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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ELIZABETH MIRABELLI, an individual, and LORI ANN WEST, an individual,

Plaintiffs,

v.

MARK OLSON, in his official capacity as President of the EUSD Board of Education, et al.,

Defendants.

Case No.: 3:23-cv-0768-BEN-VET

Plaintiffs' Memorandum of Points & Authorities in Opposition to the State Defendants' Motion for Judgment on the Pleadings

[Fed. R. Civ. P. 12(c)]

Judge:	Hon. Roger T. Benitez
Courtroom:	5A
Hearing Date:	January 8, 2024
Hearing Time:	10:30 a.m.

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INTRODUCTION

On Thursday, September 14, 2023, this Court denied the EUSD Defendants' and the State Defendants' respective Rule 12(b)(6) motions to dismiss. ECF No. 41 at 30-34. Plaintiffs then wrote to the Defendants, requesting that the parties hold their Rule 26(f) conference. Jonna Decl., ¶2. The State Defendants' response was that they were planning to file a *second* Rule 12(b)(6) motion to dismiss. Jonna Decl., ¶3 & Ex. 1. This dumbfounded Plaintiffs, who then sought to meet and confer with the State Defendants over their proposed motion. *See* Jonna Decl., ¶¶4-7 & Ex. 2; *see* Fed. R. Civ. P. 12(g) ("[A] party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion."); *Aetna Life Ins. Co. v. Alla Med. Servs., Inc.*, 855 F.2d 1470, 1475 n.2 (9th Cir. 1988) ("The philosophy underlying [Rule 12(g)] is simple and basic: a series of motions should not be permitted because that results in delay and encourages dilatory tactics.").[1]

As explained by Plaintiffs in an email summarizing the parties' meet and confer telephone call, "[we] asked whether the focus was on the cognizability of our legal theories (what EUSD's prior motion to dismiss focused on), or on the appropriateness of including the CDE in this case. If the former, that would appear to simply be an improper motion for reconsideration; if the latter, then we could amend to include the allegations from our opposition to the CDE's motion to dismiss." Jonna Decl., Ex. 2, p.1. Plaintiffs concluded their email stating: "If there are no new facts or circumstances, and the CDE simply seeks reconsideration of Judge Benitez's rulings to delay the case, then we will seek sanctions." *Id.*

Instead of substantively responding, the State Defendants simply stated that they would not file a serial Rule 12(b)(6) motion to dismiss—apparently convinced by

[1] Unless otherwise noted, all quotations are "cleaned up" by omitting citations, quotation marks, brackets, ellipses, and emphasis; all emphasis is added. Page number references are to the ECF-generated page number contained in the header of each ECF-filed document.

the cited legal authority. Jonna Decl., ¶8. But then, on the same day that they answered, the State Defendants decided to file a Rule 12(c) motion for judgment on the pleadings. *See* ECF No. 53. This, of course, is *technically* allowed by the rules, but "it is a waste of judicial resources" and sloppy at least" "to find that defendants may avoid 12(g)'s consolidation requirement merely by framing their motion as a motion for judgment on the pleadings." *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 311 F. Supp. 2d 898, 905 (S.D. Cal. 2004).

Substantively, the State Defendants' motion is nothing more than a pseudo-motion for reconsideration of the EUSD Defendants' prior motion to dismiss. *See* ECF No. 17. However, unlike a true motion for reconsideration, the State Defendants' motion fails to even attempt to distinguish the prior briefing and this Court's prior order. It has no practical utility at all—except to delay this case and drive up costs for the Plaintiffs. Nothing in the State Defendants' duplicative motion warrants a change in this Court's order. Thus, the motion should be denied and the State Defendants should be sanctioned and ordered to pay Plaintiffs' attorneys fees incurred in drafting this opposition. *See* 28 U.S.C. § 1927; S.D. Cal. CivLR 7.1(i)(1), 83.1.

LEGAL STANDARD

A. Motion for Judgment on the Pleadings

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Rule 12(c) is functionally identical to Rule 12(b)(6) and … the same standard of review applies to motions brought under either rule." *Cafasso, U.S. ex rel. v. General Dynamics C4 Systems, Inc.*, 637 F.3d 1047, 1055, n.4 (9th Cir. 2011). "Because the two motions are analyzed under the same standard, a court considering a motion for judgment on the pleadings may give leave to amend and 'may dismiss causes of action rather than grant judgment.'" *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 311 F. Supp. 2d 898, 903 (S.D. Cal. 2004) (quoting William W. Schwarzer, et al., *Federal Civil Procedure Before Trial* § 9:341 (2003)).

Thus, under Rule 12(c), a complaint must provide "fair notice of the nature of the claim, but also grounds on which the claim rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 n.3 (2007). "To survive a motion to dismiss [under Rule 12(b)(6) or Rule 12(c)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. The standard for dismissal under Rule 12(b)(6) and 12(c) is quite strict. "A complaint must not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011). The court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

B. Reconsideration & Law of the Case Doctrine

Under the "law of the case" doctrine, a court should generally not "reconsider[] an issue that has already been decided *by the same court*, or a higher court in the identical case." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). "The doctrine is not a limitation on a tribunal's power, but rather a guide to discretion." *Id.* Thus, "[t]he law of the case doctrine does not preclude a court from reassessing its own legal rulings in the same case." *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1042 (9th Cir. 2018); *accord* Fed. R. Civ. P. 54(b). "[T]he law-of-the-case doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Radu v. Shon*, 62 F.4th 1165, 1176 (9th Cir. 2023) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)).

As a guide to discretion, the law of the case doctrine counsels against reopening an issue unless "1) the first decision was clearly erroneous; 2) an intervening change in

the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." *In re Packaged Seafood Prod. Antitrust Litig.*, 635 F. Supp. 3d 1061, 1067 (S.D. Cal. 2022) (quoting *Alexander*, 106 F.3d at 876). Thus, the Local Rules provide that whenever "a subsequent motion … is made for the same relief" previously denied, the movant must establish via declaration "what new or different facts are claimed to exist" warranting a different result. S.D. Cal. CivLR 7.1(i)(1).

When a Rule 12(c) motion merely asks the court to revisit its ruling on a Rule 12(b)(6) motion, without identifying persuasive reasons for reconsideration, courts have not hesitated to summarily deny the motion under the law of the case doctrine. *See, e.g., Chae v. SLM Corp.*, No. 2:07-CV-02319, 2008 WL 11342464, at *1 (C.D. Cal. Jan. 17, 2008) (summarily denying motion as barred by law of the case doctrine); *Alexander v. City of Greensboro*, 801 F. Supp. 2d 429, 434 (M.D.N.C. 2011) (ruling solely on new issues, and stating "the court will not reconsider issues that it addressed fully at the Rule 12(b)(6) stage").

C. Sanctions under Section 1927 and the Court's Inherent Power

Any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Section 1927 sanctions may be upheld if an attorney's conduct was "reckless or in bad faith." *Cunningham v. Cty. of Los Angeles*, 879 F.2d 481, 490 (9th Cir. 1988); *see Lahiri v. Universal Music & Video Distribution Corp.*, 606 F.3d 1216, 1219 (9th Cir. 2010). An attorney acts in bad faith when he "delays or disrupts the litigation." *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991). Bad faith may also consist of recklessly raising a frivolous argument. *See In re Keegan Mgmt. Co. Secur. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996). Put differently, "[f]or sanctions to apply, if a filing is submitted recklessly, it must be frivolous, while if it is not frivolous, it must be intended to harass." *Id.* An attorney's bad faith is assessed under a subjective standard.

Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.2d 1112, 1118 (9th Cir. 2000). "Knowing or reckless conduct meets this standard." *Id.* (citing *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1121-22 (9th Cir. 1991)).

Separately, "the district court has the inherent authority to impose sanctions for bad faith, which includes a broad range of willful improper conduct." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001). "To impose sanctions under its inherent authority, the district court must make an explicit finding ... that counsel's conduct constituted or was tantamount to bad faith." *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1131 (9th Cir. 2002). Unlike under Section 1927, "mere recklessness, without more, does not justify sanctions under a court's inherent power." *Fink*, 239 F.3d at 992-94 (but also holding that "[s]anctions are available for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose").

Sanctions may be awarded under both 28 U.S.C. § 1927 and the Court's inherent authority based on a request in an opposition brief. A separate noticed motion is not required. *See Harvey v. Cable News Network, Inc.*, 48 F.4th 257, 278 (4th Cir. 2022) (citing *Meathe v. Ret*, 547 F. App'x 683, 691 (6th Cir. 2013)). Sanctions under either 28 U.S.C. § 1927 or the Court's inherent authority can also be awarded for violations of the local rules. S.D. Cal. CivLR 83.1.

ARGUMENT

The State Defendants' Rule 12(c) motion for judgment on the pleadings is a full attack on each of Plaintiffs' four pleaded counts: (1) Free Speech, (2) Free Exercise: Categorical Exemptions; (3) Free Exercise: Discretionary Exemptions; and (4) Declaratory Relief. *Compare* ECF No. 1, Compl.; *with* ECF No. 53, Mtn. Judg. Pleadings. The State Defendants' motion repeats and recasts arguments from both its own prior Rule 12(b)(6) motion to dismiss, *see* ECF No. 25, and the EUSD Defendants' prior Rule 12(b)(6) motion to dismiss. *See* ECF No. 17. Thus, the below briefing tests the State Defendants' arguments against the Complaint, the prior

briefing, and this Court's prior ruling that "the motion to dismiss for failure to state a claim is denied." ECF No. 42, Order on Rule 12(b)(6) Mtns., at 33.

I. PLAINTIFFS ADEQUATELY PLEADED A CLAIM FOR VIOLATION OF THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

The State Defendants begin their motion with an attack on Plaintiffs' free speech claim. ECF No. 53-1, Mtn. Judg. Pleadings, at 11-17. The State Defendants' argument proceeds in three sub-parts. First, the State Defendants argue that Plaintiffs have no Free Speech rights at all because all of the speech at issue is government speech. *Id.* at 12:5-13:2. Second, the State Defendants argue that the CDE's and EUSD's Parental Exclusion Policies do not violate parental rights. *Id.* at 13:3-14:16. Third, the State Defendants argue that the Parental Exclusion Policies satisfy rational basis review because they protect children's privacy interests and protect them from discrimination and harassment. *Id.* at 14:17-17:5.

On the third point, because Plaintiffs do not dispute that transgender children should be protected against discrimination and harassment, and have some limited privacy rights, there is no need to address the State Defendants' "rational basis" argument. Plaintiffs did not plead that the State Defendants have no interest in protecting children from discrimination. *See* ECF No. 1, Compl., at 23, ¶90 ("Also as a result of her faith, Mrs. West fully supports efforts to ensure that transgender or gender diverse students are treated kindly, with respect, and are not discriminated against or gossiped about."); *see also id.* at 45, ¶¶181, 183. The first and second sub-arguments will be addressed in reverse order.

A. Plaintiffs Have a Right to Object to Engaging in Illegal Speech

As stated above, with their second sub-argument, the State Defendants request that the Court reverse itself, without any justification, on the issue of whether their Parental Exclusion Policies violate parental rights. *See* ECF No. 53-1 at 13:3-14:16. The State Defendants do not dispute that they cannot force Plaintiffs to engage in illegal speech. *See, e.g., Janus v. AFSCME*, 138 S. Ct. 2448, 2473 (2018) (under Free

Speech analysis, "the employer may insist that the employee deliver any *lawful* message"); Cal. Labor Code § 1102.5(c) ("An employer … shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute"). Rather, they dispute that their Parental Exclusion Policies would actually force Plaintiffs to engage in illegal speech.

Thus, the State Defendants argue that the CDE's and EUSD's Parental Exclusion Policies do not violate parental rights, in contrast to the Court's holding that:

> The teachers could also make out a freedom of speech claim if the policy compels them to violate the law or deliberately convey an illegal message. Here, the plaintiffs[] come closest to making out a successful freedom of speech claim on the merits. This is because the policy of AR 5145.3, as presented to faculty, and EUSD's response to the plaintiffs' request for accommodations, appears to demand that these teachers communicate misrepresentations to parents about the names and pronouns adopted by their students. As discussed above, that would *likely* be unlawful and in derogation of the constitutional rights of parents.

ECF No. 42 at 23:7-14 (emphasis in original).

Nothing, however, in the State Defendants' briefing warrants a departure from this holding. The State Defendants' ultimate argument is that—conceding that parents have the right to make "medical decisions for their children," *Wallis v. Spencer*, 202 F.3d 1126, 1141-42 (9th Cir. 2000)[2]—"[a]ddressing a person using their preferred names and pronouns is not medical care" and "being transgender itself is not a medical or psychiatric condition." ECF No. 53-1 at 13:24-14:13. Thus, the State Defendants contend, no parental rights are implicated when information about a child's gender transition is withheld from parents. *See id.* (citing *Grimm v. Gloucester County School Board*, 972 F.3d 586, 612 (4th Cir. 2020); *Foote v. Town of Ludlow*, No.

[2] *Accord Mann v. Cnty. of San Diego*, 907 F.3d 1154, 1162 (9th Cir. 2018) ("'[P]arental consent is critical' in medical procedures involving children 'because children rely on parents or other surrogates to provide informed permission for medical procedures that are essential for their care.'").

CV 22-30041, 2022 WL 18356421, at *5 (D. Mass. Dec. 14, 2022)). Both sides, however, can cite cases for the proposition that addressing gender incongruence is, or is not, "medical" in nature. *See, e.g., Edmo v. Corizon, Inc.*, 935 F.3d 757, 770 (9th Cir. 2019) ("evidence-based treatment options for individuals with gender dysphoria" include "changes in gender expression and role"); Jonna Decl., Ex. 6, *T.F. v. Kettle Moraine Sch. Dist.*, No. 2021CV001650, 2023 WL 6544917 (Wis. Cir. Ct., Waukesha Cnty, Oct. 3, 2023) ("This is undisputedly a medical and healthcare issue").

But in a pleadings challenge, the focus should be on the Complaint. Thus, to begin, Plaintiffs pleaded that gender identity is actually far more complex than the State Defendants make out. *See* ECF No. 1, Compl., at 12-16, ¶¶49-60. And like any other allegations, pleaded allegations of a scientific or medical nature must be accepted as true. *Jones v. Johnson*, 781 F.2d 769, 772 n.1 (9th Cir. 1986), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014); *see also Ferrari v. Nat. Partners, Inc.*, No. 15-cv-4787, 2016 WL 4440242, at *5 (N.D. Cal. Aug. 23, 2016). In truth, there are two (or more) overlapping paradigms in which issues of gender identity arise. Often—but not always—a transgender individual is indeed suffering a psychiatric condition such as gender dysphoria, for which gender transition is a psychosocial treatment option. *See* ECF No. 1, Compl., at 12-16, ¶¶49-60.

In any event, regardless of whether a child is being "socially transitioned" as part of the traditional "transgender" paradigm, or the emerging "gender diverse" paradigm, Plaintiffs pleaded that "[s]ocial transition 'is not a neutral act'—it is an 'active intervention' that can have 'significant effects on the child or young person in terms of their psychological functioning.'" ECF No. 1, Compl., at 25-26, ¶104 (quoting Hilary Cass, *Independent review of gender identity services for children and young people: Interim report* 62 (Feb. 2022)). Thus, "the World Professional Association for Transgender Health (WPATH) has recommended that health professionals defer to parents 'as they work through the options and implications,'

even if they ultimately 'do not allow their young child to make a gender-role transition.'" ECF No. 1, Compl., at 27, ¶109 (quoting Eli Coleman, et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 7*, World Prof'l Ass'n for Transgender Health (WPATH) 17 (2012)).

On a pleadings challenge, these allegations should suffice to defeat the State Defendants' motion. But, should the Court wish, Plaintiffs can add further allegations to their complaint concerning how parental rights are violated, taken from the declaration of Dr. Anderson. *See* ECF No. 42, Prelim. Inj. Order, at 10-14 (citing Anderson declaration at length, at ECF No. 5-2).

B. Plaintiffs' Free Speech Rights Do Not End at the School Door

With their first sub-argument, the State Defendants argue that Plaintiffs have no free speech rights while on school grounds. *See* ECF No. 53-1 at 12:5-13:2. As Plaintiffs argued in their motion for a preliminary injunction, and in opposition to the motions to dismiss, the Free Speech analysis here is very complex. In addition to the factual question of whether the specific speech at issue is government speech or Plaintiffs' speech, the constitution imposes limits on what type of speech the government may make an employee engage in as a condition of employment.

As discussed above, the government cannot force an employee to engage in *illegal* speech. *See* ECF No. 42 at 23:7-14. But the Court was skeptical of Plaintiffs' argument that the government is equally prohibited from forcing Plaintiffs to engage in *ideological* speech. *See, e.g.,* ECF No. 5-1 at 18:5-19:12 & n.8 (preliminary injunction motion); ECF No. 10 at 20:13-22:14 (opposition to EUSD motion to dismiss); ECF No. 28 at 21:23-22:28 (opposition to State motion to dismiss). Instead, the Court stated: "[A]t least where the teachers' compelled speech takes place during the school day on curricular matters in carrying out the duties of their positions, *Johnson* [*v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011)] appears to foreclose a freedom of speech claim." ECF No. 42 at 23:1-3.

///

Even on this argument, *at the pleadings stage*, there is good reason to not cut off Plaintiffs' legal theory. As Plaintiffs explained in their prior briefing, the government "may not compel prospective employees to swear loyalty oaths as a condition of employment," ECF No. 5-1 at 19 n.8 (citing *Weiman v. Updegraff*, 344 U.S. 183, 190-91 (1952)), the government may not "fir[e] a teacher who refused to salute the flag," *id.* (citing *Russo v. Cent. Sch. Dist. No. 1*, 469 F.2d 623, 633-34 (2d Cir. 1972)), and, generally, "the government cannot impose 'a blanket requirement that all employees subsidize [or engage in] speech with which they may not agree' if they are not spokespersons." *Id.* at 18:23-25 (quoting *Janus*, 138 S. Ct. at 2472).

The inquiry is a practical one concerning the relationship of the speech to the interests undergirding the Free Speech clause. Thus, the Supreme Court has explained, the government is limited when it attempts to force a person to "defy her conscience about a matter of *major significance*," ECF No. 28 at 21:26 (citing *303 Creative LLC v. Elenis*, 600 U.S. 570, 604 (2023)), or attempts "'to force an individual to utter what is not in her mind about a question of *political and religious significance*.'" *Id.* at 21:15-16 (quoting *303 Creative*, 600 U.S. at 596).

As relevant here, in a case concerning the use of preferred pronouns, the Virginia Supreme Court recently accepted just this argument. *See Vlaming v. W. Point Sch. Bd.*, ___ S.E.2d ___, No. 211061, 2023 WL 8634968, at *24-30 (Va. Dec. 14, 2023) (public school French teacher stated a Free Speech claim upon being fired for refusing to use preferred pronouns). In *Vlaming*, the Virginia Supreme Court applied the reasoning of *Janus*, 138 S. Ct. 2448, and *303 Creative*, 600 U.S. 570, to limit *Garcetti v. Ceballos*, 547 U.S. 410 (2006), stating that "the curricular-speech exception in compelled-speech cases applies *only to the specific 'subjects'* that the teacher 'is expected to teach.'" *Vlaming*, 2023 WL 8634968, at *29.

The Virginia Supreme Court further explained that "[t]he School Board *cannot* … declar[e] it Vlaming's 'official duty' to courier the School Board's ideological view of gender identity" because "where the State's interest is to disseminate an ideology,

no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)). At the very least—at the pleadings stage—*Vlaming*'s endorsement of Plaintiffs' arguments concerning *Janus* and *303 Creative* provides further justification for not cutting off Plaintiffs' argument.[3]

II. PLAINTIFFS ADEQUATELY PLEADED CLAIMS FOR VIOLATION OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

A. The State Defendants Are Burdening Plaintiffs' Religious Rights

With respect to Plaintiffs' Free Exercise claims, the State Defendants begin their motion with the assertion that the State's "FAQs do not substantially burden religion." ECF No. 53-1, Mtn. Judg. Pleadings, at 17:8-18:2. Without any supporting citation, the State Defendants argue that "[t]he FAQs are not binding" and "[t]he FAQs do not require Plaintiffs or EUSD to do anything, nor do they prohibit Plaintiffs or EUSD from doing anything. The free exercise claims fail for that reason alone." *Id.* This is a mere rehashing of the State Defendants' prior Rule 12(b)(6) motion to dismiss for lack of standing. *See* ECF No. 25. As this Court stated in denying that motion:

> The state defendants argue that plaintiffs lack standing because the FAQs page at issue does not directly affect the plaintiffs. Counsel for EUSD at the hearing, in contrast, twice said that EUSD adopted AR 5145.3 precisely because of the state's FAQs page. First, at the outset of the hearing counsel was asked, "Is the school district's position that this rule that you've adopted that says that parents are not entitled to notice, that that rule is mandated by the state?" Counsel responded, "Yes, we are taking that position." Hearing Transcript at 3. Later, a similar question was asked and the same answer was given. "The Court:

[3] Interestingly, the Court was reviewing the Free Speech guarantees of the Virginia Constitution, but stated "that the extant principles of free speech presently articulated by the United States Supreme Court in its interpretation of the First Amendment equally describe the baseline protection of the right of free expression secured by the Constitution of Virginia." *Vlaming*, 2023 WL 8634968, at *24.

> Okay. So to cut to the chase, you're telling me that this rule exists because the state is telling the school board that they must do this; am I correct? EUSD Attorney: Yes, your honor." Hearing Transcript at 37.
>
> …
>
> With no evidence to the contrary at this point, it must be concluded that the State is the driving force behind EUSD's alleged violations of plaintiffs' constitutional rights. If the plaintiffs succeed in proving their case, a permanent injunction against the state defendants will be necessary to accord full relief. Therefore, plaintiffs have Article III standing.

ECF No. 42, Order on Rule 12(b)(6) Mtns., at 30:22-31:7, 32:9-13. With their new motion for judgment on the pleadings, the State Defendants still provided "no evidence to the contrary," so there is no reason to revisit this holding, *see Chae*, 2008 WL 11342464, at *1, especially in the face of the contrary evidence submitted by Plaintiffs. *See* ECF No. 28 at 13:1-20:21 (seven pages of briefing explaining why the State is engaging in "agency smurfing," that is not addressed by the State at all, but which can be added to an amended complaint if needed).

In its ruling, the Court further noted the oddity that the State had filed a lawsuit against another school district, and obtained a temporary restraining order, after it adopted a policy contrary to the State's FAQ page. *See* ECF No. 42 at 31:8-32:9. That temporary restraining order has since been converted into a preliminary injunction. Jonna Decl., Exs. 3-5.[4] It would be manifestly unjust to allow the State to extricate itself from this case so it can go prosecute that other case unhindered.

[4] In that case, the State only raised state law claims—presumably to avoid removal to federal court. *See* ECF No. 36 (attaching complaint). The Court, in turn, justified its preliminary injunction solely on the basis that gender identity is a suspect classification under the Equal Protection Clause of the California Constitution, which applies strict scrutiny to all sex-based classifications. *See* Jonna Decl., Ex. 5. Sex-based classifications under the U.S. Constitution, in contrast, are subject to only intermediate scrutiny. And the Sixth Circuit recently explained that an analogous policy was not even properly characterized as discriminating on the basis of sex. *See L.W. v. Skrmetti*, 83 F.4th 460, 480-82 (6th Cir. 2023).

B. The State FAQs Are Subject to Strict Scrutiny

The State Defendants next argue that their FAQ page on gender identity is only subject to rational basis review because it is neutral and generally applicable. ECF No. 53-1, Mtn. Judg. Pleadings, at 17:6-20:11. This is a hard argument because, like all issues in a pleading challenges, the court must "draw[] all reasonable inferences in the plaintiffs' favor" in determining whether a government policy is neutral and generally applicable. *See Lowe v. Mills*, 68 F.4th 706, 714 & n.10 (1st Cir. 2023) (court finding that policy was neutral and generally applicable, in denying preliminary injunction, was no basis to grant motion to dismiss on the same issue).

Turning back to the Complaint, it pleads that the Defendants' Parental Exclusion Policies trigger strict scrutiny because: (1) the sheer number of comparable, categorical exemptions for secular reasons makes the policies not generally applicable, ECF No. 1, Compl., at 57-59, ¶¶240-58; and (2) the breadth of discretion afforded the government in determining whether a violation has occurred makes the policies neither neutral nor generally applicable. *Id.* at 60-63, ¶¶259-80.

In its prior ruling, this Court accepted both of Plaintiffs' arguments. With respect to the categorical exemptions, the Court stated that "[t]o date, the only evidence presented supports the teachers claim: that training regarding AR 5145.3 was limited to full-time teachers. Evidence is lacking showing the policy is being applied to instructional aides, substitute teachers, office staff, or non-teaching administrators." ECF No. 42, Order on Rule 12(b)(6) Mtns., at 26:17-20. With respect to government discretion, the Court held that "whether disciplinary action is taken by EUSD depends on an undefined *ad hoc* determination of whether the parent receiving gender-related information has a legitimate reason to be informed. This is the very definition of a discretionary exemption." *Id.* at 26:28-27:3.

Presumably, the State Defendants could have attempted to laser-focus in on the actual state-level requirements, and distinguished them from EUSD's own requirements. But they did not. Instead, with respect to the government discretion,

the State Defendants merely argued the law. According to the State Defendants, "while FAQ 7 indicates that there will be circumstances in which school staff determine that parents have a need to know, as explained below, that does not change the fact that the FAQ is generally applicable." ECF No. 53-1, Mtn. Judg. Pleadings, at 19:3-5. The State Defendants then engage in a lengthy explanation of the facts of *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021), to argue that this Court should not have relied on it. ECF No. 53-1 at 19:10-20:9. Oddly, the State Defendants make no similar attempt to factually distinguish *Fellowship of Christian Athletes v. San Jose Unified School Dist.*, 82 F.4th 664, 687-88 (9th Cir. 2023) (en banc), which expounded upon *Fulton* and this Court equally relied upon. *See* ECF No. 42 at 27. Again, there is nothing here warranting a revisiting of this Court's prior determinations.

III. Plaintiffs Are Permitted to Separately Plead a Claim for Declaratory Relief

Lastly, the State Defendants argue that the Court should strike the declaratory relief claim because "declaratory relief is a remedy, not an independent cause of action." ECF No. 53-1, Mtn. Judg. Pleadings, at 20:12-17. This argument evinces a misunderstanding of the Declaratory Judgment Act.

The Declaratory Judgment Act states that "[i]n a case of actual controversy within its jurisdiction …, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought*." 28 U.S.C. § 2201(a). "[T]he very purpose of the Declaratory Judgment Act" is to resolve controversies among "parties having adverse legal interests" to avoid the coercion caused by making plaintiffs choose between "abandoning [their] rights or risking prosecution." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, 129 (2007). However, the Declaratory Judgment Act "cannot be used to create federal jurisdiction where none existed." *N. Cnty. Commc'ns Corp. v. Verizon Glob. Networks, Inc.*, 685 F. Supp. 2d 1112, 1123 (S.D. Cal. 2010). Thus, "[t]o avail itself of

the Declaratory Judgment Act, the claimant must show a justiciable controversy exists, and the controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests." *Id.*

In that context, courts are suspicious when parties attempt to create federal jurisdiction by pleading a claim for declaratory relief, and thereby note that it creates a "remedy," not a "cause of action." *See, e.g., In re Rinegard-Guirma*, 654 B.R. 390, 396 (Bankr. D. Or. 2023) ("The Declaratory Judgment Act does not confer jurisdiction. It only authorizes a federal court to grant a remedy—declaratory relief—'[i]n a case of actual controversy within its jurisdiction.' The plaintiff in a declaratory-judgment action therefore must show that the underlying 'controversy' is within the federal court's jurisdiction."); *Int'l Soc. for Krishna Consciousness v. Enz*, 495 F. Supp. 373, 378 n.4 (D. Ariz. 1979) ("The declaratory judgment remedy, 28 U.S.C. § 2201, also requires 'a case of actual controversy.'").

But that is not the situation here. Here, Plaintiffs pleaded that "an actual, justiciable controversy has arisen between Plaintiffs and Defendants concerning whether [the] Parental Exclusion Policies are legally mandated by California *or federal law*," and "Plaintiffs seek a declaration from this Court that the conclusions of the Department of Education's FAQ page *violate the U.S. Constitution*." ECF No. 1, Compl., at 63, ¶¶284-85. In part, this is a proper standalone declaratory relief claim because California law prohibits retaliating against an employee for refusing to violate federal law, *see* Cal. Labor Code § 1102.5(c), and in part it is derivative of Plaintiffs' constitutional claims. *See, e.g., Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1065 (9th Cir. 2014) (government policy will fail rational basis review if not related "to a legitimate state interest"); *Janus*, 138 S. Ct. at 2473 (under Free Speech analysis, "the employer may insist that the employee deliver any *lawful* message."); *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-CV-4015, 2022 WL 1471372, at *8 n.12 (D. Kan. May 9, 2022) (under Free Exercise analysis, "[b]ecause it is illegitimate to conceal information from parents for the purpose of frustrating their

ability to exercise a fundamental right," Parental Exclusion Policies are unlikely to "satisfy even the rational basis standard").

The State Defendants' only citation stands for the proposition that where a separately pleaded declaratory relief claim is entirely derivative of other pleaded claims, the claim can be dismissed for the "purpose of narrowing the action, by eliminating superfluous or unnecessary claims and concentrating the parties' (and the Court's) energies on the essence of the underlying dispute." *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 975 (N.D. Cal. 2010) (noting that the dismissal has no substantive effect because it is entirely derivative). But this is a rule of discretion. Other courts have found it perfectly appropriate to allow the plaintiff to separately plead a derivative declaratory relief claim, and there is no practical reason here to strike the declaratory relief claim. *See N. Cnty. Commc'ns Corp.*, 685 F. Supp. 2d at 1123 ("Because this Court finds that Verizon sufficiently pleads a claim for relief based on North County's alleged service to chat-line providers, here too, the Court finds a justiciable controversy exists affecting the legal rights between Verizon and North County. Accordingly, the Motion is DENIED as to COUNT VI."). As there is no practical reason to dismiss the declaratory relief claim, and it actually provides the practical benefit of clarifying the issues for resolution in this case, the Court should deny the State Defendants' motion.

IV. THE COURT SHOULD ORDER THE STATE DEFENDANTS' TO PAY PLAINTIFFS' REASONABLY INCURRED ATTORNEYS' FEES

As shown above, the State Defendants' motion is a frivolous, duplicative attack on the pleadings that fails to even address or distinguish this Court's well-reasoned opinion. In earnest, it is a mere motion for reconsideration, but one that fails to even identify any new law or facts warranting a departure from the Court's prior opinion. This warrants sanctions under Section 1927 or this Court's inherent authority, and under S.D. Cal. CivLR 83.1.

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As stated above, sanctions under both Section 1927 and the Court's inherent authority require a finding of "bad faith," but bad faith under each is defined slightly differently. A finding that a motion was intentionally filed for an improper purpose—such as a vindictive desire to harass or delay—is adequate under both standards. *Fink*, 239 F.3d at 992-94. But the easier standard of recklessly raising a frivolous argument is only sanctionable under Section 1927, *id.* at 993—so long as there is also a finding that the proceedings were wastefully "multiplie[d]." 28 U.S.C. § 1927.

A motion is frivolous and sanctionable for "rehashing legal arguments already rejected by the district court." *Hyde & Drath v. Baker*, 24 F.3d 1162, 1172 (9th Cir. 1994). Indeed, Courts regular award sanctions when a party's rehashing raises no new points worth considering. *See, e.g., Canon Bus. Sols., Inc. v. ASAP Copy & Print*, No. CV 12-10165, 2013 WL 12162442, at *3 (C.D. Cal. Apr. 24, 2013) (motion "simply repeated arguments that the Court considered and rejected" previously), *aff'd*, 643 F. App'x 650, 653 (9th Cir. 2016); *In re Flashcom, Inc.*, 503 B.R. 99, 131 (C.D. Cal. 2013) ("[R]elitigation of an issue that has already been decided without any new facts or law can justify sanctions"), *aff'd*, 647 F. App'x 689, 693 (9th Cir. 2016).

Indeed, even sanctions under the Court's inherent power—requiring a finding of bad faith—are appropriate because bad faith can be inferred from such a pointless motion. *Mayorga v. Ronaldo*, 656 F. Supp. 3d 1218, 1228 (D. Nev. 2023) (sanctions because party "filed various motions and objections, repeating many of the same frivolous arguments the [c]ourt previously rejected"); *Miletak v. AT&T Servs., Inc.*, No. 12-CV-5326, 2020 WL 6497925, at *3 (N.D. Cal. Aug. 3, 2020) (the plaintiff "'knowingly or recklessly raise[d] a frivolous argument' in his most recent motion, and therefore acted in bad faith, given the Court's repeated rejections of the same argument in previous rulings.").

Here, sanctions are particularly appropriate because Plaintiffs attempted to meet and confer with the State Defendants to avoid having to respond to this pointless motion. Jonna Decl., ¶¶2-8 & Exs. 1-2. The State Defendants, in turn, refused to

meaningfully meet and confer, causing Plaintiffs to threaten that they would seek sanctions if the State Defendants filed a frivolously duplicative motion. Jonna Decl., ¶¶5-6. The State Defendants then misled Plaintiffs into believing that the issue was moot. Jonna Decl., ¶8. Finally, as Plaintiffs predicted in their meet and confer email, Jonna Decl., Ex. 2, p.1, the State Defendants' motion is nothing more than a frivolous motion for reconsideration, rehashing the same points already exhaustively briefed, with no new facts or law. It can serve no practical purpose whatsoever except to harass Plaintiffs and delay this case.

Under Section 1927, *at the very least*, the State Defendants recklessly filed a frivolous motion by failing to include any new law or facts warranting a departure from this Court's prior ruling. Indeed, the Local Rules require counsel to submit a declaration specifically identifying the changed circumstances, which the State Defendants ignored. S.D. Cal. CivLR 7.1(i)(1). Notably, nothing in CivLR 7.1 excuses the State Defendants from compliance merely because they are repeating arguments previously made by a separate party (the EUSD Defendants). *Id.* What matters is that the issues have already been adjudicated. Sanctions for violation of CivLR 7.1 are warranted, under CivLR 83.1, if nothing else.

But the State Defendants' actions in response to Plaintiffs' request to meet and confer is strong evidence of bad faith. *Estakhrian v. Obenstine*, No. CV 11-3480, 2016 WL 6275599, at *3 (C.D. Cal. May 17, 2016) (as evidence of bad faith, noting that "plaintiffs made multiple attempts to meet and confer with Obenstine's counsel, which he refused to do"). If the parties had continued meeting and conferring, Plaintiffs could have addressed all of the State Defendants' concerns—or explained why this motion was not proper. Instead, the State Defendants affirmatively misled Plaintiffs into believing the issue was moot. There can be no reason for doing so except a dogged desire to file the motion, to harass Plaintiffs.

Thus, the Court should award Plaintiffs their attorneys' fees incurred in preparing this opposition. In the alternative, the Court should issue a briefing schedule

and order the State Defendants to justify their motion and why sanctions should not be awarded. This brief was prepared by Attorneys Paul M. Jonna and Jeffrey M. Trissell, who respectively spent approximately 3.0 hours and 13.6 hours preparing it (rounded down). Plaintiffs are being represented *pro bono*, and so no hourly rate is being charged to them. In similar *pro bono* cases, in the past two years, Courts have accepted or awarded Messrs. Jonna and Trissell's 2022 hourly rates of $1,140/$875 and 2021 hourly rates of $850/$690. *See DFEH v. Cathy's Creations, Inc.*, No. BCV-18-102633, 2023 WL 4147473 (Cal. Super. Ct., Kern Cnty., Apr. 3, 2023);[5] *South Bay United Pentecostal Church v. Newsom*, No. 3:20-CV-865, 2021 WL 2250818 (S.D. Cal. June 1, 2021).

These rates are in line with judicially awarded rates in San Diego County. *See CliniComp Int'l, Inc. v. Cerner Corp.*, No. 17-CV-2479, 2023 WL 2604816, at *3 (S.D. Cal. Mar. 22, 2023) (awarding partner rates of $1,465-$1,055); *Orthopaedic Hosp. v. Encore Med., L.P.*, No. 3:19-CV-970, 2021 WL 5449041, at *15 (S.D. Cal. Nov. 19, 2021) (awarding $1,140 for a partner practicing law since 2009; and $875 for a fifth-year associate attorney). For purposes of this sanctions request, Plaintiffs request that the Court award sanctions using counsel's 2022 hourly rate, and thus award sanctions of $15,320. *See* Jonna Decl., ¶¶12-14.

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[5] The *DFEH* opinion provided a lower omnibus hourly rate by averaging yearly hourly rates over six years.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the State Defendants' motion for judgment on the pleadings and sanction them for filing a frivolous motion for reconsideration.

Respectfully submitted,

LiMANDRI & JONNA LLP

Dated: December 22, 2023 By: _____

Charles S. LiMandri
Paul M. Jonna
Mark D. Myers
Jeffrey M. Trissell
Milan L. Brandon II
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Elizabeth Mirabelli v. Mark Olson, President of the EUSD Board of Education, et al.
USDC Court Case No.: 3:23-cv-00768-BEN-WVG

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; my business address is P.O. Box 9120, Rancho Santa Fe, California 92067, and that I served the following document(s):

- **Plaintiffs' Memorandum of Points & Authorities in Opposition to the State Defendants' Motion for Judgment on the Pleadings [Fed. R. Civ. P. 12(c)]; and**
- **Declaration of Paul M. Jonna, Esq. in Support of Plaintiffs' Opposition to the State Defendants' Motion for Judgment on the Pleadings.**

on the interested parties in this action by placing a true copy in a sealed envelope, addressed as follows:

Thomas Prouty, Deputy General Counsel
Len Garfinkel
California Department of Education
1430 "N" Street, Suite 5319
Sacramento, CA 95814
Tel: 916-319-0860; Fax: 916-322-2549
E-Mail: tprouty@cde.ca.gov
E-Mail: lgarfinkel@cde.ca.gov
Attorneys for CDE Defendants

Daniel R. Shinoff, Esq.
Artiano Shinoff
3636 Fourth Avenue, Suite 200
San Diego, CA 92103
Tel: 619-232-3122
E-Mail: Dshinoff@as7law.com
E-Mail: nlay@as7law.com
Attorneys for EUSD Defendants

____ **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Rancho Santa Fe, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on this date following our ordinary practices. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

__X__ **(BY ELECTRONIC MAIL)** I served a true copy, electronically on designated recipients via electronic transmission of said documents.

__X__ **(BY ELECTRONIC FILING/SERVICE)** I caused such document(s) to be Electronically Filed and/or Service using the ECF/CM System for filing and transmittal of the above documents to the above-referenced ECF/CM registrants.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct.

Executed on December 22, 2023, at Rancho Santa Fe, California.

Kathy Denworth

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Chicago, IL 60606
Tel: (312) 782-1680
*Application forthcoming

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ELIZABETH MIRABELLI, an individual, and LORI ANN WEST, an individual,

Plaintiffs,

v.

MARK OLSON, in his official capacity as President of the EUSD Board of Education, et al.,

Defendants.

Case No.: 3:23-cv-0768-BEN-VET

Declaration of Paul M. Jonna, Esq., in Support of Plaintiffs' Opposition to the State Defendants' Motion for Judgment on the Pleadings

[Fed. R. Civ. P. 12(c)]

Judge: Hon. Roger T. Benitez
Courtroom: 5A
Hearing Date: January 8, 2024
Hearing Time: 10:30 a.m.

I, Paul M. Jonna, Esq., declare and state as follows:

1. I am an attorney at law duly licensed to practice in the State of California and in the Southern District of California. I am a Partner with LiMandri & Jonna LLP, and am counsel of record for Plaintiffs Elizabeth Mirabelli and Lori Ann West. The matters discussed below are based on my own personal knowledge. I could and would testify to them if called upon to do so in court.

THE PARTIES' MEET & CONFER REGARDING THIS MOTION

2. In response to the Court's order denying the Defendants' various motions to dismiss, on Monday, September 18, 2023, I sent a letter to counsel for the Defendants to discuss next steps in the case, including to schedule the parties' Rule 26(f) conference.

3. In response, on September 20, 2023, counsel for the State Defendants—Attorneys Rebecca Feil and Christopher Mandarano—sent me a letter stating that "[t]he state-level defendants plan to file a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) by or on September 28, 2023," the date by which an answer was due. A true and correct copy of the State Defendants' letter is attached as **Exhibit 1**.

4. The next day, September 21, I sent an email to Mr. Mandarano and Ms. Feil requesting the opportunity to meet and confer as the idea of a serial Rule 12(b)(6) motion to dismiss seemed improper. In my email, I framed the issues for the meet and confer call as follows: "In particular, can you tell us what you intend to raise in your motion to dismiss? The Court's 9/14 ruling is now law of the case, so we assume your proposed motion will not be asking the Court to revisit issues that were already decided. As you may know, judges within the Southern District generally encourage meet and confer before filing dispositive motions."

5. The parties telephonically met and conferred on Friday, September 22, 2023 at 4:00 p.m. On that call, counsel for the State Defendants refused to provide any specifics regarding their forthcoming Rule 12(b)(6) motion to dismiss. The only details provided were that the first three claims would be attacked for failure to state

a claim, and that the last claim—declaratory relief—would be attacked as merely a remedy, not a cause of action.

6. As a result, when the short call was over, I sent another email to counsel for the State Defendants. In that email, I summarized our call, expressed my frustration at the lack of a meaningful meet and confer, noted that Rule 12(g)(2) prohibits serial Rule 12(b)(6) motions to dismiss, and stated that Plaintiffs would seek sanctions if the State Defendants filed such a motion.

7. A true and correct copy of my email chain with counsel for the State Defendants, with the above referenced emails, is attached as **Exhibit 2**.

8. In response, counsel for the State Defendants requested another meet and confer call, which occurred on September 25, 2023. In that call, Attorney Bruce Yonehiro informed us that the State Defendants would not file their successive Rule 12(b)(6) motion. But Mr. Yonehiro did not mention that they would instead simply file a Rule 12(c) motion.

Subsequent Relevant Proceedings

9. As the Court knows, in *People v. Chino Valley Unified School Dist.*, San Bernardino Superior Court Case No. CIV SB 2317301 (filed Aug. 28, 2023), the State of California sued Chino Valley Unified School District after it adopted a policy contrary to the State's preferred Parental Exclusion Policies. On September 6, 2023, the State obtained a temporary restraining order and on October 19, 2023, that TRO was converted into a preliminary injunction. At the hearing, the Court explained that the injunction was issuing solely under the Equal Protection Clause of the California Constitution, Cal. Const., art. I, § 7. The Court has yet to issue a final written ruling, and a subsequent hearing on the written ruling will occur in January 2024.

10. A true and correct copy of the October 19, 2023 minute order granting a preliminary injunction is attached as **Exhibit 3**. A true and correct copy of the relevant portions of the morning transcript of the October 19, 2023, hearing—in which the Court announced its tentative ruling—is attached as **Exhibit 4**. A true and

correct copy of the relevant portions of the afternoon transcript of the October 19, 2023, hearing is attached as **Exhibit 5**.

11. I also wish to inform the Court of a ruling from Wisconsin which supports Plaintiffs here. In *T.F. v. Kettle Moraine School Dist.*, Waukesha County Circuit Court Case No. 2021 CV 001650 (filed Nov. 17, 2021), the Court granted summary judgment in favor of parents who objected to the school district's Parental Exclusion Policies. The Court found that the parental right at issue was the right to make decisions regarding children's medical care, which applied even beyond the school house door. A true and correct copy of that order is attached as **Exhibit 6**.

Request for Sanctions

12. For the reasons stated in Plaintiffs' opposition, the Court should award Plaintiffs their attorneys' fees incurred in preparing this opposition. The brief was prepared by Attorneys Paul M. Jonna and Jeffrey M. Trissell, who respectively spent 3.0 hours and 13.6 hours preparing it. Plaintiffs are being represented *pro bono*, and so no hourly rate is being charged to them.

13. In similar *pro bono* cases, in the past two years, Courts have accepted or awarded my and Mr. Trissell's 2022 hourly rates of $1,140/$875 and 2021 hourly rates of $850/$690. *See DFEH v. Cathy's Creations, Inc.*, No. BCV-18-102633, 2023 WL 4147473 (Cal. Super. Ct., Kern Cnty., Apr. 3, 2023); *South Bay United Pentecostal Church v. Newsom*, No. 3:20-CV-865, 2021 WL 2250818 (S.D. Cal. June 1, 2021). The *DFEH* opinion provided a lower omnibus hourly rate by averaging yearly hourly rates over six years.

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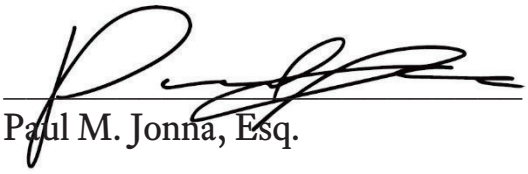
14. For purposes of this sanctions request, Plaintiffs request that the Court award sanctions using counsel's 2022 hourly rate, and thus award sanctions of $15,320. This includes $3,420 for 3.0 hours of my time and $11,900 for 13.6 hours of Mr. Trissell's time.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on December 22, 2023, in Rancho Santa Fe, California.



Paul M. Jonna, Esq.

EXHIBIT 1

CALIFORNIA DEPARTMENT OF EDUCATION
TONY THURMOND
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
1430 N STREET, SACRAMENTO, CA 95814-5901 • 916-319-0800 • WWW.CDE.CA.GOV

September 20, 2023

Via Email

Paul Jonna, Partner
LIMANDRI & JONNA LLP
P.O. Box 9120
Rancho Santa Fe, CA 92067
pjonna@limandri.com

Dear Mr. Jonna,

We are responding to your September 18, 2023 letter. The state-level defendants plan to file a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) by or on September 28, 2023. We are open to a Rule 26(f) conference at the appropriate time, if the state-level defendants remain in the case, but in our view a discovery plan and initial disclosures are premature under the circumstances until the pleadings are settled and the motion to dismiss has been resolved.

Regarding your proposal to amend the complaint and offer for an extension of time for a responsive pleading, please provide a red-lined version of a proposed amended complaint for us to consider in determining whether to stipulate or not.

Sincerely,

/s/ Rebecca P. Feil
REBECCA P. FEIL
Deputy General Counsel
Attorney for State-level Defendants

/s/ Christopher Mandarano
CHRISTOPHER MANDARANO
Deputy General Counsel
Attorney for State-level Defendants

Legal, Audits and Charters Branch
California Department of Education

EXHIBIT 2

From:	Paul Jonna
To:	Kathy Denworth; Christopher Mandarano; Jeffrey Trissell
Cc:	nlay@AS7Law.com; Charles Limandri; DShinoff@as7law.com; JSleeth@as7law.com; Elisa Ramirez; jbasel@as7law.com; Len Garfinkel; Rebecca Feil; Mark Myers
Subject:	RE: Zoom Conference - Mirabelli & West v. Olson, Case No. 3:23-cv-0768-BEN-WVG
Date:	Friday, September 22, 2023 5:02:13 PM
Attachments:	image001.png

Dear Chris, et al.,

As I'm sure you know, the Federal Rules state that defendants may only file a single motion to dismiss before answering, which must include all of their arguments. *See* Fed. R. Civ. P. 12(g)(2) ("[A] party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion."). Thus, we were surprised by your statement that the CDE was planning to file a successive Rule 12(b)(6) motion to dismiss.

On our call today, we were hoping to understand your position and your new arguments to see whether it would be fruitful to amend our complaint to narrow the issues for resolution by Judge Benitez. But you were particularly tight-lipped. You stated that your successive Rule 12(b)(6) motion would attack the first three claims for failure to state a claim against the CDE, and the fourth claim as merely a remedy, not a cause of action. Later, you said that we had failed to adequately plead all of the elements of our claims. Jeff Trissell then asked whether the focus was on the cognizability of our legal theories (what EUSD's prior motion to dismiss focused on), or on the appropriateness of including the CDE in this case. If the former, that would appear to simply be an improper motion for reconsideration; if the latter, then we could amend to include the allegations from our opposition to the CDE's motion to dismiss. *See* ECF No. 28, Oppo. to CDE Mtn. Dismiss, § III (detailing allegations that could be added if Court found complaint insufficient). You refused to explain further.

In any event, both potential arguments were already decided by Judge Benitez. *See* ECF No. 42, Ord. on Mtns. Dismiss, § V. In denying EUSD's motion to dismiss, Judge Benitez held that we pleaded adequate claims, *see id.* at § V.B., and in denying the CDE's motion to dismiss, Judge Benitez held that the CDE was a proper party. *See id.* at § V.A. We are left to assume that the CDE's new motion to dismiss will be simply a motion for reconsideration. *See* S.D. Cal. Civ. L.R. 7.1(i). Such a motion requires an attorney declaration explaining "what new or different facts and circumstances are claimed to exist which did not exist" previously. *Id*. If there are no new facts or circumstances, and the CDE simply seeks reconsideration of Judge Benitez's rulings to delay the case, then we will seek sanctions. *See* S.D. Cal. Civ. L.R. 83.1. Judge Benitez's order was comprehensive, and there was no reason why the CDE could not have raised its new arguments in its initial motion to dismiss.

I look forward to hearing your response as soon as possible.

Paul M. Jonna | Partner
LiMANDRI & JONNA LLP | P.O. Box 9120 | Rancho Santa Fe, CA 92067
Tel: (858) 759-9930 |Direct: (858) 759-9133 |Fax: (858) 759-9938
pjonna@limandri.com | www.limandri.com

From: Kathy Denworth <kdenworth@limandri.com>
Sent: Friday, September 22, 2023 2:34 PM
To: Christopher Mandarano <CMandarano@cde.ca.gov>; Jeffrey Trissell <jtrissell@limandri.com>; Paul Jonna <pjonna@limandri.com>
Cc: nlay@AS7Law.com; Charles Limandri <climandri@limandri.com>; DShinoff@as7law.com; JSleeth@as7law.com; Elisa Ramirez <ElRamirez@cde.ca.gov>; jbasel@as7law.com; Len Garfinkel <LGarfinkel@cde.ca.gov>; Rebecca Feil <RFeil@cde.ca.gov>; Mark Myers <mmyers@limandri.com>
Subject: Zoom Conference - Mirabelli & West v. Olson, Case No. 3:23-cv-0768-BEN-WVG

Dear counsel:

Below is the Zoom link for the Zoom meeting at 4:00pm today, September 22, 2023:

Join Zoom Meeting: https://us06web.zoom.us/j/84154742888?pwd=PJo2Ojr4t4VpO9LAw4Loz3T9uDKEvA.1

Meeting ID: 841 5474 2888
Passcode: 128221

One tap mobile
+16694449171,,84154742888#,,,,*128221# US
+16699006833,,84154742888#,,,,*128221# US (San Jose)

Best Regards,

Kathy

Kathy Denworth | Office Manager
Legal Executive Assistant to Charles S. LiMandri
LiMANDRI & JONNA LLP

P.O. Box 9120 | Rancho Santa Fe, CA 92067
Tel: (858) 759-9930 | Fax: (858) 759-9938
kdenworth@limandri.com

LIMANDRI & JONNA LLP
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From: Christopher Mandarano <CMandarano@cde.ca.gov>
Sent: Friday, September 22, 2023 12:26 PM
To: Jeffrey Trissell <jtrissell@limandri.com>; Paul Jonna <pjonna@limandri.com>
Cc: nlay@AS7Law.com; Charles Limandri <climandri@limandri.com>; Kathy Denworth <kdenworth@limandri.com>; DShinoff@as7law.com; JSleeth@as7law.com; Elisa Ramirez <ElRamirez@cde.ca.gov>; jbasel@as7law.com; Len Garfinkel <LGarfinkel@cde.ca.gov>; Rebecca Feil <RFeil@cde.ca.gov>; Mark Myers <mmyers@limandri.com>
Subject: RE: [EXTERNAL] RE: Mirabelli & West v. Olson, Case No. 3:23-cv-0768-BEN-WVG

Yes, we have availability at that time. Thanks.

Chris Mandarano, Deputy General Counsel
Legal, Audits and Charters Branch
California Department of Education
1430 N Street, Suite 5319
Sacramento, CA 95814-5901
Phone: 916-319-0288
Fax #: 916-322-2549
cmandarano@cde.ca.gov

From: Jeffrey Trissell <jtrissell@limandri.com>
Sent: Friday, September 22, 2023 12:04 PM
To: Paul Jonna <pjonna@limandri.com>; Christopher Mandarano <CMandarano@cde.ca.gov>
Cc: nlay@AS7Law.com; Charles Limandri <climandri@limandri.com>; Kathy Denworth <kdenworth@limandri.com>; DShinoff@as7law.com; JSleeth@as7law.com; Elisa Ramirez

<ElRamirez@cde.ca.gov>; jbasel@as7law.com; Len Garfinkel <LGarfinkel@cde.ca.gov>; Rebecca Feil <RFeil@cde.ca.gov>; Mark Myers <mmyers@limandri.com>
Subject: RE: [EXTERNAL] RE: Mirabelli & West v. Olson, Case No. 3:23-cv-0768-BEN-WVG

Chris,

A conflict has arisen for Paul. Can we move the call to 4pm? Our office manager Kathy will circulate a new Zoom link.

Thanks,
Jeff

****

Jeffrey M. Trissell | Senior Associate
LiMANDRI & JONNA LLP | P.O. Box 9120 | Rancho Santa Fe, CA 92067
Tel: (858) 759-9930 | Fax: (858) 759-9938
jtrissell@limandri.com | www.limandri.com

From: Paul Jonna
Sent: Thursday, September 21, 2023 11:23 AM
To: Christopher Mandarano <CMandarano@cde.ca.gov>
Cc: nlay@AS7Law.com; Charles Limandri <climandri@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; Kathy Denworth <kdenworth@limandri.com>; DShinoff@as7law.com; JSleeth@as7law.com; Elisa Ramirez <ElRamirez@cde.ca.gov>; jbasel@as7law.com; Len Garfinkel <LGarfinkel@cde.ca.gov>; Rebecca Feil <RFeil@cde.ca.gov>; Mark Myers <mmyers@limandri.com>
Subject: RE: [EXTERNAL] RE: Mirabelli & West v. Olson, Case No. 3:23-cv-0768-BEN-WVG

Here is a zoom link / dial in:

Paul Jonna is inviting you to a scheduled Zoom meeting.

Topic: Mirabelli, et al v Olson, et al - Meet & Confer re MTD
Time: Sep 22, 2023 02:00 PM Pacific Time (US and Canada)

Join Zoom Meeting

https://us02web.zoom.us/j/86365479792?pwd=Q0xBbzdQbmJCZUg2MDdRT3dpb2MzQT09

Meeting ID: 863 6547 9792
Passcode: 145501

One tap mobile
+16694449171,,86365479792#,,,,*145501# US
+16699009128,,86365479792#,,,,*145501# US (San Jose)

Dial by your location
• +1 669 444 9171 US
• +1 669 900 9128 US (San Jose)
• +1 253 205 0468 US
• +1 253 215 8782 US (Tacoma)
• +1 346 248 7799 US (Houston)
• +1 719 359 4580 US
• +1 309 205 3325 US
• +1 312 626 6799 US (Chicago)
• +1 360 209 5623 US
• +1 386 347 5053 US
• +1 507 473 4847 US
• +1 564 217 2000 US
• +1 646 558 8656 US (New York)
• +1 646 931 3860 US
• +1 689 278 1000 US
• +1 301 715 8592 US (Washington DC)
• +1 305 224 1968 US

Meeting ID: 863 6547 9792
Passcode: 145501

Find your local number: https://us02web.zoom.us/u/kDfyvqCvk

Paul M. Jonna | Partner
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From: Christopher Mandarano <CMandarano@cde.ca.gov>
Sent: Thursday, September 21, 2023 11:18 AM
To: Paul Jonna <pjonna@limandri.com>
Cc: nlay@AS7Law.com; Charles Limandri <climandri@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; Kathy Denworth <kdenworth@limandri.com>; DShinoff@as7law.com; JSleeth@as7law.com; Elisa Ramirez <ElRamirez@cde.ca.gov>; jbasel@as7law.com; Len Garfinkel <LGarfinkel@cde.ca.gov>; Rebecca Feil <RFeil@cde.ca.gov>
Subject: RE: [EXTERNAL] RE: Mirabelli & West v. Olson, Case No. 3:23-cv-0768-BEN-WVG

Yes, that should be fine.

Chris Mandarano, Deputy General Counsel
Legal, Audits and Charters Branch
California Department of Education
1430 N Street, Suite 5319
Sacramento, CA 95814-5901
Phone: 916-319-0288
Fax #: 916-322-2549
cmandarano@cde.ca.gov

From: Paul Jonna <pjonna@limandri.com>

Sent: Thursday, September 21, 2023 11:17 AM
To: Christopher Mandarano <CMandarano@cde.ca.gov>
Cc: nlay@AS7Law.com; Charles Limandri <climandri@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; Kathy Denworth <kdenworth@limandri.com>; DShinoff@as7law.com; JSleeth@as7law.com; Elisa Ramirez <ElRamirez@cde.ca.gov>; jbasel@as7law.com; Len Garfinkel <LGarfinkel@cde.ca.gov>; Rebecca Feil <RFeil@cde.ca.gov>
Subject: RE: [EXTERNAL] RE: Mirabelli & West v. Olson, Case No. 3:23-cv-0768-BEN-WVG

Thanks – does 2pm work?

Paul M. Jonna | Partner
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pjonna@limandri.com | www.limandri.com

From: Christopher Mandarano <CMandarano@cde.ca.gov>
Sent: Thursday, September 21, 2023 11:14 AM
To: Paul Jonna <pjonna@limandri.com>
Cc: nlay@AS7Law.com; Charles Limandri <climandri@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; Kathy Denworth <kdenworth@limandri.com>; DShinoff@as7law.com; JSleeth@as7law.com; Elisa Ramirez <ElRamirez@cde.ca.gov>; jbasel@as7law.com; Len Garfinkel <LGarfinkel@cde.ca.gov>; Rebecca Feil <RFeil@cde.ca.gov>
Subject: RE: [EXTERNAL] RE: Mirabelli & West v. Olson, Case No. 3:23-cv-0768-BEN-WVG

Hello Counsel,

Certainly. We have availability tomorrow either prior to 10AM or after 11:30AM. Would 1 PM work for you? If so please feel free to send a meeting invitation for that time.

Chris Mandarano, Deputy General Counsel
Legal, Audits and Charters Branch
California Department of Education
1430 N Street, Suite 5319
Sacramento, CA 95814-5901
Phone: 916-319-0288
Fax #: 916-322-2549
cmandarano@cde.ca.gov

From: Paul Jonna <pjonna@limandri.com>
Sent: Thursday, September 21, 2023 10:52 AM
To: Elisa Ramirez <ElRamirez@cde.ca.gov>
Cc: nlay@AS7Law.com; Charles Limandri <climandri@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; Kathy Denworth <kdenworth@limandri.com>; DShinoff@as7law.com; JSleeth@as7law.com; jbasel@as7law.com; Len Garfinkel <LGarfinkel@cde.ca.gov>; Rebecca Feil <RFeil@cde.ca.gov>; Christopher Mandarano <CMandarano@cde.ca.gov>; Sherlyn Parker <ShParker@cde.ca.gov>
Subject: [EXTERNAL] RE: Mirabelli & West v. Olson, Case No. 3:23-cv-0768-BEN-WVG

Dear Counsel:

Please let us know if you have time today or tomorrow for a short call to meet and confer over these issues. In particular, can you tell us what you intend to raise in your motion to dismiss? The Court's 9/14 ruling is now law of the case, so we assume your proposed motion will not be asking the Court to revisit issues that were already decided. As you may know, judges within the Southern District generally encourage meet and confer before filing dispositive motion. Please let us know as soon as possible when we can discuss.

Also, we will not have a redline version of our complaint ready to send to you until early next week.

Thank you.

Paul M. Jonna | Partner
LiMANDRI & JONNA LLP | P.O. Box 9120 | Rancho Santa Fe, CA 92067
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pjonna@limandri.com | www.limandri.com

From: Elisa Ramirez <ElRamirez@cde.ca.gov>
Sent: Wednesday, September 20, 2023 2:44 PM
To: Paul Jonna <pjonna@limandri.com>
Cc: nlay@AS7Law.com; Charles Limandri <climandri@limandri.com>; Jeffrey Trissell <jtrissell@limandri.com>; Kathy Denworth <kdenworth@limandri.com>; DShinoff@as7law.com; JSleeth@as7law.com; jbasel@as7law.com; Len Garfinkel <LGarfinkel@cde.ca.gov>; Rebecca Feil <RFeil@cde.ca.gov>; Christopher Mandarano <CMandarano@cde.ca.gov>; Sherlyn Parker <ShParker@cde.ca.gov>
Subject: Mirabelli & West v. Olson, Case No. 3:23-cv-0768-BEN-WVG

Dear Counsel,

Attached please find correspondence from Deputy General Counsel Rebecca Feil and Deputy General Counsel Chris Mandarano. Thank you.

Elisa Ramirez, Legal Secretary
Administrative Support and Regulations Adoption
Legal, Audits, & Charters Branch
California Department of Education
1430 N Street, Suite 5319
Sacramento, CA 95814-5901
Phone: 916-319-0860
Fax: 916-322-2549

EXHIBIT 3

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN BERNARDINO
San Bernardino District
247 West 3rd St
San Bernardino, CA 92415
www.sb-court.org

PORTAL MINUTE ORDER

Case Number: CIVSB2317301 **Date: 10/19/2023**

Case Title: The People of the State of California, Ex Rel. et al
-v-
Chino Valley Unified School District

Department S28 - SBJC	**Date: 10/19/2023**	**Time: 10:00 AM**	**Predisposition Motion re:**

Judicial Officer: Michael A Sachs
Judicial Assistant: Victoria Sanchez
Court Attendant: Mari Kilgore

Appearances
Attorney Delbert K. Tran, Alexander Simpson and James E. Zahradka II present for Plaintiff Rob Bonta, The People of the State of California, Ex Rel.
Attorney Emily Rae present for Defendant Chino Valley Unified School District
Attorney Christopher Mandrano present forCALIFORNIA DEPARTMENT OF EDUCATION
Attorney Jesse Franklin-Murdockand Josh Dixon present for Intervenor Nichole Vicario, Richard N. Wales Jr., Misty Startup, Darice De Guzman, Kristi Marcos, Kristal Barret

Proceedings
Stip and appointment of pro tem reporter filed
Jennifer Sebring #13749
A.M.-Starting at 10:08 a.m.
Stip and appointment of pro tem reporter filed
Leslie Moore #11990
P.M.- Starting on 1:15 p.m.
Rob Bonta, The People of the State of California, Ex Rel.'s Motion re: Preliminary Injunction/TRO is heard.
The Court has read and considered Opposition and reply
The Court recites its tentative ruling.
Argued by counsel and submitted.

Court Finds
Rob Bonta, The People of the State of California, Ex Rel.'s Motion re: Preliminary Injunction/TRO is granted in part.
Plaintiff Counsel to prepare Proposed Order.
1a and 1b- Granted
1c-Denied
Notice to be given by Attorney Delbert Tran.

== Minute Order Complete ==

EXHIBIT 4

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO
-o0o-

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

CASE NO. CIVSB2317301

CHINO VALLEY UNIFIED SCHOOL DISTRICT,

Defendant.

REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS
Before Hon. Michael Sachs, Judge
Department S-1
San Bernardino, California
Thursday, October 19, 2023

APPEARANCES:

For the Plaintiff: STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
BY: DELBERT K. TRAN, ESQ.
ALEXANDER SIMPSON, ESQ.
1515 Clay Street, Suite 2000
Oakland, California 94612

For the Defendant Defendant Chino Valley Unified School District:
LIBERTY JUSTICE CENTER
BY: EMILY RAE, ESQ.
440 North Wells Street, Suite 200
Chicago, Illinois

Volume 1, Pages 1-75, incl.
Reported by: JENNIFER SEBRING, CSR NO. 13749
Official Reporter Pro Tempore

APPEARANCES (continued):

For Proposed Intervenors:

CENTER FOR AMERICAN LIBERTY
BY: JOSH DIXON, ESQ.
1311 South Main Street
Suite 207
Mount Airy, Maryland 21771

DHILLON LAW
BY: JESSE FRANKLIN-MURDOCK, ESQ.
177 Post Street, Suite 700
San Francisco, California 94108

SAN BERNARDINO, CALIFORNIA, THURSDAY, OCTOBER 19, 2023

A.M. SESSION

DEPARTMENT S-1 HON. MICHAEL SACHS, JUDGE

APPEARANCES: The Plaintiff, THE PEOPLE OF THE STATE OF CALIFORNIA, represented by counsel, DELBERT K. TRAN, Attorney at Law, and ALEXANDER SIMPSON, Attorney at Law; the Defendant, CHINO VALLEY UNIFIED SCHOOL DISTRICT, represented by counsel, EMILY RAE, Attorney at Law; For Proposed Intervenors, JOSH DIXON, Attorney at Law, and JESSE FRANKLIN-MURDOCK, Attorney at Law.

(Jennifer Sebring, Official Reporter Pro Tem, CSR No. 13749)

---o0o---

THE COURT: Good morning. Thank you for being here. I appreciate everybody appearing today.

Can I have appearances, please, first before I forget to ask that question.

MR. TRAN: Yes, your Honor. Deputy Attorney General Delbert Tran on behalf of the People of the State of California.

THE COURT: Good morning.

MR. TRAN: Good morning.

MR. SIMPSON: Good morning, your Honor. Deputy Attorney General Alex Simpson on behalf of the people.

THE COURT: Good morning.

MS. RAE: Good morning, your Honor. Emily Rae, senior counsel for Liberty Justice Center on behalf of Defendant Chino

The greater the showing of one factor, the less that must be shown on the other. And that's Butt, B-U-T-T, versus State of California, 1992, 4 Cal.4th at 668 and 678.

The purpose of this preliminary injunction, if it's granted, is to preserve the status quo until a final determination following a trial. It does not constitute a final adjudication of the controversy, and it's merely going to keep the status quo in place until we have a trial in this matter.

In a constitutional context, it is well established that if the plaintiff demonstrates the likelihood of success related to a constitutional violation and injury, such a showing usually demonstrates he is suffering irreparable harm, no matter how brief the violation. Citation is Baird, B-a-i-r-d, versus Bonta, Ninth Circuit, 2023 -- 2023 Westlaw 5763345.

Accordingly, when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.

So what I want to do at this point in time is give you tentative rulings I'm making regarding the preliminary injunction.

First, the Court would grant the state's request for judicial notice of the district's policies, the transcripts, the governmental report and Website, and the New Jersey Superior Court order, but not that, as to the report and website, only their existence is properly judicially noticed. The contents therein are not.

The Court will also overrule the district's related evidentiary objections to the state's request.

I'm going to grant the district's request for judicial notice of the complaint procedure policy and the news article, but only as to the latter's existence and the fact that relevant discussions have occurred in the public realm.

As to the specific elements of the policy, I'm going to take it slightly out of order. So I want to give you my tentative as it relates to subpart C. That's the third subpart relating changes to a student's record.

Section 1-C is going to be enjoined only to those students who are 18 years of age or older. Otherwise, the motion is denied.

The significance to my evaluation regarding the constitutionality of that section, 1-C, unlike 1-A and B, treats all students equally. Its neutral on its face, it survives rational basis scrutiny, and promotes the district's stated goals unrelated to gender aspects of the policy. I will conclude that the state has not shown a likelihood of prevailing on the merits regarding 1-C.

While children generally have a right to privacy, which would cover the information disclosed under the policy, there's no reasonable expectation of privacy under the context and facts of this case nor is the invasion of privacy serious.

Again, I believe the state has not shown a likelihood prevailing on the merits as to the privacy aspect claim as it

relates to 1-C, and it's failed to show that the balancing of the harm favors an injunction.

One other point I'd like to point out that I also believe is significant. 1-C, this is the, again, portion of the policy that requires changes to a student's record to be reported to the parents, is purely a voluntary disclosure by the student.

What I mean by that is the reporting aspect of 1-C is not even implicated until such a time as the student makes a change to their school records. So hypothetically, if a student chooses not to make a change in light of what's going on at the school district, in particular the issues surrounding this motion, there is no obligation to disclose.

I understand that part of the state's opposition was essentially the fact that they acknowledged that its neutral on its face, but the concern, nevertheless, of where the student does decide to make that change in their record, the information will be reported back to the parent. But, again, the student is voluntarily making the choice, unlike the choice -- if you want to call it a choice -- being made in subparts 1-A and 11-B [sic].

Now, as to 1-A and 1-B, I would find that they are in fact constitutional -- 1-A and 1-B are unconstitutional.

1-A and 1-B discriminate on the basis of sex, and they do not survive strict scrutiny analysis since they are sexual neutral alternatives to accomplishing the district's goals.

I'll talk about that in a little bit more detail.

I would deny the motion as it relates to section 5, as section 5 only outlines how disclosures are made and recorded. The section is only implicated once there is a disclosure, but there can be no disclosures under article 1-A and B given the proposed granting of the injunction.

To the extent that section 5 relates to section 1-C, again, I'm going to deny the motion as to 1-C for the reasons previously indicated.

Before I go on to give a little bit more detail for the basis of the Court's ruling, I did want to address the evidentiary objections that have been raised.

I would overrule the state's objections to the Hunt, Buoncristiani, and Cloke declarations. I'd overrule the state's objections to Dr. Anderson's declaration.

Many of the arguments made, if valid, go to the weight of the evidence. I would also note the state asserts multiple objections to, in most instances, large sections of the declaration.

Evidentiary objections must be specific and particularized. To the extent the materials cited as being objectionable contains any statement that is not objectionable, even if meritorious objections could have been posed to unspecified portions of the material, the objections will be overruled.

Citation is OCFCD versus Sunny Crest Dairy, 1978,

77 Cal.App.3d 472. Also Rose, R-o-s-e, versus State of California, 1942, 9 Cal.2d 713.

I would overrule the district's objections to 1 through 6, 9 through 15, 17 through 25, 38, 46, 49, 56, and 61, except to the extent that the evidence is relevant for a state of mind purpose.

The district's objections Numbers 7, 16, as to the assertion that the policy is a violation of privacy, 26 through 37, 39 through 45, 47 through 48, 50 through 55, 37 through 60, and 62 through 64 are sustained.

I am finding unconstitutional sections 1-A and 1-B based on equal protection.

In coming to that conclusion, I have intentionally not discussed and will not discuss the state's arguments regarding the policy violation of right to privacy. It's not necessary based on the conclusions this Court has made as it relates to 1-A and 1-B.

Now, I could go into more detail regarding the specifics of the Court's decision. I think you've gotten a gist of it, and I'm happy to go into more detail. But I did want to give you an opportunity, at least initially, for the parties to present some of their arguments to the Court.

Clearly, we're not going to get this done by lunch.

So -- but I'd like to at least start that process. We'll take a lunch break from 12:00 to 1:30, and then we'll come back at 1:30 to finish up with any of the arguments presented by

evaluations can only be performed with a parent's medical consent.

And the Mirabelli Court heard all of the same arguments that were proposed by plaintiff and found that parents have a right to know this important information.

In conclusion, it is important to remember that plaintiff bears the burden here to show that a preliminary injunction is necessary. Plaintiff has not established why it should be able to keep secrets from parents about their own child's physical, mental, emotional, and social well being.

And because BP 5020.1 is inconsistent -- is consistent with California and federal laws, the Court should find in favor of the district and deny plaintiff's request for preliminary injunction, including as to Sections 1-A and B.

THE COURT: Thank you.

MS. RAE: Thank you.

THE COURT: Intervenor, do you want to get your discussions in at this point in time, or do you want to wait?

MR. DIXON: I'll defer to your Honor. Whichever your Honor prefers. I don't know that I'll be finished by the noon hour.

THE COURT: Okay. Then what we'll do is we'll preserve you for one -- we'll come back at 1:15, everybody, and then we'll pick up where we left off.

I do want to touch upon just a couple of things while I have some time here.

As I stated out when I read you my tentative, these tentatives are to kind of give you an idea as to where I was heading with the case. I gave you each an opportunity to address those tentatives.

I will -- I want to focus -- really focus on the Court's ultimate ruling in this case, which really I haven't heard much in the way of conversation yet. And that is this: As to 1-A and 1-B, the Court is concluding that they are unconstitutional under equal protection grounds.

The comments that counsel have made regarding the evidence, the declarations, the doctors' testimony and their declarations, about the need and the care of somebody who is transitioning has very little, if anything, to do with my tentative.

And so I just want you to be prepared, once we go around this initial round of giving you an opportunity to chat, you haven't really heard the basis for why I'm leaning on granting the ex parte as to the 1-A, 1-B, as I indicated that I was not inclined for the purposes of this hearing to touch upon the argument regarding the right to privacy.

So I haven't really heard a whole lot of argument yet, but we'll do that after lunch. See everybody at 1:15. We'll pick up where we left off. Please keep in mind that we will have to finish by 4:00 today.

MR. FRANKLIN-MURDOCK: Your Honor, I have one housekeeping question, if I may. Would your Honor like us to

submit a proposed order regarding the intervention motion?

THE COURT: Yes, please.

MR. FRANKLIN-MURDOCK: Thank you, your Honor.

THE COURT: All right. Thanks, everybody. We'll see you at 1:15.

(Whereupon the proceedings adjourned.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO
DEPARTMENT 1 HON. MICHAEL SACHS

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. CHINO VALLEY UNIFIED SCHOOL DISTRICT, Defendant.	CASE NO. CIVSB2317301 REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
)ss.
COUNTY OF SAN BERNARDINO)

I, Jennifer Sebring, Official Reporter Pro Tempore of the Superior Court of the State of California, for the County of San Bernardino, do hereby certify that the foregoing pages, 1 through 57, comprise a full, true and correct transcript of the proceedings taken in the above-entitled cause on Thursday, October 19, 2023.

Dated November 1, 2023.

Jennifer Sebring

JENNIFER SEBRING, CSR NO. 13749
OFFICIAL REPORTER PRO TEMPORE

EXHIBIT 5

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
DEPARTMENT S1 HON. MICHAEL A. SACHS, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA,)
ex rel. ROB BONTA, ATTORNEY GENERAL OF)
THE STATE OF CALIFORNIA,)
)
Plaintiff,)
)CASE NO.
vs.)CIVSB2317301
)
CHINO VALLEY UNIFIED SCHOOL DISTRICT,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT OF ORAL PROCEEDINGS
THURSDAY, OCTOBER 19, 2023

Appearances:

(See Appearance Page.)

Volume 2 of 2 LESLIE MOORE, CSR #11990
Pages 1 through 47 OFFICIAL REPORTER PRO TEMPORE

APPEARANCE PAGE:

For Plaintiff:	ROB BONTA, ATTORNEY GENERAL By: DELBERT K. TRAN, Deputy and By: JAMES F. ZAHRADKA II, Deputy 455 Golden Gate Avenue Suite 11000 San Francisco, California 94102
For Defendant:	LIBERTY JUSTICE CENTER By: EMILY RAE, Esq. 440 North Wells Street Suite 200 Chicago, Illinois 60654
For Intervenors:	DHILLON LAW GROUP, INC. By: JESSE FRANKLIN-MURDOCK, Esq. and By: JOSHUA DIXON, Esq. (Pro Hac Vice) 177 Post Street Suite 700 San Francisco, California 94108
For Third Party California Department of Education:	CALIFORNIA DEPARTMENT OF EDUCATON By: CHRISTOPHER MANDARANO, Esq. 1430 North Street Suite 5319 Sacramento, California 95814

SAN BERNARDINO, CALIFORNIA; THURSDAY, OCTOBER 19, 2023

1:14 P.M.

DEPARTMENT S1 HON. MICHAEL A. SACHS, JUDGE

APPEARANCES:

Plaintiff's Counsel, DELBERT TRAN and JAMES ZAHRADKA, Deputies Attorney General; Defendant's Counsel, EMILY RAE, Attorney at Law; Intervenors' Counsel, JOSHUA DIXON (Pro Hac Vice) and JESSE FRANKLIN-MURDOCK, Attorneys at Law; Department of Education's Counsel, CHRISTOPHER MANDARANO, Attorney at Law.

(Leslie Moore, Official Reporter Pro Tempore, CSR #11990.)

-oOo-

THE COURT: All right. Counsel, I think where we left it right before lunch is that the attorney for the intervenor was going to come and speak.

MR. DIXON: Yes, your Honor.

THE COURT: Will you state your appearance again for the record?

MR. DIXON: Josh Dixon, Center for American Liberty, on behalf of the intervenors.

THE COURT: Go ahead.

MR. DIXON: The State argues we're litigating the different case than the one it brought, but the State is asking the Court to issue an injunction against the

events that follows that: Increased likelihood of persistence, puberty blockers, all because the child misperceived who they were at age five. Causes kids to live a secret double life at school and at home, which is psychologically harmful.

Now the state argues that --

THE COURT: Counsel, let me just interrupt.

MR. DIXON: Yes, your Honor.

THE COURT: We've got other things that we need to cover and other people that need to speak. Ask you to wrap it up here.

MR. DIXON: Yes, your Honor.

I would simply add this: At root, every single one of the State's justifications for this policy is because parents may harm their children. It's a concern. But the way to handle that is to allow for an individualized determination, not this one-size-fits-all policy that assumes every parent will abuse their children because ten percent -- whatever the number the State has offered -- do it. The Supreme Court has flatly said it's anathema to this -- to our constitutional traditions to presume that all parents will abuse their kids because some parents do.

THE COURT: Thank you. I read that in the papers.

Let me jump in here, because, frankly, I'm not persuaded and part of my interest in getting the

tentative out was so that people knew where I was coming from, but my tentative is to find 1A and 1B unconstitutional as it violates equal protection. Let me explain that, and then I'll give everybody an opportunity to focus in on an argument. And I do need you to focus in on the argument as opposed to what I believe are very pertinent issues, but are not germane to this Court's proposed tentative ruling based on equal protection. Let me just, basically, start from the beginning as it relates to this ruling that I tentatively made.

I first point out, despite what I've been told here today -- or argued today, that the sex-based discrimination includes discrimination based on transgender status.

"In California, transgender discrimination is subject to strict scrutiny."

That's Taking Offense -- Taking Offense case, 66 Cal.App.5th at page 696. Under the test, the Government must show both it has a compelling interest that justifies the classification and that the classification is necessary to further the compelling interest. However, classification does not in and of itself deprive a group of equal protection, if the classification is based upon some difference between the classes, which is pertinent to the purpose of which the legislation is designed.

The Court also applies equal protection principles equally regardless of the gender being discriminated against. The first paragraph of equal protection -- of an equal protection claim -- excuse me. I'll repeat that.

"The first prerequisite of an equal protection claim is a showing that the Government has adopted a classification that affects two or more similarly situated groups in an unequal manner. The Court should not inquire whether the persons are similarly situated for all purposes, but whether they are similarly situated of the law challenged."

"The law also needs not require things which are different in fact or opinion to be treated in law as though they were the same. Instead, 'similarly situated prerequisite' simply means that an equal protection claim cannot succeed and does not require further analysis unless there is some showing that the two groups are sufficiently similar with respect to the purposes of the law in question, and, therefore, some level of scrutiny is required in order to determine whether the distinction is justified."

Again, that's from Taking Offense case.

I first want to talk about, again, how that relates to my tentative as it pertains to section 1C of the policy. Again, that policy inquires disclosure when a student without limitation requests a change in any information contained on the student's official or unofficial record. This portion of a policy has general applicability on its face to treat all students the same regardless of a classification. That's whether a student is cisgender, transgender, gender nonconforming, male, female, et cetera, and disclosure under the policy is required. Policy also requires disclosure regardless of the change involved. So long as the requested change is to the students' school records, disclosure is required.

Again, the State essentially concedes that section. It's basically neutral, since the State only seeks invalidation to the extent transgender or gender-nonconforming students' requests to change their names, pronouns, their sex or gender.

So section 1C is not subject to strict scrutiny, as I previously indicated in my tentative, because it does not treat similarly situated groups in an unequal manner based on gender, gender identity, gender expression. Instead -- and absent a legitimate right to privacy -- challenged section 1C of the policy merely needs to be rationally related to the legitimate government purpose [sic]. Those are the parental

interests that we've been talking to. And I've determined that there is, in fact, rationally related to that interest, and I do not believe that the State has a likelihood of prevailing on that issue.

But I want to talk about 1A and 1B, because I haven't really heard much about that discussion, which leads me to think that the parties agree with the Court that there's a problem with equal protection as it relates to 1A and 1B. Again, the policy is intended to promote parental involvement, foster trust, and address existing welfare concerns. The District's students are all similarly situated for the purposes of sections 1A and 1B. For instance, the District does not refute the proposition that all children, regardless of background, may have suicidal ideations or social emotional health concerns.

Despite this fact, sections 1A and 1B provide for different treatment premised upon sex or gender classifications. Discrimination is built into the operative language of the policy, since a child's requests or actions are treated differently based upon their gender incongruity, meaning sex is a determining factor. That's a suspect classification that does require strict scrutiny.

The District claims that two sections would equally apply to a student that is transitioning as compared to one that is detransitioning. Per the

District, hypothetically, a now-cisgender male that had socially transformed -- excuse me, transitioned, I apologize -- and changed official school records, but wants to revert back to being called a boy would be treated the same as a transgender student seeking to initially transition. However, in that scenario proposed by the District, sections 1A and 1B are still only implicated based upon gender incongruence between the student's then-existing gender identity and a student's records. Sex-based discrimination, therefore, still exists since sex or gender identity are the determining factors when disclosure is required.

You know, this concept is highlighted by the fact that a cisgender male wanting to be called by a different stereotypical male name, even perhaps the same name that the distransitioner seeks, would not be subjected to section 1A and 1B. Therefore, since section 1A and 1B treat otherwise similarly situated students differently based on their sex or gender identity -- excuse me -- strict scrutiny applies, and policy must be narrowly tailored to serve a compelling state interest.

Once again, the stated purpose of the policy is to prevent and reduce instances of self-harm. To that end, the District purports to promote communication and positive relationship with the parents

and guardians to get their involvement. There can be no dispute -- and I think we all agree; I've heard this time and time again today -- that the child's safety is a compelling governmental interest. The State's own evidence even underscores that significant health and safety concern that involving transgender or gender nonconforming children, such as the increased risk of suicide, the State's evidence also highlights the importance of parental involvement [sic].

However, it's not enough for the Government to identify a compelling interest. The Government must also show the statute furthers the compelling interest as narrowly tailored to that end.

"A challenged use of a classification is narrowly tailored, generally speaking, if there's no alternative means of adequately serving the compelling interest that would impose a lesser burden on the constitutional interest in question."

That's from People versus Son, S-o-n, 2020, 49 Cal.App.5th, 565 at 590.

"Only the most exact connection between justification and classification will suffice. The classification must appear necessary rather than convenient, and the availability of gender-neutral alternatives or

the failure of the legislative body to consider such alternatives will be failed to that classification."

That from the Woods case, 2008, 167 Cal.App.4th, 678, 675.

Here, the District may have a compelling interest. Transgender or gender-nonconforming students cannot be lumped together simply because the group as a whole is at greater risk for significant social emotional concerns or suicide. That overbroad generalization is simply insufficient to justify a suspect classification, because equal protection rights are held by individuals, not groups. And the policy treats all transgender children the same, irrespective of the child's actual health.

The expert evidence submitted also establishes that the state law affirms there's nothing wrong or pathologically wrong with being transgender or gender [sic] or nonconfirming, in and of itself. I do not accept what has been argued to the Court, that making a choice -- if a choice is even available to someone -- of being transgender as an indication of a mental health problem. That is just not supported anywhere, other than arguments being made by the defendants in this case.

It's not enough, as in the Woods case, that women are more victimized by domestic violence. The fact

that transgender or gender-nonconforming students may have a -- more mental health concern as opposed to others is not enough to justify the suspect classification, especially where gender-neutral alternatives are available to advance the District's interests. Gender-neutral alternatives are available and were available. I would also note that the District could accomplish its goal more directly by adopting a policy which focused on the existing problems -- that is, the bullying, the mental health, the psychological distress -- instead of focusing on a protected group. Such a proposed alternative is analogous to a less-restrictive, gender-neutral funding that was available in the Woods case.

Clearly, there are alternative policies. It does not appear to the Court that those policies were considered at all as it relates to this particular issue. Also, I point out the District could have similarly adopted a gender neutral policy that requires disclosure -- disclosure, excuse me, for participation in any type of extracurricular activity or athletic program. To the extent the District's concern is the safety of the child participating in a sport, the policy could have been merely tailored to directly address those safety concerns that the participation in the event presents, again, instead of focusing on the individual's gender or gender expression.

It's clear to me that, despite the arguments being made by the defendants in this matter, this policy is discriminatory on its face. The District did not consider any gender-neutral alternatives, and, clearly, gender-neutral alternatives are available to satisfy those of the School District in establishing this policy.

So I want to expound on my reasoning for granting the preliminary injunction as to A and B. Again, they violate equitable protection principles. There are lesser restrictive or gender-neutral means of accomplishing the District's interests, and based on that the Court -- excuse me, the State has, therefore, established a likelihood of prevailing on the merits.

So I will grant the preliminary injunction as it relates to 1A and 1B, and my intent would be to grant -- excuse me, deny the preliminary injunction as it relates to 1C. It's a different circumstance. It's a circumstance in which the students are voluntarily making this type of information available to be added to their school records, unofficial or otherwise. It's not a mandated obligation of the students. It's not a mandated obligation of the staff at the school.

This addition or amendment to the permanent record really is solely -- solely the action of the student if they want to update that record or provide that

information. No one's forcing the student to make that forced -- forced disclosure on their side regarding 1C. So that's where I'm coming from.

Now, I'm offering you all an opportunity to address those items. Those items do not factor into consideration the -- the privacy rights, because I've indicated I'm not going to go there. I do not need to go there, based on the Court's finding that equal protection bars the 1A and 1B. We can all agree that a -- it's a -- utmost concern of everybody involved here is the safety of the kids. But this policy is unconstitutional, nonetheless, on equal protection grounds, and, therefore, the School District's going to be enjoined from focusing on 1A and 1B. As to 1C, I'm allowing that to stand, except with the modification I made earlier that it does not apply to students over the age of 18 who remain in the school district.

But this is what I want the discussion to be focused. So I'm going to start back with the People. I know they've previously addressed 1C, but I'm giving them another opportunity, based on what you've heard from the others, if you'd like to add to that conversation.

MR. TRAN: Yes, your Honor.

Just to clarify, to add to the conversation just in response made by intervenors or the District?

THE COURT: Sure, yes.

issue resolved. And that's my goal here today.

I'm -- I'm not in any way demeaning any position in this case. I appreciate every position in this case, and my ultimate concern are the kids. They are marginalized and sometimes they feel they're not protected, that nobody has their back. And my job as the judge is to have their back, is to have any parties' back who feels they are marginalized, just not children. That's the function of our courts.

So I'm going to stick with my tentatives on the case. I'm going to ask the People to prepare rulings based on orders I made today.

Do we have a trial setting conference coming up?

MR. TRAN: Yes, your Honor. I believe that's set for February.

MS. RAE: February 26th, I believe.

THE COURT: All right. So that will be the next appearance on that case.

When we return, we'll be discussing trial dates, naturally. And until then, thank you all again for your excellent briefing on the case. I appreciate everybody's efforts. I appreciate the parents being here. I appreciate the parents expressing their interest in the case. I appreciate the students who showed up at the board meetings and who submitted declarations in the case.

Thank you very much.

MR. TRAN: Thank you, your Honor.

May I ask two housekeeping questions?

THE COURT: Yes, sir.

MR. TRAN: For the proposed order -- we have included a proposed order that includes a note about notification of the order being provided to all District employees, and we're just wondering if the Court has a position on that adjustment or whether that would be appropriate for our proposal --

THE COURT: Well, I think that's appropriate to let everybody know the status. And then just ask you to include, also, the fact that we have these amicus folks here, we've got the intervenors here, and what we did as far as the intervention. That kind of a thing.

MR. TRAN: Thank you, your Honor.

And then for the proposed order that the intervenors will be introducing, I know there was some discussion about whether arguments would be duplicative, and the Court mentioned that it would be watchful of duplicative arguments.

Is that something we should address in that proposal?

THE COURT: I don't think that's necessary.

MR. TRAN: Okay.

THE COURT: I think they did a fair job here today,

and I didn't hear much. I would have jumped in and objected -- inserted my own objection, I should say.

Anything else I can do for you folks?

MR. DIXON: No, your honor.

MS. RAE: No, your Honor.

THE COURT: All right.

Thank you very much. Appreciate it.

MR. TRAN: Thank you, your Honor.

MR. SIMPSON: Thank you, your Honor.

(Whereupon the proceedings were continued to February 26, 2024, Department S28, 8:30 a.m.)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
DEPARTMENT S1 HON. MICHAEL A. SACHS, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Plaintiff, vs. CHINO VALLEY UNIFIED SCHOOL DISTRICT, Defendant.	CASE NO. CIVSB2317301 REPORTER'S CERTIFICATE

I, LESLIE MOORE, CSR, RPR, Official Reporter Pro Tempore of the Superior Court of the State of California, County of San Bernardino, do hereby certify that the foregoing pages, 1 through 47, inclusive, to the best of my knowledge and belief, comprise a full, true and correct computer-aided transcript of the proceedings taken in the above-entitled cause held on October 19, 2023.

Dated this 31st of October, 2023.

LESLIE MOORE, C.S.R. NO. 11990, RPR
OFFICIAL REPORTER PRO TEMPORE

EXHIBIT 6

FILED
10-03-2023
Clerk of Circuit Court
Waukesha County
2021CV001650

BY THE COURT:

DATE SIGNED: October 2, 2023

Electronically signed by Michael P. Maxwell
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT- BRANCH 8 WAUKESHA COUNTY

T.F., et. al.,

Plaintiffs,

vs.

Case: 2021CV1650

KETTLE MORAINE SCHOOL DISTRICT,

Defendant.

DECISION AND ORDER

The Complaint alleges that the Kettle Moraine School District (hereinafter "Kettle Moraine") violated parental rights by adopting a policy to allow, facilitate, and affirm a minor student's request to transition to a different gender identity at school without parental consent and even over the parents' objection. *(See Doc. #2, ¶1)* Kettle Moraine responds that there is no justiciable controversy as one set of plaintiffs (T.F. and B.F.) are no longer in the district and the other set of plaintiffs (P.W. and S.W.) do not currently have a child for which the policy would have a current application and therefore they do not have standing or a claim which is ripe for determination. *(See Doc. #19, p. 3)* The matter is before the Court on cross Motions for Summary Judgment.

FINDINGS OF FACT

1. T.F. and B.F. had a daughter ("A.F.") that attended Kettle Moraine Middle School ("KMMS") in the Kettle Moraine School District. (T.F. Affidavit, Dkt. 79, ¶1).

2. A.F. began questioning her gender identity and T.F. and B.F. moved her to a mental health center and that center focused on "affirming" this new gender identity. (*Id.*, at ¶2-3).

3. A.F. then returned to the school with some parental support for the identity, but T.F. and B.F. ultimately changed course and went to the school informing them they wished to refer to A.F. by her legal name and female pronouns. (*Id*., at ¶7-11).

4. The District replied by saying they will follow the guidance of A.F. in what pronouns to use, even over parental objections. (*Id.*, at ¶13).

5. In response T.F. and B.F. withdrew A.F. from the District and shortly thereafter A.F. concluded that she did not want to transition genders. (*Id.*, at ¶15-20).

6. S.W. and P.W. are parents who have two children within the district and are concerned that the District would handle this process in the same way for their children as well if their children were to seek a gender transition. (S.W. Affidavit, Dkt. 80).

7. Social transitioning is separate from medical transitioning and consists of individuals who adopt their transgender identity in ways such as hairstyle/clothing, use of opposite-sex facilities, and adopting name and pronoun changes. (Expert Affidavit of Dr. Erica Anderson, Dkt. 77, ¶8).

8. Gender dysphoria is where one feels that their natal sex does not match their perceived gender identity and this gender incongruence usually causes clinically significant distress or impairment. (*Id*., at ¶9).

9. The World Professional Association for Transgender Health (WPATH) publishes Standards of Care (SOC) that provide guidelines for transgender care with WPATH SOC7 remaining the most current document until September 6, 2022 when WPATH SOC8 was released. (*Id*., at ¶10).

10. There has been an increasing rise in gender dysphoria in children who have not experienced this before and can even come as a surprise to parents and others when it eventually manifests. (*Id*., at ¶12); (Expert Affidavit of Dr. Stephen Levine, Dkt. 78, ¶196) ("For many parents, a trans identity may appear to arise "out of the blue" around puberty.").

11. Among those who express gender dysphoria there are individuals who eventually conclude that they no longer wish to transition. (Anderson Aff., Dkt. 77 at ¶19-20).

12. Social transitioning of one's gender is a decision that should usually be preceded by a mental health professional ("MHP") conducting a psychological assessment in order to see the benefits and challenges of such a transition. (*Id.*, at ¶55).

13. Social transitioning represents "one of the most difficult psychological changes a person can experience." (*Id*., at ¶41).

14. According to Dr. Levine, it is appropriate for parents to say no to a social transition because it is their job to help children avoid making bad decisions. (*Id*., at ¶57).

15. Social transitioning is a "powerful psychotherapeutic intervention" that likely reduces the number of children desisting from their transgender identity and can lead them to using puberty blockers and cross-sex hormones, which carry known risks. Thus, informed consent from the parents must be obtained before socially transitioning a child. (Levine Aff., Dkt. 78, ¶202).

16. Social transitioning without full support of one's parents can result in the child living a double life which can be "psychologically harmful." (*Id.*, at ¶200-201).

17. There is also no evidence to suggest that socially and/or medically transitioning reduces risk of suicide among individuals experiencing gender dysphoria. (*Id.*, at ¶142).

18. Trained psychotherapists should not drive a wedge between a parent and their child as social transition can only occur with "the support and acceptance of parents/caregivers." (Anderson Aff., Dkt. 77, ¶74-75).

19. Further, "[c]ircumventing, bypassing, or excluding parents from decisions about a social transition undermines the main support structure for a child or adolescent who desperately needs support." (*Id*., at ¶76).

20. A school facilitated transition without parental consent/buy-in infringes on parents' ability to take a more cautious approach to their child as well as a treatment approach that does not involve immediate transitioning. (*Id*., at ¶71-72).

21. The District acknowledges that they affirmed A.F.'s social transition because of advice from A.F.'s therapist and worry over a potential Title IX violation. (Michael Comiskey Affidavit. Dkt. 67, ¶12-13).

22. Multiple individuals from the District provided input on whether or not to allow A.F. to socially transition including (1) Mike Comiskey, the principal of KMMS; (2) Allison Beyerl, the school psychologist; (3) Charles Wiza, the director of student services; (4) Pat Deklotz, the superintendent; and (5) Gary Vose, the board of education president. (Kettle Moraine Response to Interrogatories, Ex. 1, Dkt. 73, p.4, ¶1-2).

23. Pat Deklotz was the individual ultimately responsible for deciding to affirm A.F.'s preferred gender identity over the objection of her parents. (*Id*., at p.5, ¶5).

DISCUSSION

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2015 WI 65, ¶31, 363 Wis. 2d 699, 866 N.W.2d 679. The only facts that are of relevant in this consideration are "material facts" which are facts "that [are] 'of consequence to the merits of the litigation.'" *Haase-Hardie v. Wis. Dep't of Natural Res.*, 2014 WI App 103, ¶13, 357 Wis. 2d 442, 855 N.W.2d 443 (quoting *Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294)). Those material facts cannot have a "genuine issue" between the parties and such issue "is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Strasser v. Transtech Mobile Fleet Serv.*, 236 Wis. 2d 435, ¶32, 613 N.W.2d 142 (2000) (citing *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991)). If a jury could go either way, then summary judgment would not be appropriate because the purpose of summary judgment is to "eliminate unnecessary trials." *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 562, 297 N.W.2d 500 (1980). Just because the question of law may be novel or particularly difficult does not make summary judgment any less appropriate of a remedy provided that the requirements, i.e., no dispute of material facts, are still met. *See id.*, 98 Wis. 2d at 569.

In summary judgment "[s]upporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." Wis. Stat. § 802.08(3) (2007). An adverse party may respond with their own affidavits in order to show that there is an issue of material fact, "[i]f the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party." *Id*. This is because "evidentiary

facts set forth in the affidavits or other proof are taken as true by a court if not contradicted by opposing affidavits or other proof." *L.L.N. v. Clauder*, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997) (citing *Leszczynski v. Surges*, 30 Wis. 2d 534, 539, 141 N.W.2d 261 (1966)).

Plaintiffs contend they are entitled to summary judgment because the record reflects that there are undisputed facts that the District has put forth a policy that violates parental rights as well as the District specifically violating B.F. and T.F.'s rights as parents relating to how the District utilized this policy in effect towards their daughter. (Dkt. 74, pp. 34-35).

Defendants on the other hand contend that they are entitled to summary judgment due to the fact that plaintiffs B.F. and T.F. have not identified a fundamental right that the District may have violated. (Dkt. 69, p. 2). As to plaintiffs P.W. and S.W., defendants say summary judgment is appropriate because plaintiffs have failed to identify a policy at issue nor have they been negatively impacted by the District so there is no justiciable controversy. (Dkt. 69, p. 3).

I. What Standard Should Be Applied, Further What Right Has Been Identified?

The first question that must be addressed is what standard this Court should apply in determining who summary judgment should be resolved in favor of. Two interconnected pieces that this Court must determine is what right is at stake and in turn what level of protection is required for that right. As "a court's task in a challenge based on substantive due process 'involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it." *Blake v. Jossart*, 2016 WI 57, ¶47, 370 Wis. 2d 1, 884 N.W.2d 484 (quoting *State v. Wood*, 2010 WI 17, ¶18, 323 Wis. 2d 321, 780 N.W.2d 63) (alteration in original). Substantive due process is a right separate from procedural due process, which focuses on ensuring fair procedures are in place, and instead

substantive due process "protects individuals from 'certain arbitrary, wrongful actions regardless of the fairness of procedures used to implement them.'" *Black v. City of Milwaukee*, 2016 WI 47, ¶43, 369 N.W.2d 272, 882 N.W.2d 333 (quoting *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997)).

a. The Right at Issue is not the Right to Control Education of One's Child but the Right to Make Medical and Healthcare Decisions for a Child.

Defendants have suggested that plaintiffs have not identified a carefully defined fundamental right that defendants may have violated. (Dkt. 69, p. 12). In support of this they reference the Supreme Court which has said that cases involving substantive due process require a "'careful description' of the asserted fundamental liberty interest." *Wash. v. Glucksberg*, 521 U.S. 701, 721 (1997) (internal citations omitted). Defendants say that this Court cannot consider the broad generalized right to raise one's children and instead must identify what specific right is at issue. (Dkt. 69, p. 13). Defendants heavily focus on claiming the plaintiffs have asserted a right to direct their children's education. (*Id.*). In part they refer to plaintiff's Summons & Complaint (Dkt. 2), which refers to the right of parents to direct the education of their children. (Dkt. 69, p. 12). However, this is just one of the rights that plaintiffs make reference to in their Complaint. (*See* Dkt. 2, ¶¶52-60, pp. 13-15). Defendants say plaintiffs cannot make "sweeping references to constitutional doctrines." (*Id.*); *Larson v. Burmaster*, 2006 WI App 142, ¶39, 295 Wis. 2d 333, 720 N.W.2d 134. However, that case does not say that such broad references are inherently impermissible, rather there the plaintiffs "[did] not apply [those] concepts to their case in the form of a reasoned argument." *Larson*, 2006 WI App 142 at ¶39. Defendants then cite a plethora of federal case law laying down their argument on why the right to control education is a limited one. (*See* Dkt. 69 pp.13-17).

One of these cases, *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), explained that parents do have a recognized liberty interest in the "custody, care, and nurture of their children" and that right resides firstly with the parents, however "[it] does not reside their exclusively, nor is it 'beyond regulation [by the state] in the public interest.'" *Id*., 949 F.3d at 1231 (internal citations omitted) (alterations in original). This case focused on whether there was a fundamental right to determine if a parent could have to the right to limit the risk their children would be exposed to nude members of the opposite sex in places like locker rooms. *Id*. That is not what is at issue in this case. This case involves a question of whether or not there is a right associated with getting the District to comply with the parents request to not use A.F.'s preferred pronouns and male name while she is at school.

Defendants also refer to parents limited rights on whether or not they can control how the school teaches their child from the First, Second, and Sixth Circuits with *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003), and *Blau v. Fort Thomas Pub. Sch. Dis.*, 401 F.3d 381 (6th Cir. 2005), respectively. (Dkt. 69, pp. 16-17). All these cases focus on the recognized right that parents can control where their kids go to school, but parents cannot control the particularized content that their kids learn. (*See id*.). Further, Defendants second heading from their argument section within their Reply Brief to their Motion for Summary Judgment reads: PLAINTIFFS DO NOT HAVE A FUNDAMENTAL RIGHT TO CONTROL HOW A SCHOOL EDUCATES THEIR CHILD. (Dkt. 90, p. 6). When presenting oral argument before this Court, Defendants said that this is not a fundamental rights issue and "this isn't a medical issue. It is not a medical issue. It's a constitutional issue." (Dkt. 91, pp. 23:20-24:5).

Plaintiffs rebut this point raised by defendants by saying they "do not seek to 'control every aspect of a child's education' or 'direct how a public school teaches their child.'" (Dkt. 87, p. 4). Plaintiffs rightly point out that the case law the Defendants rely on deal with "a school district making a significant and controversial health-related decision for a particular child over the parents' objection." (Dkt. 87, p. 5). They also reference one of the cases cited by Defendants that mentions the distinction that having a child take an anonymous survey does not carry with it the same weight as other protected familial rights such as visitation or sending a kid to a private school over a public one. *C. N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 (3rd Cir. 2005). In their oral argument they reinforced this point of not suggesting there is a right to control education by saying "[w]e don't disagree. That is not and has never been our argument in this case." (Dkt. 91, p. 5:20-21).

This case is not about parents controlling how a school specifically educates its students. This is also not a case about the broader societal debate or implications of transgenderism in our youth or the political movement that supports it.

One of the main rights plaintiffs have suggested this case implicates is the parental decision-making authority, such as making healthcare decisions, which they argue is a fundamental liberty interest that requires passing of strict scrutiny. (Dkt. 74, p. 20 and 26). Defendants seemingly ignore this argument from the Plaintiffs, instead focusing on arguing against a position that the Plaintiffs never took up - which is the right to control how a school educates one's child. Though they do address the parental rights position they say that "no court has expanded the scope of [parental right's] so broadly as to include a right of parents to control what nickname and pronoun school personnel use during the day." (Dkt. 88, p. 12).

Under *Michels v. Lyons*, 2019 WI 57, 387 Wis. 2d 1, 927 N.W.2d 486, parents have fundamental liberty interest in the decisions regarding "care, custody, and control of their children." *Id.*, at ¶24. The state only has an interest when the child's physical and mental health or welfare is in jeopardy. *Id*. However, the state's interest if violating a parent's right, must still be narrowly tailored. *Id*., at ¶21 (explaining that infringements on the right of parental autonomy are subject to strict scrutiny and this must be narrowly tailored).

Further, "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham v. J.R*., 442 U.S. 584, 603 (1979). A child is not granted the same autonomous rights as adults because "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Id*.

Plaintiffs have introduced uncontested expert affidavits explaining that this is a medical issue as they offer insight into transgenderism and how both medical and social conditioning can impact a child's mental health. (Dkt. 74, pp. 3-13). Of particular importance to note is that both doctors agree that living a "double life" where a child's gender roles are different at home and school, is "inherently psychologically unhealthy" and can undermine existing support structures for that child. (Dkt. 74, p. 12); *see also* (Dkt. 78, ¶¶ 200-201); (Dkt. 77, ¶¶ 74-76). Both doctors do note that all professional organizations that have handled these types of scenarios suggest a child receives professional evaluation, but none have said that a school district should continue the process of treating or addressing that child's alternative gender identity without "parental consent and buy-in." (Dkt. 74 p. 12); *see also* (Dkt. 77, ¶¶54-57, 77); (Dkt. 78, ¶¶185-187, 200).

This is undisputedly a medical and healthcare issue – the Defendants put forth no evidence to the contrary. As such, the School District went against the parents' wishes on how to medically treat their child. This directly implicates an infringement against the parental autonomy right to direct the care for their child. *Michels*, 2019 WI 57 at ¶24.

b. As the Liberty Issue at Stake is the Right to Decide Medical Decisions for One's Child, the District Must Survive the Strict Scrutiny Approach.

Defendants first contend that the test that should be applied to their actions is the test of shocking the conscience. (Dkt. 69, p. 10). Their argument is that a violation of substantive due process resulting from executive action requires a "shocks-the-conscience" standard. *Black v. City of Milwaukee*, 2016 WI 47, ¶43, 369 N.W.2d 272, 882 N.W.2d 333; *see also Gorokhovsky v. City of Chi.*, 813 F. App'x 221, 223 (7th Cir. 2020). This is a high standard to show, requiring that it offend "even hardened sensibilities" or the "decencies of civilized conduct." *Black*, 2016 WI 47 at ¶44.

They argue this is a different standard than if a legislature had taken action that violates substantive due process where that would only require passing a standard of rational basis or strict scrutiny, depending on the liberty infringed upon. *State v. Alger*, 2015 WI 3, ¶39, 360 Wis. 2d 193, 858 N.W.2d 346 (explaining that if no fundamental right or suspect class is implicated rational basis applies whereas if those were implicated strict scrutiny would apply).

Defendants contend that even if this Court where to apply the legislative standard to this issue it would only need to pass the lesser rational basis review. (Dkt. 88, pp. 9-10). Continuing further down that path they also suggest that if this Court where to find strict scrutiny would apply, their actions would pass that as well because defendants narrowly tailored their actions to fit a compelling state interest. (*Id*., at p. 15).

Plaintiffs have rebutted the claim that the "shocks-the-conscience" test is the appropriate one by pointing out that the Seventh Circuit has acknowledged that the shocks-the-conscience analysis is not applicable to every substantive due process claim. *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999). Even the Supreme Court has noted that the "shocks-the-conscience" test can be applied *alongside* the fundamental liberty test, i.e., strict scrutiny. *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (plaintiff failed both shocks-the-conscience test and strict scrutiny so there not a violation of the Fourteenth Amendment). They allege that some of the other federal circuits have misapplied the shocks-the-conscience test due to a misreading of the case *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). (Dkt. 89, pp. 3-4). When reading *Lewis*, the Supreme Court in citing to support the use of this test notes a previous case, *United States v. Salerno*, 481 U.S. 739 (1987), where they include a parenthetical quoting the case. *Lewis*, 523 U.S. at 847. The relevant portion from *Salerno* quoted in *Lewis* is "'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' … *or* interferes with rights 'implicit in the concept of ordered liberty.'" *Salerno*, 481 U.S. at 746 (internal citations omitted) (emphasis added). The shocks-the-conscience test is just one of the avenues to attack egregious government conduct, but there are also still the protections in place for conduct that interferes with fundamental rights. *See id*.

Plaintiffs have put forth two expert affidavits, one from a clinical psychiatrist and another a transgender clinical psychologist, which this Court finds persuasive. (Dkt. 74, p. 4, n. 1-2). Defendants have put forth nothing in rebuttal to plaintiff's expert affidavits. These affidavits unquestionably show this is a question of making a medical and/or healthcare decision for a child and one that the District has interfered with. This means there is a fundamental liberty

interest at stake that the government is interfering with and thus the District's actions must pass strict scrutiny.

The School District could not administer medicine to a student without parental consent. The School District could not require or allow a student to participate in a sport without parental consent. Likewise, the School District can not change the pronoun of a student without parental consent without impinging on a fundamental liberty interest of the parents.

c. Additionally, This Case Does Not Implicate Title IX and Defendants Reliance on Such is Unwarranted.

Another area of dispute is whether or not Title IX applies to this situation. Defendants have said that they wanted to continue to refer to A.F. by her requested male name and pronouns out of a worry that they may be in violation of Title IX had they not done so. (Dkt. 69, p. 7). They further say directly that "[t]he federal government has also taken the position that failing to respect a student's chosen pronoun can violate Title IX." (Dkt. 69, p. 22). To support this proposition the District refers to a Dear Colleague letter regarding Transgender Students[1]. (*Id.*).

However, this letter has since been rescinded and is no longer in effect, partially due to the fact that a federal district court in *Texas v. United States*, 201 F. Supp. 3d 810, 831 (N.D. Tex. 2016) enjoined this letter and said it violated the law. Even further, within the Seventh Circuit, these letters are not law and are persuasive at best. *See Doe v. Purdue Univ.*, 928 F.3d 652, 669 (7th Cir. 2019) ("That said, the letter, standing alone, is obviously not enough to get [plaintiff] over the plausibility line."); *see also Cephus v. Blank*, 2022 U.S. Dist. Lexis 224964 at *19 (WD. WI. 2022) (explaining that the Seventh Circuit has precedent saying Dear Colleague letters are relevant to see if a Title IX claim is plausible). The Dear Colleague letter defendants

[1] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

rely on has no impact on whether or not Title IX would be implicated in a factual pattern such as this one. In fact, the Seventh Circuit weighed in recently in a case that reinforces the Plaintiffs position that Title IX would not apply here. (*See* Dkt. 87, pp. 13-15).

In *Kluge v. Brownsburg Cmty. Sch. Corp.*, 64 F.4th 861 (7th Cir. 2023) a teacher requested a Title VII exemption to referring to transgender students by the names that best suited their gender identities and instead requested to refer to all students solely by their surnames. *Id*., 64 F.4th at 864. The Seventh Circuit ultimately concluded that this exception could not be found by a reasonable jury to impose only a *de minimis* harm to the "school's conduct of its business." *Id.* Therefore they granted summary judgment in favor of the school district. *Id.* In doing so they did note a defense raised by the school district, which they found to be unavailing, regarding the district's reliance on previous Seventh Circuit caselaw, *Whitaker v Kenosha Unified SD*, 858 F.3d 1034, 1050 (7th Cir 2017). *Id.*, 64 F.4th at 916. The Court noted that "[e]ven if we were to accept that the School District considered *Whitaker*, at best that case creates only a speculative risk of Title IX liability based on Kluge's actions," which suggests that *Whitaker* does not wholeheartedly confirm if Title IX applies to this issue. *Id.* The Court again references this proposition later when referring to how existing cases, such as *Bostock v. Clayton Cty*., 140 S. Ct. 1731 (2020), could be read into Title IX but the Court concluded that, "[s]uch legal assumptions, without the benefit of Supreme Court or Seventh Circuit authorities establishing Title IX liability for transgender discrimination, present merely speculative risk of Title IX liability for the School District." *Id*.

In short, Title IX is not applicable. While the Seventh Circuit's position is only a persuasive authority to this Court, neither the Supreme Court of the United States nor any other Wisconsin authority has addressed this issue. This Court finds the determination of the Seventh

Circuit that the issue of transgenderism has not been applied to Title IX to be a persuasive one at this time.

d. The Actions of the District Do Not Pass the Test of Strict Scrutiny.

Strict scrutiny requires that a "statute must be narrowly tailored to advance a compelling state interest" and it "is an exacting standard, and it is the rare case in which a law survives it." *State v. Roundtree*, 2021 WI 1, ¶27, 395 Wis. 2d 94, 952 N.W.2d 765 (internal citations omitted); *Glucksberg*, 521 U.S. at 721.

Defendant's argue that their actions would survive this because they were narrowly tailored to support a "vulnerable population of students" while also "complying with state and federal laws and guidance for the treatment of transgender and gender non-conforming students." (Dkt. 88, p. 16). They rely on a federal district court case from Maryland to support this where the court there found that the school district did not need to tell parents if their kids went with different names/pronouns. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 2022 U.S. Dist. LEXIS 149021 (D. Md. Aug. 18, 2022).

However, there the court found the fundamental right to be whether parents had a right "to be promptly informed of their child's gender identity." *John & Jane Parents 1*, at *20. The court also focused on the fact that parents do not have a right to direct their child's education. *Id*., at *25. That court viewed the case as closer to one's where curriculum was challenged. *Id.*, at 33.

The Maryland court did not consider the medical implications of such actions in the same way as they are presented before this Court. Further, federal district courts are only persuasive to this Court, and this is coming from one that is not even within this Court's federal circuit.

Kettle Moraine's reliance on attempting to comply with state and federal laws as well as guidance is also unavailing because there is no definitive guidance on this issue from relevant jurisdictions and the federal guidance pertaining to Title IX is, at best, an unsettled question.

Plaintiffs suggest that the District's actions are not narrowly tailored because there are not the necessary procedural protections in place that are necessary to override a parent's choice of how to medically treat their child. This is required as seen in *Michels* were the parent's decision was only overridden after introducing "clear and convincing" evidence. *Id.*, 2019 WI 57 at ¶37. Perhaps the District could introduce clear and convincing evidence in order to supplant a parent's medical judgment, but they certainly cannot do so on a whim in the manner that they did, and they have put forth no evidence – let alone clear and convincing evidence in this case. As Plaintiffs correctly point out, even in cases where Wisconsin's Child Protective Services are involved there is still a right to proper procedural fairness before a parent is deprived of their child within Wis. Stat. §§ 48.13; 48.27; 48.30. (Dkt. 74, p. 34).

II. There Is an Unwritten Policy in Place by the District and as Such P.W. and S.W. Have Standing.

Finally, Defendants seek to avoid the serious issues in this case by claiming that Kettle Moraine does not have a policy on how to handle transgender issues such as are raised in this case. To be clear, many school districts have grappled with this controversial issue in the way that parents and voters expect – promulgate a policy, provide for public input, and then adopt or reject the policy through a vote of the people's representatives on the school board. Unfortunately, in this case, Kettle Moraine chose a different path.

While the actions the School District has already taken violated the rights of the B.F. and T.F., if there is no set policy in place, can the second set of plaintiffs, P.W. and S.W., claim a sufficient enough injury to sustain this case? This Court answers yes.

The requirements for what count as justiciable controversies are statutory in nature. *See Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶35, 244 Wis. 2d 333, 627 N.W.2d 866; *see also* Wis. Stat. §§ 806.04 and 813.01.

Defendants also discuss the alleged hypothetical nature of the potential injury to P.W. and S.W. It is true that in Wisconsin a plaintiff does to show that there is a requirement that an injury "must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Fox. v. Wis. Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 525, 334 N.W.2d 532, 537 (1983) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). In *Fox,* the plaintiff did not have standing because his claims rested on a series of "increasingly unlikely events actually occur[ing]." 112 Wis. 2d at 529.

Looking at the events in *Fox* shows a much more abstract fact pattern and reasoning to reach an injury than what the Plaintiffs suggests could take place here. In *Fox*, the district attorney sought to stop a prison being built in Portage, Wisconsin out of the fear that it may detrimentally affect prisoners' mental health, which may cause a higher rate of recidivism, which may increase crime and welfare costs in Milwaukee, Wisconsin, which may make his job harder and injure him as a district attorney. *Fox*, 112 Wis. 2d at 529.

That fact pattern is a much broader and hypothetical one than that of P.W. and S.W.'s children developing questions about their gender identity and asking the School District to refer to them by new pronouns and the School District obliging them against the request of the parents, or even simply never informing the parents.

The Plaintiffs expert affidavits are undisputed for purposes of summary judgment. *See* Wis. Stat. § 802.08(3); *Clauder*, 209 Wis. at 684. These experts speak to how fast this type of change in a child can come about to the point where it may be "out of the blue" or "come as a surprise to others" such as parents, family members, or friends. (Dkt. 78, p. 71, ¶196); (Dkt. 77, p. 6, ¶11). Indeed, even in this present case it is undisputed that A.F. began experiencing this change in her belief regarding her gender identity in December of 2020 without prior indication, shocking both of her parents. (Dkt. 79, p. 1, ¶¶2-3). P.W. and S.W. do have an imminent threat because if their children decide tomorrow to change their gender identity the School District may go along with that at the potential detriment of the child's health because that does not necessarily mean the parent's will also agree with the child's decision to switch pronouns and such split affirmations are psychologically unhealthy to a child. (Dkt. 78, ¶¶ 200-201); (Dkt. 77, ¶¶ 74-76).

Plaintiffs rely on *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) to support the proposition that a single decision can in effect create a policy. (Dkt. 89, p. 8). There, the Supreme Court handled questions regarding municipalities that "even a single decision by such a body unquestionably constitutes an act of official government policy." *Pembaur*, 475 U.S. at 480 (citing *Owen v. City of Independence*, 445 U.S. 622 (1980)). The Court further wrote that single officials with final policymaking authority can create a policy and if an official has such authority is a question of state law. *Id.*, 475 U.S. at 483. School districts are "an arm of the city government" and thus subject to restrictions that municipalities are as they are "not a separate governmental unit." *State ex rel. West Allis v. Dieringer*, 275 Wis. 2d 208, 222, 81 N.W.2d 533, 541 (1957); *see also Greenfield v. West Milwaukee*, 272 Wis. 215, 75 N.W.2d 424 (1956)

(explaining that a statute splitting assets and liabilities amongst municipalities included school districts in the definition of municipality).

Here, Pat Deklotz, the superintendent or School's District administrator, *Wis. Stat. §* 115.001(8), acted on this issue after discussing it with the school board. (Dkt. 73, pp. 3-4, ¶¶1-2). District administrators have rule-making authority if they act with the consent of the school board. *Wis. Stat. §* 120.13(1)(b)1.

Rather than doing what the voters have elected them to do, the Kettle Moraine School Board abrogated their responsibility to either pass judgment on a policy regarding these serious issues or to affirm the actions of their employee, the superintendent. Instead, the School District has hidden behind claims of no parental right or unfounded Title IX issues rather than give parent's in their district what they deserve – clear guidance on how the district intends to handle these controversial issues. By failing to act, the District has implemented a policy, by the actions of their employee, which implicates the rights of P.W. and S.W. in the decision-making authority of their children. The injury that they may suffer is not far too attenuated so as to make the injury "hypothetical." As mentioned by the expert affidavits, and as seen through A.F., this is an issue that can arise seemingly out of nowhere and the School District has already shown by their actions that their policy is a willingness to go against parental wishes when handling the medical treatment of gender dysphoria in minors through affirming them by social transition.

CONCLUSION

This Court has before it what modern society deems a controversial issue – transgenderism involving minors within our schools. Clearly, the law on this issue is still developing across the country and remaining largely unsettled. However, this particular case is not about that broad controversial issue. This particular case is simply whether a school district can supplant a parent's right to control the healthcare and medical decisions for their children.

The well established case law in that regard is clear – Kettle Moraine can not. The School District abrogated the parental rights of B.F. and T.F. on how to medically treat A.F. when the district decided to socially affirm A.F. at school despite B.F. and T.F. requesting it does not. Through its policy of disregarding parental wishes on a medical or health related decision and with how fast questioning ones gender can arise, P.W. and S.W. are at real risk of being harmed by the current School District policy.

The current policy of handling these issues on a case-by-case basis without either notifying the parents or by disregarding the parents wishes is not permissible and violates fundamental parental rights.

IT IS HEREBY ORDERED,

1) Defendant's Motion for Summary Judgment is DENIED.
2) Plaintiff's Motion for Summary Judgment is GRANTED.
3) Kettle Moraine School District's policy to enable and affirm a minor student's transition to a different gender identity at school without parental consent violates parents' constitutional right to determine the appropriate medical and healthcare for their children.
4) Kettle Moraine School District's policy violated T.F. and B.F. constitutional rights as parents to determine the appropriate medical and healthcare for their children.
5) Kettle Moraine School District is enjoined from allowing or requiring staff to refer to students using a name or pronouns at odds with the student's biological sex, while at school, without express parental consent.