8 **Other**

9 District Administrative Regulation 5145.3 8, 9, 10, 11, 16, 17 18, 19, 20, 21

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MEMORANDUM OF POINTS AND AUTHORITIES

1
2 The operative First Amended Complaint (“FAC”) alleges that the Chico Unified School
3 District (“District”) is violating the constitutional rights of Plaintiff AURORA REGINO
4 (“Plaintiff”) to direct the upbringing of her children and to freedom from interference in familial
5 relations. Specifically, Plaintiff alleges that Administrative Regulation 5145.3 (“AR 5145.3”)
6 authorizes District personnel to “socially transition” her children without parental notice and
7 consent. However, despite Plaintiff’s assertions, AR 5145.3 does not authorize District
8 employees to “socially transition” students. As explained in the regulation, as well as other
9 submissions to the Court, “social transitioning” is the child’s own decision to adopt a gender
10 expression which aligns with their own, self-determined gender identity – not a third person’s
11 acceptance and use of that child’s preferred transgender name and pronouns. Far from directing
12 students to express themselves in a particular way, AR 5145.3 simply requires District personnel
13 to accept social transitioning decisions a student has already made, and to keep that information
14 confidential from parents if requested by the student unless disclosure is otherwise permissible
15 such as for the safety of the child.

16 Moreover, the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) has
17 repeatedly held that the right of a parent to direct the upbringing of a child (1) does not usurp the
18 constitutionally-recognized right of privacy held by that child; (2) does not empower a parent or
19 guardian to impose their own gender identity preferences upon the child; nor (3) empowers a
20 parent or guardian to impose their own curriculum preferences upon a public school district.
21 Likewise, precedent further provides that the right of freedom from interference in familial
22 relations is limited to matters of State efforts to (1) physically separate a child from their parent,
23 and/or (2) retaliate against one for the conduct of the other. A public entity maintaining the
24 confidentiality of a child’s gender identity which the child themselves is already keeping
25 confidential from the parent does not constitute an unlawful interference in familial relations.

26 Finally, Ninth Circuit precedent further provides that Plaintiff’s procedural due process
27 claims must fail because AR 5145.3 is a rule generally applicable to the public, not individual
28 persons; and therefore, Plaintiff is not constitutionally entitled to individual notice and hearing.

1 For these reasons, the Court should grant the instant motion, and dismiss all causes of
2 action raised in the FAC.

3 **PERTINENT BACKGROUND**

4 Defendant KELLY STALEY is the Superintendent of the District. Dkt., “First Amended
5 Complaint,” Apr. 10, 2023 (ECF 42) (“FAC”), ¶ 25. In her position, Defendant Staley is
6 responsible for overseeing implementation of District policies. FAC, ¶ 25.

7 Plaintiff AURORA REGINO is the mother of A.S. and C.S., minor students who attend
8 District schools. FAC, ¶¶ 4, 16. During the 2021-2022 school year, A.S. attended an elementary
9 school operated by the District. FAC, ¶ 4.

10 AR 5145.3 sets forth how the District will comply with applicable state and federal civil
11 rights laws concerning discrimination, harassment, intimidation, and bullying based upon any
12 protected category, including race, color, and ancestry, among others. Request for Judicial
13 Notice (“RJN”) No. 1. As of the 2021-2022 school year, AR 5145.3 read, in pertinent part:

14 Gender transition refers to the process in which a student changes from living and
15 identifying as the sex assigned to the student at birth to living and identifying as the sex
16 that corresponds to the student’s gender identity.¹ ...

- 17 1. Right to privacy: A student's transgender or gender-nonconforming status is the
18 student’s private information and the district shall only disclose the information to
19 others with the student's prior written consent....
- 20 6. Names and Pronouns: If a student so chooses, district personnel shall be required to
21 address the student by a name and the pronoun(s) consistent with the student’s gender
22 identity, without the necessity of a court order or a change to the student’s official
23 district record. ...

24 RJN, No. 1 [at pp. 4-7]. In turn, the FAC alleges, in pertinent part:

25 64. ...A.S. went to [school counselor] Ms. Robertson’s office to tell her that she ‘felt
26 like a boy’ or words of similar effect. Ms. Robertson asked A.S. if she had a boy’s name

27 ¹ See also, Dkt., “Declaration of Jack Turban,” Feb. 14, 2023 (ECF 22-3) (at para. 19, defining
28 “social transition”); RJN No. 2 (WPATH SOC 8, at p. S253) (defining “transition”).

1 that she would like to be called and whether she would like to be referred to by male
2 pronouns. A.S. was unsure whether she wanted others at school to start calling her by a
3 male name and pronouns, but she felt pressured by Ms. Robertson, so she responded in
4 the affirmative and told Ms. Robertson her boy's name was "J.S." Ms. Robertson asked
5 A.S. if she wanted her mother to be informed about her new identity at school, and A.S.
6 said she did not. At the time, A.S. ... thought that her mother would be "mad" at her for
7 wanting to identify as a boy. ...

8 66. After the meeting, Ms. Robertson walked A.S. back to her classroom and told her
9 teacher that A.S. was now going by the name "J.S." and male pronouns, and her teacher
10 immediately began referring to her as such. In addition, pursuant to [AR 5145.3] Ms.
11 Robertson and/or A.S.'s teacher arranged for other school personnel to begin referring to
12 A.S. by "J.S." and male pronouns, which they did.

13 67. Once A.S. told Ms. Robertson she "felt like a boy," the Girls Group meetings
14 changed substantially. Instead of arts-and-craft projects, Ms. Robertson now led A.S. and
15 her female classmates in a discussion regarding sexuality and gender identity. ...

16 68. Over the course of the spring semester of 2022, A.S. had approximately two
17 additional one-on-one meetings with Ms. Robertson. At these meetings, Ms. Robertson
18 provided A.S. with additional resources regarding her supposed new male identity, such
19 as referring A.S. to a local community group that advocates for LGBTQ+ causes and
20 discussing "top surgery" and "breast binding" with her.

21 69. A.S. told Ms. Robertson that she wanted to tell her mother about her new male
22 identity, but Ms. Robertson was not supportive of this course of action. [Ms. Robertson]
23 ... encouraged [A.S.] to speak with other family members before telling her mother.

24 70. During this time, pursuant to [AR 5145.3], school personnel and students continued
25 referring to A.S. by her new name and pronouns. Every day at school, A.S. was known as
26 "J.S." and referred to with male pronouns, while at home, she remained A.S. ...

27 FAC, ¶¶ 64, 66-70 (emphasis in original, footnotes omitted).

28 Based upon these allegations, Plaintiff raises substantive due process, procedural, and

1 First Amendment challenges to AR 5145.3. FAC, ¶¶ 99-133.

2 **ARGUMENT**

3 **I. THE FAC FAILS TO STATE FACTS CONSTITUTING A FACIAL VIOLATION**
4 **OF PLAINTIFF’S SUBSTANTIVE DUE PROCESS RIGHTS**

5 A. Plaintiff Fails to Allege the Deprivation of a Right Secured by Federal Law

6 Count One raises a claim under title 42, United States Code section 1983 (“Section
7 1983”), alleging that AR 5145.3 facially violates Plaintiff’s substantive due process rights. FAC,
8 ¶¶ 99-106. To state a claim under Section 1983 alleging a violation of substantive due process,
9 the complainant must establish a “deprivation of life, liberty, or property.” *Brittain v. Hansen*,
10 451 F.3d 982, 991 (9th Cir. 2006) (internal grammatical marks and citation omitted). In addition,
11 the complainant must also establish a “cognizable level of executive abuse of power as that
12 which shocks the conscience.” *Id.* (internal grammatical marks and citations omitted). Finally,
13 “[a] facial challenge to a [policy] is, of course, the most difficult challenge to mount
14 successfully, since the challenger must establish that no set of circumstances exists under which
15 the [policy] would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).

16 i. Parents Do Not Have a Right to Impose their Gender Identity Preferences

17 Here, with regard to the “deprivation of life, liberty, or property” element, Count One
18 alleges that AR 5145.3 denies Plaintiff of her right to direct the upbringing of A.S. FAC, ¶¶ 100-
19 101. Indeed, parents do hold a liberty interest in making decisions concerning the care, custody,
20 and control of their children. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir. 2005).
21 However, Plaintiff contends that her rights include the authority to decide for herself whether
22 A.S. will become transgender, and that her child might have no say in the matter:

23 [AR 5145.3] *authorizes children to make* mature, consequential, private, and potentially
24 life-altering *decisions without parental* knowledge or *consent* by excluding parents from
25 the decision-making process on these matters...; ...

26 [AR 5145.3] *usurps parents’ responsibility as the ultimate decision-maker regarding*
27 their children’s mental health and well-being, including but not limited to *decisions*
28 *related to their gender identity*

1 FAC, ¶ 101 (emphasis added, quoted language from subparagraphs (a), (f)).

2 The question, therefore, is whether a parent does have a constitutional right to know their
3 child's gender identity, and compel their own identity preferences upon the child. To that end,
4 the federal constitution provides individuals a right of privacy concerning personal information.
5 *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977). This right applies to the sex lives of students with
6 regard to their parents. For example, in *C.N. v. Wolf*, 410 F.Supp.2d 894, 903 (C.D. Cal. 2005),
7 the Court found that a minor student had raised a valid claim of invasion of privacy by asserting
8 that the school district had disclosed her sexual orientation to a parent without the student's
9 consent. See also, *Nguon v. Wolf*, 517 F.Supp.2d 1177, 1191, 1195-96 (C.D. Cal. 2007) (citing
10 *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000)).

11 More recently, a federal district court specifically held that minor students also have a
12 privacy right to maintain their gender identities a secret from their parents. *John & Jane Parents*
13 *I v. Montgomery Cnty. Bd. of Educ.* (“*J&J Parents*”), 2022 U.S. Dist. LEXIS 149021 (D. Md.
14 Aug. 18, 2022) (appeal pending). While this particular federal court represented the District of
15 Maryland, it relied heavily upon the Ninth Circuit's *Fields* analysis in coming to its
16 determination. *Id.*, at *26, 34-35. The court found that maintaining a “student's gender identity
17 confidential unless and until that student consents to disclosure ... both protect[s] the student's
18 privacy and create[s] ... a zone of protection ... in the hopefully rare circumstance when
19 disclosure of the student's gender expression while at school could lead to serious conflict within
20 the family, and even harm.” *Id.* at *38-39. Indeed, gender identity, in general, has long been
21 considered information subject to the right of privacy in the Ninth Circuit. *Nelson v. NASA*, 568
22 F.3d 1028, 1037-38 (9th Cir. 2009) (J. Wardlaw concurring); see also *Sterling*, 232 F.3d at 196
23 (“It is difficult to imagine a more private matter than one's sexuality and a less likely probability
24 that the government would have a legitimate interest in disclosure of sexual identity.”)

25 A month after the *J&J Parents* decision, a New Hampshire Superior Court likewise
26 found that minor students have a privacy right to maintain their gender identity a secret from
27 their parents. Finding such a right attune to previous federal court decisions, including the right
28 of minor students to keep private their use of a school's birth control clinic, *Doe v. Irwin*, 615

1 F.2d 1162, 1168-69 (6th Cir. 1980), and conversations with a school counselor, *Thomas v.*
2 *Evansville-Vanderburgh Sch. Corp.* 258 Fed.Appx. 50, 52-54 (7th Cir. 2007), the New
3 Hampshire court emphasized that “the Policy does not prevent parents from observing their
4 children’s behavior...; talking to their children; providing religious or other education to their
5 children; choosing where their children live and go to school; obtaining medical care and
6 counseling for their children; monitoring their children’s communications...; choosing with
7 whom the children socialize; and deciding what their children may do in their free time. In short,
8 the Policy places no limits on the plaintiff’s ability to parent her child as she sees fit.” Order,
9 *Jane Doe v. Manchester Sch. Dist.*, Case No. 216-2022-CV-00117, at *6-7 (N.H. Superior Court,
10 Hillsborough County, Northern District, Sept. 5, 2022); RJN No. 3.

11 In short, every court known to the District to consider the question has found that a child
12 has a right of privacy as to their gender identity which supersedes any desire of a parent (1) to
13 know, let alone (2) impose their own gender identity preferences upon the child.

14 ii. Parents Do Not Have a Right to Impose their Curriculum Preferences

15 In addition, case law has long established that parents have no right to impose their
16 preferences as to how school districts educate their students. “[O]nce parents make the choice as
17 to which school their children will attend, their fundamental right to control the education of
18 their children is, at the least, substantially diminished,” and “they do not have a fundamental
19 right generally to direct *how* a public school teaches their child.” *Fields*, 427 F.3d at 1206
20 (emphasis in original). While “parents have a right to inform their children when and as they
21 wish on the subject of sex, they have no constitutional right . . . to prevent a public school from
22 providing its students with whatever information it wishes to provide, sexual or otherwise, when
23 and as the school determines that it is appropriate to do so.” *Parents for Privacy v. Barr*, 949
24 F.3d 1210, 1231 (9th Cir. 2020) (internal grammatical marks and citation omitted).

25 In other words, the scope of a parent’s right to direct the educational upbringing of their
26 child, which would include teacher-student conversations concerning gender identity, generally
27 stops at the schoolhouse door. Plaintiff exercised her right to direct the educational upbringing of
28 A.S. by choosing to enroll her child in the District. Upon Plaintiff making that decision, it was

1 the District's decision as to what curriculum and extracurricular activities would be afforded her
2 child. In turn, it was A.S.'s own personal decision whether to inform Plaintiff of her new gender
3 identity. The law requires the District to respect that decision absent circumstances such as
4 concern for the safety of the child.

5 iii. Parents Do Not Have a Right to Notice and Consent to Treatment

6 Finally, case precedent is clear, the federal Constitution does not empower parents with a
7 right to notice and/or consent of medical and psychological care their minor children voluntarily
8 seek. For example, as discussed above, federal circuit courts have recognized that minor students
9 have the right to keep private their use of a school's birth control clinic, *Irwin*, 615 F.2d at 1168-
10 69, and conversations with a school counselor, *Thomas*, 258 Fed.Appx. at 52-54. Indeed, any
11 State-mandated rule requiring parental notice and/or consent is unconstitutional unless it survives
12 strict scrutiny. *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 945-46 (9th Cir. 1997) (any
13 rule treating minors differently raises strict scrutiny review). To that end, "when the minor is
14 mature enough to make her own [medical] decisions independent of her parents, the State has no
15 more interest in notifying her parents than it would in notifying the parents of an adult woman --
16 namely, none." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F. Supp. 2d 1012, 1019 (D.
17 Idaho 2005). "The State runs afoul of the Constitution ... when it attempts to give that same
18 power [of consent] to parents of mature daughters capable of making their own informed
19 choices. Because maturity does not always correspond to the age of majority, minors must have
20 the chance to demonstrate their maturity." *Planned Parenthood v. Miller*, 63 F.3d 1452, 1460
21 (8th Cir. 1995). Thus, for example, the United States Supreme Court requires that any State-
22 compelled, parental consent requirement for an abortion must include a provision permitting the
23 minor to "bypass" the requirement if they are mature enough to make their own decisions.
24 *Bellotti v. Baird*, 443 U.S. 622, 653-54 (1979).

25 Indeed, even so-called "immature" minors maintain constitutional protections. "A child,
26 merely on account of his minority, is not beyond the protection of the Constitution. As the Court
27 said in *In re Gault*, 387 U.S. 1, 13 (1967), 'whatever may be their precise impact, neither
28 the Fourteenth Amendment nor the Bill of Rights is for adults alone.'" *Bellotti*, 443 U.S. at 633.

1 “The Court's concern for the vulnerability of children is demonstrated in its decisions dealing
2 with minors’ claims to constitutional protection against deprivations of liberty or property
3 interests by the State. With respect to many of these claims, we have concluded that the child’s
4 right is virtually coextensive with that of an adult.” *Id.* at 634. Given these constitutional
5 protections, while at the same time “recogni[zing] that, during the formative years of childhood
6 and adolescence, minors often lack the experience, perspective, and judgment to recognize and
7 avoid choices that could be detrimental to them,” the United States Supreme “Court has held that
8 the States validly *may* limit the freedom of children to choose for themselves in the making of
9 important affirmative choices with potentially serious consequences,” but only if the limitation
10 survives strict scrutiny by way of the State establishing (1) a compelling interest for doing so,
11 and (2) that the means are narrowly tailored. *Id.* at 635 (emphasis added); *Nunez by Nunez*, 114
12 F.3d at 945-46 (strict scrutiny). Thus, while States *may* impose limitations upon when minors
13 can make their own decisions if such regulations can survive strict scrutiny, there is certainly no
14 constitutional mandate *requiring* them to do so – especially in the form of parental notice and
15 consent requirements.

16 For all of these reasons, Plaintiff cannot establish the “deprivation of life, liberty, or
17 property” element of her Section 1983 substantive due process claim.

18 **B. Plaintiff Fails to Allege District Conduct that “Shocks the Conscience”**

19 In addition, Plaintiff further fails to allege facts of District conduct that “shocks the
20 conscience.” “[W]e consider conduct to be conscience-shocking if it was taken with deliberate
21 indifference toward a plaintiff's constitutional rights.” *Sylvia Landfield Trust v. City of Los*
22 *Angeles*, 729 F.3d 1189, 1195 (9th Cir. 2013). “[C]onduct intended to injure in some way
23 unjustifiable by any government interest is the sort of official action most likely to rise to the
24 conscience-shocking level....” *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

25 Here, as discussed above, there has been unanimity in court decisions holding that
26 students have a controlling, constitutional right to privacy concerning their sex and gender
27 information. In addition, as discussed in connection with the preceding motion for preliminary
28 injunction, the California Department of Education (“CDE”) has issued guidance pursuant to its

1 statutory authority under California Education Code section 33308.5, subdivision (a), that
2 California law requires the District to accept the direction of students regarding their gender
3 identity – including requests concerning the confidentiality of that information. RJN No. 4 [FAQ
4 Nos. 6-8]. Thus, given the unanimity of case decisions on this question, and the direction of the
5 CDE, the fact that the District’s regulation simply requires it to respect the gender identity and
6 privacy wishes of its students does not constitute “deliberate indifference” towards any purported
7 parental rights in a manner that “shocks the conscience.” Also, the regulation expressly provides
8 for circumstances where parental disclosure is permissible such as for the safety of the child.

9 Moreover, again, the federal court in *J&J Parents* found that maintaining a “student’s
10 gender identity confidential unless and until that student consents to disclosure ... create[s] ... a
11 zone of protection . . . in the hopefully rare circumstance when disclosure of the student's gender
12 expression while at school could lead to serious conflict within the family, and even harm.”
13 2022 U.S. Dist. LEXIS 149021 at *38-39. Given the *parens patriae* governmental interest in
14 protecting minors from domestic violence, *Mueller v. Auker*, 700 F.3d 1180, 1186-87 (9th Cir.
15 2012); any emotional distress Plaintiff may have collaterally incurred as a result of the District
16 protecting its students from potential physical harm fails the “shocks the conscious” standard.

17 C. Plaintiff Cannot Show AR 5145.3 Would Be Invalid in Every Circumstance

18 Finally, as noted above, “[a] facial challenge to a [policy] is, of course, the most difficult
19 challenge to mount successfully, since the challenger must establish that no set of circumstances
20 exists under which the [policy] would be valid.” *Salerno*, 481 U.S. at 745. Here, given that there
21 are unquestionably circumstances in which disclosing a student’s gender identity to a parent or
22 guardian will “lead to serious conflict within the family, and even harm,” as found in *J&J*
23 *Parents*, 2022 U.S. Dist. LEXIS 149021 at *38-39; and given that the Supreme Court expressly
24 held in *Bellotti*, 443 U.S. at 633 that mature minors have the right to bypass any parental notice
25 requirement, Plaintiff cannot satisfy the *Salerno* standard of establishing that AR 5145.3 would
26 be invalid in every conceivable circumstance.

27 D. AR 5145.3 Satisfies Rational Basis Review

28 When a substantive due process claim does not involve a fundamental right, rational basis

1 review applies. *Witt v. Dep't. of the Air Force*, 527 F.3d 806, 817 (9th Cir. 2008). Such review
2 only requires the rule in question to bear a “reasonable relation to a legitimate state interest.”
3 *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). Here, as discussed in *J&J Parents*, 2022
4 U.S. Dist. LEXIS 149021 at *39, the District has a legitimate state interest to protect the
5 student’s privacy and create a zone of protection from potential domestic abuse. Maintaining the
6 confidentiality of a student’s gender identity has a reasonable relationship with that interest.

7 Accordingly, for all of these reasons, Count One fails to state facts raising a legally-
8 cognizable claim, and should be dismissed by the Court.

9 **II. THE FAC FAILS TO STATE FACTS CONSTITUTING AN AS-APPLIED** 10 **VIOLATION OF PLAINTIFF’S SUBSTANTIVE DUE PROCESS RIGHTS**

11 Count Two alleges the same substantive due process claim as Count One, except it raises
12 an as-applied challenge to AR 5145.3 rather than a facial one. FAC, ¶¶ 107-113. An “as-applied
13 attack ... challenges only ... a subset of the statute’s applications, or the application of the statute
14 to a specific factual circumstance, under the assumption that a court can separate valid from
15 invalid subrules or applications.” *Hoye v. City of Oakland*, 653 F.3d 835, 857 (9th Cir. 2011)
16 (internal grammatical marks and citation omitted). “The underlying constitutional standard,
17 however, is no different then [sic] in a facial challenge.” *Legal Aid Servs. of Or. v. Legal Servs.*
18 *Corp.*, 608 F.3d 1084, 1096 (9th Cir. 2010). Thus, to prevail in Count Two, Plaintiff must still
19 establish a “deprivation of life, liberty, or property,” as well as a “cognizable level of executive
20 abuse of power as that which shocks the conscience.” *Brittain*, 451 F.3d at 991 (internal
21 grammatical marks and citations omitted). The only difference for this as-applied challenge is
22 that Plaintiff need not establish that AR 5145.3 is unlawful in every conceivable circumstance,
23 but only that it was applied to her, specifically, in an unconstitutional manner.

24 Here, with regard to the purported “gender transitioning,” the FAC first alleges that the
25 District instructed its students to “explore their sexual identities and consider whether they felt
26 like they were not the gender associated with their sex.” FAC, ¶ 58; see also FAC, ¶ 67. Again,
27 however, a school’s curriculum choices do not interfere with a parent’s right to raise their
28 children. *Barr*, 949 F.3d at 1231; *Fields*, 427 F.3d at 1206. From there, the FAC admits that A.S.

1 “began feeling like she might be a boy.” FAC, ¶ 60. Notably, the FAC does not allege that it
2 was the District who instructed or suggested to A.S. that she “might be a boy.” The FAC then
3 admits that “A.S. went to Ms. Robertson’s office to tell her that she ‘felt like a boy’” FAC, ¶
4 64. In other words, the pleading admits that it was A.S. who approached District personnel
5 regarding her gender identity, not vice-versa.

6 Next, the pleading admits that Ms. Robertson responded by simply “ask[ing] A.S. if she
7 had a boy’s name that she would like to be called and whether she would like to be referred to by
8 male pronouns.” FAC, ¶ 64. Notably, the FAC does not allege that Ms. Robertson directed A.S.
9 that she must do so. While the FAC alleges that A.S. “felt pressured” by this simple request,
10 nothing in the FAC suggests that Ms. Robertson’s question would “shock the conscience” –
11 especially in light of the CDE guidance requiring school districts to address transgender students
12 in the manner the student prefers. FAC, ¶ 64. The FAC then admits that A.S. “responded in the
13 affirmative and told Ms. Robertson her boy’s name was ‘J.S.’” FAC, ¶ 64. In other words, A.S.
14 had already chosen her own identity, not the District. The FAC then provides that “[a]fter the
15 meeting, Ms. Robertson walked A.S. to her class and told her teacher that A.S. was now going
16 by the name ‘J.S.’ and male pronouns, and her teacher immediately began referring to her as
17 such,” in line with the CDE guidelines and AR 5145.3 requirements. FAC, ¶ 66.

18 In addition, the FAC alleges that “[o]ver the course of the spring semester of 2022, A.S.
19 had approximately two additional one-on-one meetings with Ms. Robertson. At these meetings,
20 Ms. Robertson provided A.S. with additional resources regarding her new male identity, such as
21 referring A.S. to a local community group that advocates for LGBTQ+ causes and discussing
22 ‘top surgery’ and ‘breast binding’ with her.” FAC, ¶ 68 (footnotes omitted). Notably, however,
23 as to the former, the pleading merely alleges that Ms. Robertson notified A.S. of a local
24 community group to which she might be interested. The FAC does not allege that Ms. Robertson
25 directed A.S. to join, visit, or even review the group as a mandatory requirement. As to the latter,
26 the pleading notably does not allege who started the purported conversations regarding “top
27 surgery” and “breast binding;” how brief those discussions may have been; nor, if Ms.
28 Robertson’s contribution to the conversations included anything more than general support for

1 A.S. In other words, the FAC does not raise any factual allegations regarding the manner in
2 which the District allegedly “gender transitioned” A.S. that diverged from the AR 5145.3
3 framework requiring this Court to consider additional factors in this “as applied” challenge
4 beyond those relevant to the “facial” analysis above – an analysis that establishes that the
5 pleading fails to raise a cognizable substantive due process claim.

6 With regard to maintaining the confidentiality of A.S.’s gender identity, the FAC admits
7 that during the aforementioned meeting, “Ms. Robertson asked A.S. if she wanted her mother to
8 be informed about her new identity at school, and A.S. said she did not. At the time, A.S. ...
9 thought that her mother would be ‘mad’ at her for wanting to identify as a boy.” FAC, ¶ 64. In
10 other words, again, it was A.S. who directed the District to keep their gender identity
11 confidential from Plaintiff, not the other way around. The FAC then alleges that sometime later
12 “A.S. told Ms. Robertson that she wanted to tell her mother about her new male identity, but Ms.
13 Robertson was not supportive of this course of action. [Ms. Robertson] ... encouraged [A.S.] to
14 speak with other family members *before* telling her mother. ... On or about April 8, 2022, A.S.
15 told her grandmother about her new gender identity. A.S.’s grandmother informed [Plaintiff] of
16 the news later that day.” FAC, ¶¶ 69, 72. Notably, the pleading does not allege that the District
17 directed, nor even advised, A.S. to keep their gender identity secret from Plaintiff. Rather, the
18 FAC admits that the District simply “*encouraged*” A.S. to “speak with other family members
19 *before* telling her mother,” with the unsurprising result that those family members would likely
20 notify Plaintiff before A.S. did so, herself. Again, the District has a governmental interest in
21 protecting its students from hostile reactions by family members – and, again, “[a]t the time, A.S.
22 ... thought that her mother would be ‘mad’ at her for wanting to identify as a boy.” FAC, ¶ 64.

23 Thus, like the “social transitioning” allegations, those alleging the District encouraged
24 A.S. to tell other family members of her gender identity “*before*” discussing the matter with their
25 mother do not establish that the District acted in a way divergent from AR 5145.3 requiring this
26 Court to consider any additional factors in this “as applied” challenge beyond those relevant to
27 the “facial” analysis above. In turn, whereas the facial analysis above establishes that the District
28 did not violate any substantive due process rights, the Court should dismiss Count Two, as well.

1 **III. THE FAC FAILS TO STATE FACTS CONSTITUTING A VIOLATION OF**
2 **PLAINTIFF’S PROCEDURAL DUE PROCESS RIGHTS**

3 Counts Three and Four raise additional Section 1983 claims asserting facial and as-
4 applied violations of Plaintiff’s procedural due process rights. FAC, ¶¶ 114-122. However, “[t]he
5 first inquiry in every [procedural] due process challenge is whether the plaintiff has been
6 deprived of a protected interest in ‘property’ or ‘liberty.’” *Am. Mfrs. Mut. Ins. Co. v. Sullivan*,
7 526 U.S. 40, 59 (1999). “Only after finding the deprivation of a protected interest do we look to
8 see if the State’s procedures comport with due process.” *Id.* To that end, as discussed above, AR
9 5145.3 does not infringe upon Plaintiff’s right to direct the upbringing of her child. Accordingly,
10 on this ground alone, the Court should dismiss Counts Three and Four.

11 Moreover, the Supreme Court has long held that when a public entity deprives a person
12 of a liberty interest through legislative action, that person is not entitled to any procedural due
13 process beyond the standard legislative process. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*,
14 239 U.S. 441, 445-46 (1915). This fact has been repeatedly recognized by District Courts within
15 the Ninth Circuit, as well as outside federal appellate courts. For example, the Eleventh Circuit
16 Court of Appeal, citing *Bi-Metallic*, has recently explained, “[i]n deciding what the Due Process
17 Clause requires when the State deprives persons of life, liberty or property, the Supreme Court
18 has long distinguished between legislative and adjudicative action. The State often deprives
19 persons of liberty or property through legislative action – general laws that apply to more than a
20 few people. When the state does so, the affected persons are not entitled to *any* process beyond
21 that provided by the legislative process.” *Jones v. Governor of Fla.*, 975 F.3d 1016, 1048 (11th
22 Cir. 2020) (emphasis in original, grammatical marks and citation omitted). Likewise, the Eastern
23 District of California, recently found that “[w]ith respect to Procedural Due Process, assuming
24 that Plaintiffs have a protected liberty interest, under *Halverson v. Skagit Cnty*, 42 F.3d 1257 (9th
25 Cir. 1994), ‘governmental decisions which affect large areas and are not directed at one or a few
26 individuals do not give rise to the constitutional procedural due process requirements of
27 individual notice and hearing.’ Rather, for actions that apply to the public in general, due
28 process is satisfied when officials perform their responsibilities in the normal manner prescribed

1 by law.” *Culinary Studios, Inc. v. Newsom*, 517 F.Supp.3d 1042, 1052 (E.D. Cal. 2021).

2 Here, the FAC lacks any allegation that the District enacted AR 5145.3 pursuant to some
3 manner prohibited by law. See generally, FAC. Accordingly, on this additional, independent
4 ground, the Court should dismiss both of Plaintiff’s procedural due process claims.

5 **IV. THE FAC FAILS TO STATE FACTS CONSTITUTING A FACIAL VIOLATION**
6 **OF PLAINTIFF’S INTIMATE HUMAN RELATIONSHIP RIGHTS**

7 Count Five raises a claim under Section 1983, asserting that AR 5145.3 facially violates
8 Plaintiff’s “intimate human relationship” rights allegedly protected by the First Amendment to
9 the United States Constitution. FAC, ¶¶ 123-128. The Supreme Court has recognized a right to
10 “enter into and maintain certain intimate human relationships” free from “undue intrusion by the
11 State.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984). A parent-child relationship is one
12 such protected relationship. *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000). However,
13 this right is protected by the Due Process Clause of the Fourteenth Amendment, not the First
14 Amendment. *IDK, Inc. v. Cnty. of Clark*, 836 F.2d 1185, 1192-93 (9th Cir. 1988). Accordingly, it
15 is subject to the same “shock the conscience” standard discussed above.

16 To that end, in the parent-child context, the “intimate human relationship” right has only
17 been recognized in two contexts to the knowledge of the District. First, the right of a parent and
18 child to physically live and/or congregate together has been recognized. See e.g., *Hameetman v.*
19 *City of Chicago*, 776 F.2d 636, 642 (7th Cir. 1985). Second, the right has been recognized where
20 the parent or child suffers retaliation because of the other’s conduct. See e.g., *Agostino v.*
21 *Simpson*, 2012 U.S. Dist. LEXIS 207375, *26-27 (S.D.N.Y. Mar. 29, 2012). Efforts to otherwise
22 expand this right have been rejected. For example, in *Bovee v. Broom*, 2012 U.S. Dist. LEXIS
23 15314 (S.D. Ill. Feb. 7, 2012), the Court dismissed a claim alleging that a guidance counselor
24 violated the familial right by telling a child that their parent was “bad at being a father,” finding
25 that the accused conduct did not satisfy the “shock the conscience” standard. Similarly, in
26 *Hernandez v. Cnty of Alameda*, 2023 U.S. Dist. LEXIS 11260, *28-30 (N.D. Cal. Jan. 23, 2023),
27 the Court dismissed a claim raised by a child that the familial right had been violated by the
28 failure to provide adequate medical care to their parent, leading to that parent’s death.

1 Here, the FAC does not allege that the District has done anything to physically separate
2 A.S. from Plaintiff. Nor, do the allegations allege any act of retaliation. Indeed, the allegations
3 do not establish any purported interference of any kind – and certainly not one that would “shock
4 the conscience.” Rather, the District is simply alleged to have kept information confidential
5 from Plaintiff that A.S. was already keeping confidential from her. In other words, the District
6 simply maintained the status quo at the request of A.S. As such, the FAC fails to raise a legally-
7 cognizable claim of any unconstitutional interference with Plaintiff’s familial rights.

8 **V. THE FAC FAILS TO STATE FACTS CONSTITUTING AN AS-APPLIED**
9 **VIOLATION OF PLAINTIFF’S INTIMATE HUMAN RELATIONSHIP RIGHTS**

10 Finally, Count Six alleges the same due process claim as Count Five, except it raises an
11 as-applied challenge rather than a facial one. FAC, ¶¶ 129-133. Thus, to prevail in Count Six,
12 Plaintiff must still establish a “deprivation of life, liberty, or property,” as well as a “cognizable
13 level of executive abuse of power as that which shocks the conscience.” *Brittain*, 451 F.3d at
14 991 (internal grammatical marks and citations omitted). For the reasons discussed above, she
15 cannot do so. In addition, again, the FAC admits that during their aforementioned meeting, “Ms.
16 Robertson asked A.S. if she wanted her mother to be informed about her new identity at school,
17 and A.S. said she did not.” FAC, ¶ 64. As such, again, it was A.S. who directed the District to
18 keep their gender identity confidential from Plaintiff, not the other way around. Thus, the
19 allegations concerning the District maintaining the confidentiality of A.S.’s gender identity do
20 not establish that the District acted in a way divergent from AR 5145.3 requiring this Court to
21 consider any additional factors in this “as applied” challenge beyond those relevant to the
22 “facial” analysis above – an analysis that establishes that the pleading fails to raise a cognizable
23 due process claim. As such, the Court should dismiss Count Six, as well.

24
25 Dated: April 25, 2023

LEONE ALBERTS & DUUS

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