No. 23-________

In the
Supreme Court of the United States

JOHN AND JANE PARENTS 1; JOHN PARENT 2,
Petitioners,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION and SHEBRA L. EVANS, BRENDA WOLFF, JUDITH DOCCA, KARLA SILVESTRE, REBECCA SMONDROWSKI, LYNNE HARRIS, SCOTT JOFTUS, and MONIFA B. MCKNIGHT, individually and in their official capacities as Members of the Montgomery County Board of Education,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

Steven W. Fitschen
James A. Davids
National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322
(757) 650-9210
sfitschen@nationallegal
foundation.org

Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
655 15th St., NW, Ste. 425
Washington, D.C. 20005
(202) 250-3833
rick@claybrooklaw.

Counsel for Petitioners

APPENDIX TABLE OF CONTENTS

Opinions in *Parents 1 v. Montgomery County Board of Education*, No. 22-2034 (4th Cir., Aug. 14, 2023) 1a

Majority opinion 1a

Dissenting opinion 27a

Memorandum Opinion in *Parents 1 v. Montgomery County Board of Education*, No. 8-20-cv-3552-PWG (D. Md., Aug. 18, 2022) 51a

Complaint in *Parents 1 v. Montgomery County Board of Education*, No. 8-20-cv-3552-PWG (filed on removal on Dec. 7, 2020) 106a

Montgomery County Public Schools *Guidelines for Student Gender Identity* (Exhibit 1 to Complaint) 148a

Montgomery County Public Schools Form 560-80, *Intake Form: Supporting Student Gender Identity* (Exhibit 2 to Complaint) 164a

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2034

JOHN AND JANE PARENTS 1; JOHN PARENT 2,

Plaintiffs - Appellants,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION; SHEBRA L. EVANS, individually and in their official capacity as Member of the Montgomery County Board of Education; BRENDA WOLFF, individually and in their official capacity as Member of the Montgomery County Board of Education; JUDITH DOCCA, individually and in their official capacity as Member of the Montgomery County Board of Education; KARLA SILVESTRE, individually and in their official capacity as Member of the Montgomery County Board of Education; REBECCA SMONDROWSKI, individually and in their official capacity as Member of the Montgomery County Board of Education; LYNNE HARRIS, DR. SCOTT JOFTUS AND DR. MONIFA B. MCKNIGHT,

Defendants - Appellees.

- -

PACIFIC JUSTICE INSTITUTE; DR. ERICA E. ANDERSON; JEWISH COALITION FOR RELIGIOUS LIBERTY; COALITION FOR JEWISH VALUES; AMERICAN HINDU COALITION; ISLAM AND RELIGIOUS FREEDOM ACTION TEAM; ALLIANCE DEFENDING FREEDOM,

Amici Supporting Appellant.

AMERICAN CIVIL LIBERTIES UNION; PFLAG; PFLAG REGIONAL CHAPTERS; CHASE BREXTON HEALTH CARE; FCPS PRIDE; FREESTATE JUSTICE; HUMAN RIGHTS CAMPAIGN; THE TREVOR PROJECT; TIME OUT YOUTH CENTER; WHITEMAN-WALKER HEALTH; WHITMAN WALKER INSTITUTE; PROFESSORS OF PSYCHOLOGY & HUMAN DEVELOPMENT; MASSACHUSETTS; CALIFORNIA; COLORADO; CONNECTICUT; DISTRICT OF COLUMBIA; HAWAII; ILLINOIS; MARYLAND; MINNESOTA; NEW JERSEY; NEW YORK; OREGON; RHODE ISLAND; VERMONT; WASHINGTON,

Amici Supporting Appellee.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Paul W. Grimm, Senior District Judge. (8:20-cv-03552-PWG)

Argued: March 9, 2023 Decided: August 14, 2023

Before NIEMEYER, QUATTLEBAUM, and RUSHING, Circuit Judges.

Vacated and remanded by published opinion. Judge Quattlebaum wrote the majority opinion, in which Judge Rushing joined. Judge Niemeyer wrote a dissenting opinion.

QUATTLEBAUM, Circuit Judge:

Frederick Douglass famously said that our freedoms as Americans rest in the ballot box and the jury box.[1] So true. But when may we open each box? This appeal illustrates that dilemma.

The Montgomery County Board of Education adopted Guidelines for Gender Identity for 2020–2021 that permit schools to develop gender support plans for students. The Guidelines allow implementation of these plans without the knowledge or consent of the students' parents. They even authorize the schools to withhold information about the plans from parents if the school deems the parents to be unsupportive.

In response, three parents with children attending Montgomery County public schools challenged the portion of the Guidelines that permit school officials to develop gender support plans and then withhold information about a child's gender support plan from their parents. Terming it the "Parental Preclusion Policy," the parents allege the policy unconstitutionally usurps the parents' fundamental right to raise their children under the Fourteenth Amendment.

But, before considering the merits of the parents' argument, we must decide whether the parents have alleged that the Parental Preclusion Policy caused an injury to them sufficient to give them access to the jury box—or, stated differently, to create

---

[1] Frederick Douglass, *The Life and Times of Frederick Douglass: From 1817–1882*, at 333 (John Lobb ed., 1882). Douglass also said there is a third box on which our freedoms rest—the cartridge box. However, we need not open that box today.

what we call "standing." And this case begins and ends with standing.

The parents have not alleged that their children have gender support plans, are transgender or are even struggling with issues of gender identity. As a result, they have not alleged facts that the Montgomery County public schools have any information about their children that is currently being withheld or that there is a substantial risk information will be withheld in the future. Thus, under the Constitution, they have not alleged the type of injury required to show standing.

Absent an injury that creates standing, federal courts lack the power to address the parents' objections to the Guidelines. That does not mean their objections are invalid. In fact, they may be quite persuasive. But, by failing to allege any injury to themselves, the parents' opposition to the Parental Preclusion Policy reflects a policy disagreement. And policy disagreements should be addressed to elected policymakers at the ballot box, not to unelected judges in the courthouse. So, we remand to the district court to dismiss the case for lack of standing.

I.

First, some background on the Guidelines. They provide that "all students should feel comfortable expressing their gender identity, including students who identify as transgender or gender nonconforming." J.A. 68. The goals of the Guidelines are to

> [s]upport students so they may participate in school life consistent with their asserted gender identity; [r]espect the right of students to keep their

> gender identity or transgender status private and confidential; [r]educe stigmatization and marginalization of transgender and gender nonconforming students; [and] [f]oster social integration and cultural inclusiveness of transgender and gender nonconforming students.

J.A. 68. To further these goals, the Guidelines call for "gender support plan[s]." J.A. 69.

> The principal (or designee), in collaboration with the student and the student's family (if the family is supportive of the student), should develop a plan to ensure that the student has equal access and equal opportunity to participate in all programs and activities at school and is otherwise protected from gender-based discrimination at school.

J.A. 69. The specifics of a student's gender support plan depend on information provided by the student in consultation with school officials. But "each plan should address identified name; pronouns; athletics; extracurricular activities; locker rooms; bathrooms; safe spaces, safe zones, and other safety supports; and formal events such as graduation."
J.A. 69.

The Guidelines also address communication with the student's parents. "Prior to contacting a student's parent/guardian, the principal or identified staff member should speak with the student to ascertain the level of support the student either

receives or anticipates receiving from home." J.A. 69. Schools are to "support the development of a student-led plan that works toward inclusion of the family." J.A. 69. But the school may withhold information about a student's gender support plan "when the family is nonsupportive." J.A. 69.

II.

Three parents of children attending Montgomery County Public Schools sued the Board and a number of individual defendants[2] in Maryland state court, challenging the Parental Preclusion Policy. Once again, this is the portion of the Guidelines that permit the schools to both develop a gender support plan without parental involvement and withhold information about a student's gender support plan from the student's parents. The parents asserted that the Parental Preclusion Policy violates their fundamental right to raise their children under the Fourteenth Amendment of the Constitution as well as various state and federal statutes. After removing the case to the United States District Court for the District of Maryland, the Board moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state claims for which relief can be granted. The district court granted the motion and dismissed all the parents' claims. The parents timely appealed but only as to the dismissal of their federal constitutional claim.

---

[2] For convenience, we refer to the defendants collectively as "the Board."

III.

On appeal, the parents' focus is narrow. They do not challenge the Guidelines as a whole. Using their own words, the parents "filed this action challenging the Parental Preclusion Policy." Op. Br. 4. To eliminate any uncertainty, the parents clarified that they

> are not attempting to dictate a curriculum about transgenderism or to change the [] bullying guidelines. They are only insisting that they be informed of their own, individual children's behavior when it deviates from the prior instruction about the naming and gender of their child—and not lied to about it by school personnel. [3]

Op. Br. 15–16.

In addition to arguing that the district court did not err in dismissing the parents' claim on the merits, the Board argues that the parents lacked Article III standing because they did not allege facts

---

[3] The parents' focus on the Parental Exclusion Policy seems strategic. The broader the challenge, the more likely the parents are to encounter what they describe as the "curricular exception" to fundamental parental rights. *See* Op. Br. 14; *Herndon v. Chapel Hill-Carrboro Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996) (explaining that parents have a liberty interest, protected by substantive due process, in directing their children's schooling; but, unless coupled with a religious element, rational basis review applies to regulations made by public schools).

that showed the Parental Preclusion Policy caused an "injury in fact." Resp. Br. 18. The Board did not raise this issue below and the district court did not address it. But because standing is jurisdictional, "it may be raised and addressed for the first time on appeal." *Davison v. Randall*, 912 F.3d 666, 677 (4th Cir. 2019).

Since standing involves our jurisdiction to hear this appeal, we begin there. We must determine whether the injury the parents complain of—a breach of their "rights to access certain information generated and retained about their minor children"—conveys standing based on the facts alleged. J.A. 36.

A.

To answer this question, it is useful to review some basics. Article III of the Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. That federal courts' jurisdiction is limited to actual cases or controversies is a "bedrock" principle fundamental to our judiciary's role in our system of government. *Raines v. Byrd*, 521 U.S. 811, 818 (1997).

A dispute is not a case or controversy if the plaintiff lacks standing. *Id.* To establish standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)). In other words, a plaintiff must have a sufficient "personal stake in the alleged dispute" and have a particularized injury that a court can remedy. *Raines*, 521 U.S. at 819 (internal quotation marks and citation

omitted).

Discussions about standing are inevitably wonky. But that should not obscure the importance of the underlying principles involved. "The requirement of standing furthers the separation of powers between the three branches of our government. Under the Constitution, a party's grievance without an injury in fact does not confer standing . . . ." *Menders v. Loudoun Cnty. Sch. Bd.*, 65 F.4th 157, 163 (4th Cir. 2023). That means disputes without an injury that confers standing should be addressed to elected officials, not the courts. Indeed, under Article III:

> [F]ederal courts do not adjudicate hypothetical or abstract disputes. Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities. And federal courts do not issue advisory opinions.

Transunion LLC, 141 S. Ct. at 2203. The limit on federal courts' jurisdiction is clear: "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *Id.* at 2205 (internal quotation marks and citations omitted). At bottom, we may only resolve real controversies with real impact on real people.

This appeal concerns the injury-in-fact requirement of standing.[4] That prong requires either

---

[4] The Board also argued that the parents lack standing because their alleged injuries are not redressable

a current injury, a certainly impending injury, or a substantial risk of a future injury. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("An injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not conjectural or hypothetical. An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." (cleaned up)); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). And for a future injury to support Article III standing, the claimed harm must not be so speculative as to lie "at the end of a 'highly attenuated chain of possibilities.'" *South Carolina v. United States*, 912 F.3d 720, 727 (4th Cir. 2019) (quoting *Clapper*, 568 U.S. at 410) (noting that "[t]he Supreme Court has repeatedly held" that harms lying at the end of a highly attenuated chain of possibilities are too speculative to support standing). The risk of a future injury must be substantial, not just conceivable.

B.

With that background, we turn to the parents' allegations here. They allege that the Parental Preclusion Policy is currently in place. They claim it applies to all students, including their children. They claim that under that policy, the Montgomery County public schools have withheld information concerning over 300 gender support plans of students from parents. The parents claim they have a fundamental right in the rearing of children and that implementing a gender support plan and withholding information about such a plan from parents interferes

---

by courts. But because of our injury-in-fact decision, we need not address the redressability argument.

with that right in violation of the Constitution's due process clause.

But those allegations are insufficient to create standing. To repeat, standing requires either a current injury, a certainly impending injury or substantial risk of a future injury. And the parents do not allege one.

As for a current injury, they have not alleged any of their children have gender support plans. Nor have they alleged that their children have had any discussions with school officials about gender-identity or gender-transition issues. So, according to their allegations, no information is being withheld from them under the Parental Preclusion Policy. In their briefs to us on appeal, the parents effectively concede a lack of current injury by arguing they should be able to challenge the policy before they are injured. Rep. Br. 8 ("[I]f they cannot preemptively challenge the policy, then they will be *required* to suffer the harm before they are capable of challenging the policy.") The closest the parents come to asserting a current injury is opining that "[f]or all [they] know, some of their own children *could be* part of the 300" students with a gender support plan. Rep. Br. 2 (emphasis added). This does not establish a current injury.

The parents likewise have not alleged any facts that indicate they have a certainly impending injury or a substantial risk of future harm from the Parental Preclusion Policy. For example, they have not alleged that they suspect their children might be considering gender transition or have a heightened risk of doing so. Again, the closest the parents come to alleging such a possibility is stating that "[f]or all [they] know," their children "might soon be" subject to a gender support plan that is withheld from them. Rep. Br. 2.

Without more, any risk of future injury alleged

by the parents is far more attenuated than what the Supreme Court has allowed. In *Clapper*, attorneys, human rights advocates and members of the media challenged provisions of the Foreign Intelligence Surveillance Act that permitted the government, with approval from a FISA court, to surveil non-citizens outside the United States' borders. 568 U.S. at 401. The plaintiffs alleged they were in contact with individuals they *believed* to be targets of government surveillance and thus *believed* their communications would be unconstitutionally captured. *Id.* at 406–07.

In analyzing standing, the Supreme Court reiterated that "no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id.* at 408 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006)). And it explained that "allegations of *possible* future injury are not sufficient" to support standing. *Id.* at 409 (internal quotation marks omitted). The Court held that plaintiffs' "argument rests on their highly speculative fear that" the government would identify the individuals with whom the plaintiffs were in contact to be targets; then, the government would decide to use the particular type of surveillance being challenged and not other sources of information gathering; then, the FISA court had to approve the desired surveillance; and, finally, the government would intercept the communications. *Id.* at 410. According to the Supreme Court, this "speculative chain of possibilities" that "require[d] guesswork as to how independent decisionmakers will exercise their judgment" was insufficient to establish Article III

standing. *Id.* at 413–14.[5]

The parents' claims likewise depend on a speculative fear, the occurrence of which requires guesswork as to actions of others. Determining whether the parents will ever sustain an injury based on the Parental Preclusion Policy requires a chain of the following future events to occur: (1) their minor children must determine they identify as transgender or gender nonconforming, (2) their minor children must decide they want to approach the school about a gender support plan, (3) the school must deem the parents unsupportive and (4) it must then decide to keep the information about their children from them.

---

[5] *Clapper* is no outlier. Nor is its test limited to claims involving national security. The Supreme Court has reiterated this concept multiple times since the *Clapper* decision in a variety of legal contexts. *See, e.g.*, *TransUnion LLC*, 141 S. Ct. at 2210 ("As this Court has recognized, a person exposed to a risk of future harm may pursue forward-looking, injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is *sufficiently imminent* and substantial." (emphasis added)); *California v. Texas*, 141 S. Ct. 2104, 2119 (2021) ("It would require far stronger evidence than the States have offered here to support their counterintuitive theory of standing, which rests on a 'highly attenuated chain of possibilities.'" (citation omitted)); *Susan B. Anthony List*, 573 U.S. at 158 ("An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" (cleaned up)). So while there may not be a Supreme Court case in the context of the type of claim the parents advance, we see no reason why the analysis from *Clapper* and these other decisions would not apply.

And, on these allegations, any determination on the likelihood of these events occurring requires guesswork as to both their children's actions and actions of the Montgomery County public schools.

The parents also argue that we should find standing because they may never know they have been injured. Indeed, the Parental Preclusion Policy allows the Montgomery County public schools to hide the very information about the children that would establish the injury. And the Montgomery County Board of Education does not deny this. Perhaps because the Board of Education's position is so staggering from a policy standpoint, this argument has some appeal.

But the Supreme Court's *Clapper* decision and our *Wikimedia Foundation v. National Security Agency*, 857 F.3d 193 (4th Cir. 2017), decision tell us that we do not toss out the injury requirement because the government hides information. Those cases dealt with challenges to government surveillance, which the government keeps secret. Even though that hindered plaintiffs' ability to determine whether they had been injured, both *Clapper* and *Wikimedia* found no Article III standing for plaintiffs who could not allege an imminent or substantially likely harm. Thus, the fact that the Montgomery County Board of Education permits its schools to keep information about its students' gender support plans and related gender-identity issues from their parents, while perhaps repugnant as a matter of policy, does not create standing.

Simply put, the parents may think the Parental Preclusion Policy is a horrible idea. They may think it represents an overreach into areas that parents should handle. They may think that the Board's views on gender identity conflict with the values they wish

to instill in their children. And in all those areas, they may be right. But even so, they have alleged neither a current injury, nor an impending injury or a substantial risk of a future injury. As such, these parents have failed to establish an injury that permits this Court to act. Or, to use Douglass' language, the jury box is not available to them. These parents must find their remedy at the ballot box.

C.

Our good colleague in dissent reaches a different conclusion. He insists our determination that the parents challenge only the Parental Preclusion Policy reads the complaint too narrowly. According to the dissent, the parents have brought a broader challenge to the Guidelines on Gender Identity and have sufficiently alleged facts to support standing. But there are several problems with this argument.

1.

First, the parents disavow the dissent's interpretation of their claims. They could hardly have been clearer in telling us that they only challenge the Parental Preclusion Policy. In the very first sentence of the complaint, the parents state that they "have brought this action to enforce their rights to access certain information generated and retained about their minor children." J.A. 36. Right off the bat, they clarified that their case is about the Parental Preclusion Policy and that the injury they complain of is lack of access to information about their children. But that is not all. In their briefs to us, they repeated this framing of their challenge, emphasizing that they "are *only* insisting that they be informed of their own,

individual children's behavior when it deviates from their prior instruction about the naming and gender of their child—and not lied to about it by school personnel." Op. Br. 15 (emphasis added). The dissent may wish the parents advanced a different theory. But in our system, we resolve the issues the parties press; not ones we'd prefer they had pressed.

2.

Second, the dissent misconstrues the allegations of the complaint that purportedly support its theory that the parents challenge to the Guidelines extends beyond the Parental Preclusion Policy. It cites paragraph two of the complaint:

> [The] Policy [is] expressly *designed to circumvent parental involvement* in a pivotal decision affecting the Plaintiffs Parents' minor children's care, health, education, and future. *The Policy enables [the Board] personnel to evaluate minor children about sexual matters* and *allows minor children, of any age, to transition* socially to a different gender identity at school without parental notice or consent. . . . *The Policy then prohibits personnel from communicating with Parents* about this potentially life-altering and dangerous choice, unless the minor child consents to parental disclosure.

Dissenting Op. at 32. But those allegations do not suggest a broader challenge. Instead, they immediately follow the paragraph where the parents

expressly state that they brought this case to enforce their rights to information. So read in context, paragraph 2 merely elaborates on effects of the Parental Preclusion Policy. It is not any different or a broader challenge.

The dissent also cites paragraph 34 of the complaint:

> Pursuant to the [Montgomery County Public Schools] Policy, [Montgomery County Public Schools] *is taking over the rightful position of the Plaintiff Parents* and intentionally *hindering them from counseling their own minor children* concerning an important decision that will have life long repercussions and from providing additional professional assistance to their children that the parents may deem appropriate. *This decision directly relates to the Plaintiff Parents' primary responsibilities* to determine what is in their minor children's best interests with respect to their support, care, nurture, welfare, safety, and education.

Dissenting Op. at 32. These allegations likewise do not represent a broader challenge or describe an alternative injury. To the contrary, they explain the consequences the parents contend result from the Parental Preclusion Policy. This is evident from the actual language of paragraph 34 itself. But it is even more clear when that paragraph is read in context. The immediately preceding paragraph describes the parents' alleged injury as stemming directly from

potential withholding of information in the future. J.A. 46. ("Plaintiff Parents cannot wait to challenge the [Montgomery County Public School] Policy until they learn that one of their children experiences gender dysphoria."). Thus, paragraph 34 does not suggest a challenge that is broader than the Parental Preclusion Policy; it confirms that is the focus of their challenge. So, the allegations in the complaint are consistent with the clear statements from the parents on appeal that their challenge is narrowly focused on the Parental Preclusion Policy.

3.

Third, disagreements about the relative breadth of the complaint's language aside, none of the harms the dissent argues are described in the complaint occur until a child identifies as transgender or gender nonconforming and has approached the school for a gender support plan. And even after that, the school must also deem the parents unsupportive and decide to keep the information about their child from them. That leaves these parents at the end of a "hypothetical chain of events" that the Supreme Court has told us precludes standing.

4.

Fourth, the dissent repeats several times that the parents allege the Guidelines are mandatory and apply to all students. We agree. But we disagree that such allegations are enough to confer standing. In other words, just because a policy or practice exists and is unconstitutional does not mean a particular plaintiff has been injured and has standing to challenge it. *See Valley Forge Christian Coll. v.*

Americans United for Separation of Church & State, Inc., 454 U.S. 464, 489 (1982) (rejecting the view that "the business of the federal courts is correcting constitutional errors, and [] 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor" as having "no place in our constitutional scheme").

Susan B. Anthony List illustrates this principle. There, two advocacy groups challenged the constitutionality of an Ohio statute prohibiting the use of false statements during political campaigns. 573 U.S. at 152. The Court identified the test for when "pre-enforcement review" of an allegedly unconstitutional law is allowed. *Id.* at 159. To establish standing in that context, the Court explained, it is not enough that plaintiffs be subject to a law they believe to be unconstitutional. Rather—to satisfy the injury-in-fact requirement of standing—they must show (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" and that (2) "there exists a credible threat of prosecution thereunder." *Id.* (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

This test would be meaningless if the Court's standing inquiry simply asked whether the plaintiff was the subject of an allegedly unconstitutional law. In *Susan B. Anthony List*, the law being challenged applied to the plaintiffs. Nevertheless, the plaintiffs were required to show more—that there was a credible threat of government *action* that would harm them. In other words, a plaintiff must show it is substantially likely she will actually be *injured* by the law, not simply that she must operate under the realm of an unconstitutional law or policy. Likewise, in our case,

the parents must show a substantial risk that they will be injured by the school's policy of nondisclosure—not merely that it applies to their children in the abstract.

5.

Fifth and finally, the dissent argues that *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), supports its conclusion that the parents have standing. It highlights that the Court found standing there even though harm depended on a chain of future events. In *Parents Involved*, parents claimed a student-assignment plan that allocated slots in oversubscribed high schools based on race violated the Constitution's equal protection clause. The school district argued that the parents did not have standing because, unless they apply for a slot and do not receive it, none of the plaintiffs "can claim an imminent injury." *Parents Involved*, 551 U.S. at 718. The district court agreed with the school district. In dismissing their claim, it reasoned that "[plaintiffs] will only be affected if their children seek to enroll in a Seattle public high school and choose an oversubscribed school that is integration positive—too speculative a harm to maintain standing." *Id.* The Supreme Court rejected this argument, stating that "[t]he fact that it is possible that children of group members will not be denied admission to a school based on their race—because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage—does not eliminate the injury claimed." *Id.* at 718–19. The Court then explained "[plaintiffs] also asserted an interest in not being 'forced to compete for seats at certain high schools in a system

that uses race as a deciding factor in many of its admission decisions.'" *Id.* at 719 (citation omitted). And because "one form of injury under the Equal Protection Clause is being forced to compete in a race-based system," the plaintiffs had asserted a valid injury. *Id.*

Parents Involved provides the parents' strongest argument for standing. As the parents note, the harm there depended on a chain of future events involving decisions of others. Even so, the Supreme Court held that standing existed. And it held the harm was being forced to participate in an unconstitutional system. So, applying *Parents Involved* in this situation might suggest that the parents have standing.

But nothing about *Parents Involved* nor subsequent Supreme Court decisions indicate the standing standard from *Parents Involved* applies beyond the context of equal protection claims. The Supreme Court has not applied that standard in other contexts. In fact, if *Parents Involved*'s standing analysis extended to other contexts, the Court's standing analyses in subsequent cases does not make sense.

Take *Clapper*. There, the plaintiffs alleged that to do their work, they were forced to risk the capture of their communications under an unconstitutional law. If the plaintiffs could show standing based on the presence of an alleged unconstitutional law or policy without also showing that it had caused concrete harm, why did the Court hold the plaintiffs lacked standing?

Nor is this interpretation compatible with our own recent jurisprudence. We have consistently held that parties must show either a certainly impending harm or a substantial risk of harm for a future injury to satisfy Article III standing. *See, e.g.*, *O'Leary v. TrustedID, Inc.*, 60 F.4th 240, 245 (4th

Cir. 2023) (describing plaintiff's alleged future injury as "the kind of daisy chain of speculation that can't pass muster under Article III"); *South Carolina*, 912 F.3d at 728 (rejecting standing where harm rested on a "highly attenuated chain of possibilities"); *Beck v. McDonald*, 848 F.3d 262, 272 (4th Cir. 2017) ("*Clapper*'s iteration of the well-established tenet that a threatened injury must be 'certainly impending' to constitute an injury-in-fact is hardly novel.").

In other words, we do not read *Parents Involved* as abrogating the certainly- impending-or-substantial-risk test that applies in cases involving standing for future injuries. Rather, it hinges on the fact that the Supreme Court has repeatedly held, in equal protection cases, that being "forced to compete in a race-based system" is sufficient for Article III standing. *Parents Involved*, 551 U.S. at 719; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) ("The injury in *cases of this kind* is that 'a discriminatory classification prevent[s] the plaintiff from competing on an equal footing.'" (emphasis added)); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' *in an equal protection case* of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." (emphasis added)). To reach such a conclusion, we would have to, like racehorses wearing blinders, focus only on *Parents Involved* and ignore the rest of the Supreme Court's standing jurisprudence.

Not only would applying *Parents Involved*'s standing analysis beyond the equal protection context be incompatible with subsequent Supreme Court decisions; it also would substantially lower the bar for standing. Under the dissent's reasoning, Article III

standing would now exist whenever a plaintiff alleges that he or she is being forced to be part of or participate in any allegedly unconstitutional governmental policy, regardless of whether that policy causes an injury to the plaintiff. That approach would seem to open the doors of federal courthouses for disagreements that our Founders, in crafting Article III, intended to be resolved by the other branches of our government.[6]

---

[6] The dissent says our analysis "makes no sense and has no basis in constitutional law." Dissenting Op. at 37. While that comment might provide a nice soundbite, it ignores the fact that the Supreme Court has repeatedly established and acknowledged different standing requirements for different alleged constitutional violations. Consider three different types of claims all brought under the First Amendment. First Amendment free speech cases use a specifically delineated test for standing that does not apply to other constitutional claims. *See Am. Fed'n of Gov't Emps. v. Off. of Special Couns.*, 1 F.4th 180, 187 (4th Cir. 2021) ("In cases involving the First Amendment, injury-in-fact may be established either by 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder,' or a 'sufficient showing of self-censorship which occurs when a claimant is chilled from exercising his right to free expression[.]'" (internal citations omitted)). And First Amendment Free Exercise Clause cases involve a different standing standard from First Amendment Establishment Clause cases. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 224 n.9 (1963) ("[T]he requirements for standing to challenge state action under the Establishment Clause, unlike those

6.

In sum, the dissent points to no allegations from the parents that their children are transgender, are transitioning, are considering transitioning, are struggling with gender identity issues or are at a heightened risk for questioning their biological gender. Nor does it point to any allegations that the parents otherwise suspect their children's schools are currently withholding information from them or that there is a substantial risk the schools might do so in the future. The dissent's fundamental point—"The issue of whether and how grade school and high school

---

relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed."). These decisions show that our recognition that different standing analyses apply to different types of claims does not rank the Equal Protection Clause above the Due Process Clause. It simply means the Supreme Court has established different standing standards for different constitutional claims. Indeed, the Court's language, when discussing equal protection claims of the variety in *Parents Involved*, indicates that the standing rules for equal protection cases are based on the inherent nature of those claims. *Ne. Fla. Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 666 ("The 'injury in fact' *in an equal protection case of this variety* is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." (emphasis added)). Because injuries vary based on the constitutional claim involved, it does, in fact, make sense that standing principles would as well. Finally, the dissent offers no substantive response to our analysis of why *Parents Involved* does not support the parents' arguments for standing.

students choose to pursue gender transition is a family matter, not one to be addressed initially and exclusively by public schools without the knowledge and consent of parents"—may be compelling. But because these parents have not alleged an injury that confers Article III standing, their remedy lies in the ballot box, not the jury box.

IV.

Like the dissent, the parents make compelling arguments about the Parental Preclusion Policy from the Montgomery County Board of Education's Guidelines for Gender Identity. But they do not allege a current injury, a certainly impending injury or a substantial risk of future injury. As a result, they have not alleged Article III standing. And without standing, we have no jurisdiction to hear the dispute. Thus, we vacate the district court's order and remand for the case to be dismissed without prejudice.

VACATED AND REMANDED

NIEMEYER, Circuit Judge, dissenting:

The issue of whether and how grade school and high school students choose to pursue gender transition is a family matter, not one to be addressed initially and exclusively by public schools without the knowledge and consent of parents. Yet, the Montgomery County Board of Education (the "Board") preempts the issue to the exclusion of parents with the adoption of its "Guidelines for Student Gender Identity," which invite all students in the Montgomery County public schools to engage in gender transition plans with school Principals *without the knowledge and consent of their parents*. This policy implicates the heartland of parental protection under the substantive Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion); *Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994). And parents whose children are subject to the policy must have access to the courts to challenge such a policy. *See, e.g.*, *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 719 (2007).

The majority reads the Parents' complaint in this case in an unfairly narrow way and thus denies the Parents the ability to obtain relief, concluding that the Parents have no standing to challenge the Guidelines until they learn that their own children are *actually considering* gender transition. In reaching that conclusion, the majority is, I submit, unnecessarily subjecting the Parents by default to a mandatory policy that pulls the discussion of gender issues from the family circle to the public schools without any avenue of redress by the Parents. In reaching such a conclusion, the majority totally overlooks material

allegations of the complaint about the Parents' injury, which are sufficient to give the Parents standing. For example, the Parents alleged:

> Pursuant to the MCPS [Montgomery County Public Schools] Policy, MCPS is *taking over the rightful position of the Plaintiff Parents* and *intentionally hindering them* from counseling their own minor children concerning an important decision that will have life long repercussions and from providing additional professional assistance to their children that the parents may deem appropriate. *This decision directly relates to the Plaintiff Parents' primary responsibilities* to determine what is in the minor children's best interests with respect to their support, care, nurture, welfare, safety, and education.

(Emphasis added). And in their complaint, they quoted Guidelines provisions to support these allegations. The majority's conclusion is, in the circumstances of this case, an unfortunate abdication of judicial duty with respect to a very important constitutional issue that is directly harming and will likely continue to harm the Parents in this case by usurping their constitutionally protected role.

I.

As the Parents allege in their complaint, the Montgomery County Board of Education, in furtherance of its policy prohibiting discrimination in

the Montgomery County, Maryland, public schools based on a range of classifications, including "sex, gender, gender identity, gender expression, and sexual orientation," adopted the "2020- 2021 Guidelines for Student Gender Identity in Montgomery County Public Schools." The Guidelines are dedicated to making "all students ... comfortable expressing their gender identity" by "recogniz[ing] and respect[ing] matters of gender identity; [by] mak[ing] all reasonable accommodations in response to student requests regarding gender identity; and [by] protect[ing] student privacy and confidentiality." And to this end, the Guidelines state specific goals of (1) promoting students' participation "in school life consistent with their asserted gender identity"; (2) protecting students' right "to keep their gender identity or transgender status private and confidential"; (3) "reduc[ing] stigmatization and marginalization" of such students; (4) "foster[ing] social integration and cultural inclus[ion]" of such students; and (5) providing them with support to address their status. And in turn, the Guidelines direct the staff of Montgomery County public schools to "recognize and respect matters of gender identity; make all reasonable accommodations in response to student requests regarding gender identity; and protect student privacy and confidentiality."

As relevant to this appeal, the Guidelines include provisions that make promises to all students in the school system about privacy and confidentiality, and they offer students the ability to secretly develop and implement transition plans with the school Principal (or designee). The Guidelines define "transition" as "the process by which a person decides to live as the gender with which the person identifies, rather than the gender assigned at birth."

Under the Guidelines, a student wishing to develop and implement a transition plan fills out an intake form on which the student is asked to rate the level of parental support the student expects, on a scale from 1 to 10. If the support level is deemed inadequate and the student so desires, the student is assured that the student's parents will not be told about the development and implementation of the plan. The Guidelines do not indicate that any particular score suffices for a student's parents to be deemed "unsupportive" but instead direct staff members to make that determination by considering both the information in the form and any other information gathered from consultation with the student. The Guidelines explain the reason for excluding parents as follows:

> In some cases, transgender and gender nonconforming students may not openly express their gender identity at home because of safety concerns or lack of acceptance. Matters of gender identity can be complex and may involve familial conflict.

Accordingly, the Guidelines explicitly prohibit disclosure of the student's status "to other students, *their parents/guardians*, or third persons." (Emphasis added).

Moreover, when parents are being excluded from the development and implementation of a transition plan, the Guidelines direct staff to engage in a form of coverup by providing that "[s]chools should seek to minimize the use of permission slips and other school-specific forms that require disclosure of a student's gender or use gendered terminology"

and that "[u]nless the student or parent/guardian has specified otherwise, when contacting the parent/guardian of a transgender student, [Montgomery County] school staff members should use the student's legal name and pronoun that correspond to the student's sex assigned at birth."

The transition plans that are developed and implemented under the Guidelines include changing names and pronouns; requiring staff to comply with the use of such names and pronouns; changing school records; giving students the "right to dress in a manner consistent with their gender identity"; providing access to "gender-separated areas," *e.g.*, "bathrooms, locker rooms, and changing rooms"; providing access to classes and sports, in-school athletics, and clubs in accordance with the student's new gender identity; promising special arrangements for "outdoor education/overnight field trips," including sleeping arrangements; and providing safe places and other similar accommodations.

Finally, the Guidelines direct staff to "understand implicit bias, promote diversity awareness, and consider the risk of self-harm or the presence of suicidal ideation." And they encourage schools "to have age-appropriate student organizations develop and lead programs to address issues of bullying prevention for all students, with emphasis on LGBTQ+ students."

The Guidelines are not voluntary and instead apply mandatorily to all students in the school system, regardless of age, and all students are thus engaged with staff to help, as the Guidelines state, eliminate bullying, harassment, and discrimination based on gender, gender identity, gender expression, and sexual orientation.

II.

Parents of students attending Montgomery County public schools commenced this action against the Board to challenge the legality of the particular aspect of the Guidelines that provides for the design and implementation of plans for students' gender transition, which involve numerous steps and actions by the school and the student and which authorizes such action without the knowledge and consent of the student's parents, if that is the student's choice. This exclusion of the parents is based on the Board's stated understanding that "transgender and gender nonconforming students may not openly express their gender identity at home because of safety concerns or lack of acceptance. Matters of gender identity can be complex and may involve familial conflict." The Board's Guidelines rest this exclusion on the stated principle that students "have a right to privacy" that includes "the right to keep private one's transgender status or gender nonconforming presentation at school" from the student's parents. The Parents alleged that this aspect of the Guidelines is both illegal under various statutes and, as relevant here, unconstitutional, denying them substantive due process under the Fourteenth Amendment, which gives them "the fundamental rights . . . to direct the care, custody, education, and control of their minor children." They also alleged that the transition plans are "life-altering" and involve "dangerous" choices, in which parents have a right to be involved. They seek both declaratory and injunctive relief, as well as one dollar in damages.

The district court granted the Board's motion to dismiss the Parents' complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a plausible

claim for relief. In reaching its conclusion, the court determined that the Guidelines were best characterized as an aspect of the school district's *educational curriculum* and noted that parents' rights to contest curricular choices that public schools make are quite narrow and are subject to rational basis review, citing and mainly relying on *Herndon v. Chapel Hill- Carrboro City Board of Education*, 89 F.3d 174 (4th Cir. 1996). The court stated, "[P]arents have no due process or privacy right to override the determinations of public schools as to the information to which their children will be exposed while enrolled as students." (Quoting *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1200 (9th Cir. 2005)). At bottom, the court concluded that the Board "easily meets" the rational basis standard of review, as it "certainly has a legitimate interest in providing a safe and supportive environment for all [Montgomery County Public Schools] students, including those who are transgender and gender nonconforming. And the Guidelines are certainly rationally related to achieving that result." Addressing the aspect of the Guidelines that allows the exclusion of parents from the process of developing and implementing transition plans, the court stated:

> If the Guidelines mandated parental disclosure as the Plaintiff Parents urge, their primary purpose of providing transgender and gender nonconforming students with a safe and supportive school environment would be defeated. *A transgender child could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to their*

> *parents*, regardless of their own wishes or the consequences of the disclosure.

(Emphasis added).

From the district court's order dated August 18, 2022, dismissing their complaint, the Parents filed this appeal. And, for the first time on appeal, the Board contends that the Parents lack Article III standing to challenge the Guidelines. While the Board did not raise this issue below and the district court did not address it, Article III standing may nonetheless be raised and addressed for the first time on appeal because it is a matter of jurisdiction. *See Davison v. Randall*, 912 F.3d 666, 677 (4th Cir. 2019). And the majority now dismisses this case for lack of Article III standing.

III.

In support of its standing argument, the Board contends that "Plaintiffs nowhere allege that they have actually been (or are likely to be) harmed in any way by the Guidelines." It argues that the Parents' claim "relies on a highly attenuated chain of possibilities that is far too speculative to establish standing." And the majority agrees, relying on the absence of any allegation that the Parents' children "might be considering gender transition or have a heightened risk of doing so." *Ante* at 11. But, in order to reach that conclusion, the majority crimps the Parents' complaint, limiting it to the simple allegation that the Parents "are only insisting that they be informed of their own, individual children's behavior." *Ante* at 7. Taking this very restrictive view of the scope of the complaint, the majority denies the Parents any relief because their "focus is

narrow" and they identify no information that has been wrongly withheld from them. *Ante* at 7, 11–12. The Parents, however, assert that they are subject to a broader ongoing policy that violates their constitutional rights and that they therefore have standing to challenge it. They note that the Board "does not deny" that it has implemented the Policy by assisting "more than 300 students . . . exhibit as transgender at school without notice to their parents." The Parents argue further that the Guidelines explicitly target a group of which they are members — "parents of children attending [Montgomery County Public] schools" — and for that reason alone, they have standing, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992). They note that in *Lujan*, the Court held that "[w]hen the suit is one challenging the legality of government action or inaction, . . . standing depends considerably upon *whether the plaintiff is himself an object of the action* (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* (emphasis added). First, it is readily apparent that the Parents' complaint is far broader in scope than the narrow reading given it by the majority. To be sure, the Parents complain about not being informed about their children's gender identity issues, but such allegations are but part of their repeated broader allegations that school personnel actively facilitate the adoption of gender transition plans without parents' involvement, knowledge, or consent, which they allege is the constitutional violation causing them constitutional injury. As the complaint states in ¶ 2:

> [The] Policy [is] expressly *designed to*

> *circumvent parental involvement* in a pivotal decision affecting the Plaintiffs Parents' minor children's care, health, education, and future. *The Policy enables [the Board] personnel to evaluate minor children about sexual matters* and *allows minor children, of any age, to transition* socially to a different gender identity at school without parental notice or consent. . . . *The Policy then prohibits personnel from communicating with Parents* about this potentially life-altering and dangerous choice, unless the minor child consents to parental disclosure.

(Emphasis added). Again, in ¶ 28, the complaint states, "The evaluation by [Montgomery County Public Schools] personnel of minor students as required by the . . . Policy and Form 560-80 is deliberately not performed with prior parental consent."

And rather than simply focusing on injury from *a lack of being given notice* — as the majority limits the complaint's request for relief — the complaint alleges a broader constitutional injury of *usurping parental roles*. As the complaint states in ¶ 34:

> Pursuant to the [Montgomery County Public Schools] Policy, [Montgomery County Public Schools] *is taking over the rightful position of the Plaintiff Parents* and intentionally *hindering them from counseling their own minor children* concerning an important decision that will have life long

> repercussions and from providing additional professional assistance to their children that the parents may deem appropriate. *This decision directly relates to the Plaintiff Parents' primary responsibilities* to determine what is in their minor children's best interests with respect to their support, care, nurture, welfare, safety, and education.

(Emphasis added). And to make clear this broader scope of the complaint, the Parents' requests for relief include a request for an injunction that prohibits the Board (1) "from evaluating and then enabling" gender transition without Parents' consent; (2) from "preventing its personnel" from communicating with parents about gender identity issues; (3) from "actively deceiving parents" about their children's actions with respect to gender identity.

Thus, the Parents are challenging a mandatory policy that is forced upon their children and that governs them daily, having the potential to change or actually changing the dynamics between parents and children in the school system insofar as gender identity is being actively discussed, counseled, and addressed in the school setting. Moreover, in its most intrusive element, the Policy invites minor children to develop and implement a gender transition plan without the knowledge, consent, or participation of their parents. It follows that the Parents, as alleged, cannot know whether their children have acted on that invitation because of the Policy's provisions authorizing the exclusion of parents.

In these circumstances, the Parents are not merely unharmed bystanders who simply have "a keen

interest in the issue," *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013), and they are not claiming an "abstract" injury, *see TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Rather, they have a "personal stake" in the dispute, *Raines v. Byrd*, 521 U.S. 811, 819 (1997), as the Board has implemented ongoing, interactive Guidelines that are directed at all students in the Montgomery County public schools in furtherance of its policy against bullying, harassment, and intimidation. Several aspects of the Guidelines reflect this. *First*, the Guidelines are not voluntary or optional, but are forced on the Parents without their consent. *Second*, the Guidelines are not merely threatened or prospective, but are indeed in operation, applying *to all students in the system*. *Third*, the Guidelines *proscribe conduct* and *prescribe actions* in furtherance of making "*all students* feel comfortable expressing their gender identity." And *fourth*, the Guidelines actively encourage *all students* to identify and feel comfortable with their views and feelings about gender identity, including gender transition, and *they invite every student* who so desires to develop a transition plan with the Principal (or designee) that involves a lengthy list of lifestyle changes and arrangements and that promises to accomplish that without parental involvement if the child anticipates that the child's parents would not support such a plan. Thus, as a result of the entire program, the dynamics and dialogue between parent and child have been changed on an ongoing basis. Important decisions about gender, sex, care, and growth and related matters, including any potentially related medical issues, are pulled from the family circle to the exclusive purview of the State. Thus, in their interactions at home, the Parents must now contend with the worry that school officials might, for example,

deem "unsupportive" the Parents' view that their child ought to transition only after professional psychological or psychiatric consultation. School officials might also deem "unsupportive" the Parents' positions regarding a variety of other widely held views concerning the appropriate care for children who question their gender identity, thus invoking the Guidelines' secrecy provisions. And the Board legally justifies its posture in the name of protecting the students' right to privacy, apparently assuming that that right trumps their parents' right to raise them and care for them.

Because all these aspects and consequences of the ongoing plan implicate, in a meaningful and, indeed, shocking way, the Parents' substantive due process rights under the Fourteenth Amendment, the Parents have plausibly alleged that they are, on an ongoingbasis, suffering constitutional injury or are facing "substantial risk" of suffering such injury. *Clapper v. Amnesty Int'l*, 568 U.S. 398, 414 n.5 (2013). While Article III standing requires a showing of "concrete harm," the Supreme Court has made clear that "[v]arious intangible harms can . . . be concrete," including the "disclosure of private information[] and intrusion upon seclusion." *TransUnion*, 141 S. Ct. at 2204. And it added that "those traditional harms may also include harms specified by the Constitution itself." *Id.* Those injuries, as well as a sufficient risk of those injuries, can thus give rise to standing.

The circumstances here are quite similar to those in another case in which the Supreme Court concluded that parents did indeed have standing to challenge a school policy. In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), the defendant school districts had adopted student assignment plans that relied upon

race "to determine which public schools certain children may attend." *Id.* at 709–710. While the students could express interest in attending particular schools, the school districts relied upon "an individual student's race in assigning that student to a particular school, so that the racial balance at the school [would fall] within a predetermined range based on the racial composition of the school district as a whole." *Id.* at 710. The school districts contended that the plaintiff Parents Involved, which was challenging the practice, lacked standing "because none of [its] current members can claim an imminent injury," arguing that "Parents Involved members *will only be affected if their children seek to enroll* in a Seattle public high school and choose an oversubscribed school that is integration positive." *Id.* at 718 (emphasis added). Given those nested layers of contingency, the school districts argued that the alleged harm was too speculative. The Supreme Court rejected the school districts' arguments and found that Parents Involved had standing. Of particular relevance, the Court observed:

> The fact that it is possible that children of group members will not be denied admission to a school based on their race — because they choose an undersubscribed school or an oversubscribed school in which their race is an advantage — does not eliminate the injury claimed.

Id. at 718–19. The Court held that it was a form of constitutional injury to the parents to be *forced to participate* in "a race-based *system* that *may* prejudice the plaintiff." *Id.* at 719 (emphasis added).

So it is here. As in *Parents Involved*, the Parents in this case have alleged (1) that the school has implemented a policy with systemic effects that reach *all* enrolled students and their families; (2) that the Parents are forced into this systemic policy; and (3) that the policy causes them constitutional injury. Thus, as in *Parents Involved*, the Parents here have alleged constitutional injury that is sufficient to give them standing. *See* 551 U.S. at 719. The injury here is not merely threatened but is also ongoing because the Parents and their children are subject to the Guidelines and related policies under which the Parents are deliberately being excluded from the discussion about gender and gender transition, which "*may* prejudice" them. *Id*. (emphasis added). Indeed, the Parents claim — and the School Board nowhere disputes — that the school system at present has roughly 300 secret transitions in place. Moreover, all students are addressed by the policy, being prohibited from certain conduct, being directed in their actions and response to gender issues, and being invited on a continuing basis to develop and transition their genders pursuant to a school-sponsored plan — *all without the knowledge and consent of their Parents*. And the Parents have also alleged that eliminating the challenged portions of the Guidelines would redress their constitutional injury. These facts readily satisfy the established requirements of Article III standing. *See Lujan*, 504 U.S. at 560–61.

The majority dismisses the applicability of the Court's *Parents Involved* decision because that decision found standing for constitutional injury under the Equal Protection Clause, not the Due Process Clause, which is as at issue here. *See ante* at 20–21. But not only did the Court not so limit its holding, the majority's argument suggests that injury

under the Due Process Clause yields rank to injury under the Equal Protection Clause. This argument makes no sense and has no basis in constitutional law.

The majority also attempts to undermine my analysis with various conclusory but unsupportable statements that are dismissive of clear allegations in the Parents' complaint. For example, the majority fails to account for the Parents' clear allegations that the Guidelines "*enable[]* [the Board's] personnel *to evaluate* minor children about sexual matters and allows minor children, of any age, *to transition* socially to a different gender . . . [and] *prohibits* personnel from communicating with parents." The Parents also allege that the Guidelines "*interfere*" with the rights of parents to be fully "*involved* in addressing issues relating to gender [transition]." These allegations describe, in the present tense, how the public schools are engaging with students regarding whether they want to transition their gender while prohibiting any disclosure of the discussions and actions with parents. Yet, the majority's response is merely to recite *other* allegations claiming a right to information, thereby construing the alleged interference and involvement with parental rights as something else quite different. The majority further suggests that this case would be different if Parents were not challenging simply "the Parental Preclusion Policy" (which allows schools to withhold information about a student's gender identity) but also the "Guidelines as a whole." Yet again, the complaint reads broader. It defines, in ¶ 19, the "Policy" that it is challenging to include (1) the Guidelines; (2) the Form 560-80 (the intake form students fill out to explore gender transition); and (3) "related training" of staff "regarding gender identity." And with this definition of "Policy," it alleges that the Board violated

the Parents' Fourteenth Amendment rights "by adopting a Policy (defined [in ¶ 19])." It then describes all aspects of the Policy, including the *exclusion* of Parents, the *evaluation* of students "about sexual matters," the *enabling* of gender transits by students, and the *prohibition* on school personnel communicating with parents. Finally, the complaint alleges, in ¶ 34, that with the "Policy," the Board "is *taking over the rightful position* of the Plaintiff Parents." (Emphasis added). And the relief that the Parents seek conforms to these broader allegations, not just the denial of notice.

In this case, there is no record to consider other than the complaint, which is subject to a motion to dismiss. Thus, in reviewing it, we must take its factual allegations as true — and all of them. We may not ignore or marginalize material allegations inconsistent with the decision we have reached. Taking the complaint fairly, I conclude that Parents have alleged a real, non-abstract issue in which they have a personal stake and are directly affected and constitutionally harmed. They are not complaining in the abstract about the ideology of the Board's Policy; they are complaining that the Policy is actually interfering with the parent-child relationship and that their own children are forcefully being subjected to it. They have an interest; they are harmed; and their grievance can be redressed by a favorable judicial decision. I conclude that the Parents have standing to bring their action.

IV.

Because I find standing, I turn to the legal sufficiency of the complaint. The Parents' complaint alleged, among other things, a claim under 42 U.S.C. § 1983 based on a violation of the Due Process Clause of

the Fourteenth Amendment. Their complaint asserted that the Board deprived them "of their rights, privileges, or immunities secured by the United States . . . Constitution[] . . . by execution, adoption, enforcement, and application of the [Board's] Policy with respect to withholding and secreting from Plaintiff Parents information concerning transgender inclinations and behavior of their minor children." The complaint defined "Policy" to be the Guidelines, the student intake form, related staff training, and official Board policy. The Parents' complaint alleged that the Policy is "expressly designed to circumvent parental involvement in a pivotal decision affecting the Plaintiff Parents' minor children's care, health, education, and future"; it "enables [the Board's] personnel to evaluate minor children about sexual matters and allows minor children, of any age, to transition socially to a different gender identity at school without parental notice or consent." To demonstrate the adverse potential consequence of the Board's Policy, the complaint asserted that transgender children have "significantly higher rates of suicide ideation, suicide attempts, and suicide, both with respect to the average population and to those of a homosexual sexual orientation." It continued, "Multiple studies have found that the vast majority of children (roughly 80-90%) who experience gender dysphoria ultimately find comfort with their biological sex and cease experiencing gender dysphoria as they mature (assuming they do not transition)." Finally, it explained, "[t]here is significant consensus that children with gender dysphoria and their parents can substantially benefit from professional assistance and counseling 'as they work through the options and implications,'" quoting guidance from the World Professional Association for Transgender Health.

The complaint also alleged that the Board adopted the Policy "deliberately" to exclude parents, and pursuant to that intention, the Board would withhold gender-identity information "even if the Plaintiff Parents specifically request such information."

For relief, the Parents sought a declaratory judgment that the Policy "with respect to withholding from parents knowledge of and information about their minor children's transgender inclinations and behaviors and all records thereof violates the fundamental rights of parents to direct the care, custody, education, safety, and control of their minor children as guaranteed by the United States Constitution." They also sought an injunction against the Board prohibiting it (1) "from evaluating and then enabling children to transition socially to a different gender at school . . . without prior parental notice and consent"; (2) "from preventing its personnel, without first obtaining the child's consent, from communicating with parents that their child may be dealing with gender dysphoria or that their child has or wants to change gender identity and from training its personnel to follow such policy"; and (3) "from actively deceiving parents by, among other things, using different names for their child(ren) around parents than they do in the school setting." Finally, the Parents sought nominal damages of one dollar.

The district court granted the Board's motion to dismiss for failure to state a claim, analyzing the Parents' complaint as a challenge to the Board's *curricular decisions*. In that vein, the court began its analysis by stating that the Parents do not have a fundamental right "to dictate the nature of their children's education" or "to override the determinations of public schools as to the information

to which their children will be exposed while enrolled as students." It concluded that "it is clear in the case law that parents do not have a constitutional right *to dictate a public school's curriculum*." (Emphasis added). Applying rational basis review, the court held that the Guidelines easily met that standard by furthering the Board's interest "in providing a safe and supportive environment for all [Montgomery County Public Schools] students, including those who are transgender and gender nonconforming," which could not be accomplished with "the automatic disclosure to [students'] parents, regardless of the [students'] own wishes." Conditionally, the court also found that the Board's interests sufficed to satisfy strict scrutiny review on the grounds that the Guidelines are narrowly tailored in furtherance of the Board's compelling interests in "(1) protecting their students' safety and ensuring a safe, welcoming school environment where students feel accepted and valued; (2) not discriminating against transgender and gender nonconforming students; and (3) protecting student privacy." (Cleaned up). The court explained that these three interests were in actuality interlocking aspects of a student's well-being and right to privacy. The Parents contend that the district court did not address the issue that their complaint raised, treating their argument as an assertion of the right to have a say in school curriculum and policy decisions rather than as an assertion of their substantive due process parental rights, which could not be dismissed under rational basis review. As the Parents state, "This is not, as the district court would have it, a dispute about what is taught in the classroom to every child." While the Parents acknowledge that parents do indeed transfer to public schools some of their responsibilities with respect to educating their

children, they contend that "they do not send them to public schools to supplant their primary right and responsibility to decide what is in the best interests of their children by allowing school personnel to decide whether and when their children should gender transition or how they should do so. Nor do they relinquish their right to provide professional assistance to their children who do want to transition."

I agree with the Parents that the district court erred in addressing the Guidelines' implementation as a curricular decision, effectively sidestepping their actual claim that the parental exclusion aspect of the Guidelines violates their substantive due process rights as parents. The Parents clearly asserted in their complaint that they were seeking to vindicate their fundamental liberty interest in the "care, custody, and control of their children," as guaranteed by the Fourteenth Amendment and as stated in *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion); *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside *first in the parents*, whose primary function and freedom include preparation for obligations *the state can neither supply nor hinder*" (emphasis added)). The Parents point out that these principles are "beyond debate," *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), and that the relationship between parent and child in these contexts is "inviolable except for the most compelling reasons," *Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994), thus requiring strict scrutiny of the State's significant interference with these rights, *see Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014).

Moreover, I also agree that the district court

erred in its strict scrutiny analysis by relying on the students' well-being and privacy interests to defeat the Parents' fundamental substantive due process right. Just as it is no defense to an alleged infringement of a plaintiff's First Amendment right to claim a compelling interest in not hearing disagreeable viewpoints, so also is it no defense to an alleged infringement of parental substantive due process rights to claim a compelling interest that is premised on a rejection of that right — in this case, the Board's claimed interest in having matters central to the child's well-being kept secret from and decided by a party other than the parents. In other words, the district court failed to recognize that its analysis was akin to holding there to be a *per se* interest in infringing on the Parents' rights by granting students a superior right to privacy and granting the school the prerogative to decide what kinds of attitudes are not sufficiently supportive for parents to be permitted to have a say in a matter of central importance in their child's upbringing. But that is effectively a nullification of the constitutionally protected parental rights.

While the district court's errors would require that we vacate its opinion, we would still have to determine whether the Parents have stated a claim sufficient to survive dismissal under Rule 12(b)(6). At this stage of the proceedings, we would, as is well established, have to accept the Parents' well-pleaded factual allegations as true and determine only whether they state a plausible claim for relief. *See Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 179–80 (4th Cir. 2009). I conclude that they do.

While the science and medicine related to gender identification, gender dysphoria, and gender transitioning are, these days, being actively debated, it is clear that developing and implementing a gender

transition plan for minor children without their parents' knowledge and consent do not simply implicate a school's curricular decisions but go much further to implicate the very personal decisionmaking about children's health, nurture, welfare, and upbringing, which are fundamental rights of the Parents. *See Troxel*, 530 U.S. at 65; *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ricard v. USD 475 Geary Cnty. Sch. Bd.*, No. 5:22-cv-4015, 2022 WL 1471372, *8 (D. Kan. May 9, 2022) ("It is difficult to envision why a school would even claim — much less how a school could establish — a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns"). Moreover, such "care and nurture of the child reside *first in the parents*, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince*, 321 U.S. at 166 (emphasis added). This means that *the parents* have, in the first instance, the fundamental constitutional right "*to make decisions*" regarding their children's care. *Troxel*, 530 U.S. at 66 (emphasis added). And "[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*, 442 U.S. at 603; *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992) ("Those enactments [requiring parental notification or consent prior to a minor's obtaining an abortion], and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation

with their parents and that children will often not realize that their parents have their best interests at heart”), *overruled on other grounds by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). And significant state interference with such fundamental rights must be examined under the strict scrutiny standard. *See Bostic*, 760 F.3d at 377.

I would thus hold that the Parents’ complaint challenging the Board’s policy to the extent it excludes parents from their children’s decisions to develop and implement gender transition plans, states a plausible claim for relief under the Due Process Clause.

Accordingly, I would vacate the district court’s order of dismissal and remand for further proceedings.

622 F.Supp.3d 118
United States District Court, D. Md., S. Div.

JOHN AND JANE PARENTS 1, et al., Plaintiffs,
v.
MONTGOMERY COUNTY BOARD OF EDUCATION, et al., Defendants.
Case No. 8:20-3552-PWG

Signed August 18, 2022

MEMORANDUM OPINION

Paul W. Grimm, United States District Judge

In this action, three parents of Montgomery County Public School ("MCPS") students allege that MCPS's 2020–2021 Guidelines for Student Gender Identity in Montgomery County Public Schools (the "Guidelines") violate their state and federal constitutional rights as parents, as well as various state and federal statutes and regulations. ECF No. 7, Complaint. Pending before me is the Motion to Dismiss filed by Defendant Montgomery County Board of Education ("MCBE") and its members. ECF No. 32, Defendants' Motion to Dismiss ("Motion"). The Motion has been fully briefed,[1] and an Amicus Brief has been filed in support of MCBE's Motion.[2] I have reviewed the

---

[1] ECF No. 53, Plaintiffs' Opposition ("Opposition"), and ECF No. 54, Defendants' Reply (Reply).

[2] ECF No. 46, Brief of Amici Curiae PFLAG Metro DC; Freestate Justice; The Center for LGBTQ Health Equity – Chase Brexton Health Care; MoCo Pride Center; Rainbow Youth Alliance; SMYAL; and Whitman-Walker, Inc. / DBA Whitman-Walker Health in Support of

Parties' filings and find that no hearing is necessary. Local Rule 105.6 (D. Md. 2021). For the reasons outlined in this Memorandum Opinion, the Defendants' Motion to Dismiss is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiffs in this matter, who have filed their claims anonymously, are the adult parents of minor children who presently attend high school in the Montgomery County Public School system ("Parents" or "Plaintiff Parents"). Compl. ¶¶ 3–4. All three Parents also have younger children, who they intend to enroll in MCPS "at some time during their elementary and secondary education." *Id.* The Parents filed this action against MCBE and its members in the Circuit Court for Montgomery County, Maryland, on October 20, 2020, and MCBE removed it to this Court. *Id.*; ECF No. 1, Notice of Removal.

The Parents allege in their Complaint that MCBE has adopted a "Policy," *i.e.*, the Guidelines, "expressly designed to circumvent parental involvement in a pivotal decision affecting" their children's "care, health education, and future." Compl. ¶ 2. The Parents allege that the Guidelines enable school "personnel to evaluate minor children about sexual matters and allow[ ] minor children, of any age, to transition socially to a different gender identity at school without parental notice or consent." *Id.* The Parents complain that the Guidelines "further

---

Defendants' Motion to Dismiss ("Amicus Brief").

require[ ] school personnel to enable this transition, including by using pronouns other than those consistent with the child's" sex assigned at birth.[3] *Id.* The Complaint contains no specific allegations regarding the application of the Guidelines in counseling their own children, and the Parents do not allege that their own children are transgender or gender nonconforming. *See generally id.*

A. The Guidelines

The Parents attach a copy of the Guidelines, in their entirety, as Exhibit 1 to their Complaint. ECF 7-1, Guidelines. The first substantive page of the Guidelines includes the following introduction:

> Montgomery County Public Schools [ ] is committed to a safe, welcoming school environment where students are engaged in learning and are active participants in the school community because they feel accepted and valued. To this end, all students should feel comfortable expressing their gender identity, including students who identify as transgender or gender nonconforming. It is critical that all MCPS staff members recognize and respect

---

[3] I endeavor in this Opinion to use language that is consistent with the terminology provided in Appendix 1 of the American Psychological Association's Guidelines for Psychological Practice With Transgender and Gender Nonconforming People, available at https://www.apa.org/practice/guidelines/transgender.pdf. *See also* the Human Rights Campaign's Glossary of Terms, available at https://www.hrc.org/resources/glossary-of-terms.

> matters of gender identity; make all reasonable accommodations in response to student requests regarding gender identity; and protect student privacy and confidentiality. To assist in these efforts, MCPS has developed the following guidelines for student gender identity that are aligned with the Montgomery County Board of Education's core values, guidance from the Maryland State Department of Education, and the Montgomery County Board of Education Policy ACA, *Nondiscrimination, Equity, and Cultural Proficiency*, which prohibits discrimination, stigmatization, and bullying based on gender identity, as well as sex, gender, gender expression, and sexual orientation, among other personal characteristics. These guidelines cannot anticipate every situation which might occur. Consequently, the needs of each student must be assessed on a case-by-case basis.

Id. at 3.

Immediately following that introduction, the Guidelines identify the following "Goals":

- Support students so they may participate in school life consistent with their asserted gender identity;
- Respect the right of students to keep their gender identity or transgender status private and confidential;
- Reduce stigmatization and marginalization of transgender and gender nonconforming students;
- Foster social integration and cultural inclusiveness of transgender and gender

nonconforming students;
- Provide support for MCPS staff members to enable them to appropriately and consistently address matters of student gender identity and expression.

Id.

As informed by that backdrop, the Guidelines go on to provide guidance and instructions on how MCPS personnel can provide support and resources to transgender and gender nonconforming students enrolled in Montgomery County Public Schools. The Guidelines address topics including: establishing a gender support plan; protecting student privacy; using the appropriate names and pronouns for transgender and gender nonconforming students; maintaining school records; dress code; participation in gender-based activities including physical education and school-based athletics; dealing with bullying and/or harassment of transgender and gender nonconforming students; and providing transgender and gender nonconforming students with designated safe spaces in their school buildings. Guidelines at 3–5.

Portions of the Guidelines explicitly anticipate parental involvement in developing a gender-support plan for transgender and nonconforming students. Other portions advise MCPS personnel to avoid disclosing a student's gender identity to their parents without the student's consent, particularly if the student has not yet disclosed their gender identity to their parents, or if the student either expects or knows their parents to be unsupportive. Those are the portions of the Guidelines that are primarily at issue

in this case. They are reproduced below:

- GENDER SUPPORT PLAN:
    - The principal (or designee), in collaboration with the student and the student's family (if the family is supportive of the student), should develop a plan to ensure that the student has equal access and equal opportunity to participate in all programs and activities at school and is otherwise protected from gender-based discrimination at school. The principal, designee, or school-based mental health professional (e.g., school psychologist or school counselor) should use MCPS Form 560-80, *Intake Form: Supporting Students, Gender Identity*, to support this process and assist the student in participating in school. The completed form must be maintained in a secure location and may not be placed in the student's cumulative or confidential files. While the plan should be consistently implemented by all school staff, the form itself is not intended to be used or accessed by other school staff members. *Id.* at 4.
- COMMUNICATION WITH FAMILIES:
    - Prior to contacting a student's parent/guardian, the principal or identified staff member should speak with the student to ascertain the level of support the student either receives or anticipates receiving from home. In some cases, transgender and gender

nonconforming students may not openly express their gender identity at home because of safety concerns or lack of acceptance. Matters of gender identity can be complex and may involve familial conflict. If this is the case, and support is required, the Office of School Support and Improvement or the Office of Student and Family Support and Engagement (OSFSE) should be contacted. In such cases, staff will support the development of a student-led plan that works toward inclusion of the family, if possible, taking safety concerns into consideration, as well as student privacy, and recognizing that providing support for a student is critical, even when the family is nonsupportive. *Id.*

- PRIVACY AND DISCLOSURE OF INFORMATION:
    - All students have a right to privacy. This includes the right to keep private one's transgender status or gender nonconforming presentation at school. Information about a student's transgender status, legal name, or sex assigned at birth may constitute confidential medical information. Disclosing this information to other students, their parents/guardians, or third parties may violate privacy laws, such as the federal Family Educational Rights and Privacy Act (FERPA). *Id.*
    - Transgender and gender nonconforming students have the right to discuss and

demonstrate their gender identity and expression openly and decide when, with whom, and how much to share private information. The fact that students choose to disclose their status to staff members or other students does not authorize school staff members to disclose a student's status to others, including parents/guardians and other school staff members, unless legally required to do so or unless students have authorized such disclosure. It is inappropriate to ask transgender or gender nonconforming students more questions than are necessary to support them at school. *Id.*

- STAFF COMMUNICATION:
    - Unless the student or parent/guardian has specified otherwise, when contacting the parent/guardian of a transgender student, MCPS school staff members should use the student's legal name and pronoun that correspond to the student's sex assigned at birth. *Id.* at 5.

Appended to the Guidelines is a copy of MCPS Form 560-80, *Intake Form: Supporting Students, Gender Identity* ("Intake Form"), which is provided by MCPS's Office of Student and Family Support and Engagement. *Id.* at 9–10. The Intake Form indicates that the "school administrator, counselor, or psychologist should complete [the] form with the student," and that the Intake Form is to be kept confidential as part of the process of establishing support for transgender and gender nonconforming students. The Intake Form states:

> Parents/guardians may be involved if the student states that they are aware of and supportive of the student's gender identity. This form should be kept in a secure, confidential location. See distribution Information on Page 2. This form is not to be kept in the student's cumulative or confidential folders.[4] All plans should be evaluated on an ongoing basis and revised as needed.

Id.

The Intake Form also includes a section captioned "Support/Safety for Student," which asks the student: (1) whether their parents are aware of their gender identity; (2) to rank the level of support they have at home on a scale of one to ten; and (3) what considerations should be accounted for if parental support is low or lacking. *Id.*

B. The Complaint

The Plaintiff Parents object to the Guidelines because, they argue, they inappropriately instruct MCPS schools to withhold information from parents regarding their children's gender identity as expressed at school. *See generally* Compl. The Parents assert seven causes of action in their Complaint. *Id.* In Count I, the Parents claim that the Guidelines violate "Maryland Family Law" by interfering with the Parents' statutory right and responsibility to provide their children with "support, care, nurture, welfare, and education." Compl. ¶¶ 44–49 (citing Md.

---

[4] In an apparent contradiction, the distribution information on Page 2 states that a copy of the Intake Form *should* be placed in the "School Confidential folder (in principal's office)."

Code, § 5-203 of the Family Law Article). In Count II, they allege that the Guidelines violate provisions of the Maryland Code of Regulations that require schools to maintain student records and to make those records available for parental review upon request. *Id.* ¶¶ 50–56. The Parents specifically allege that the Guidelines' instruction to keep the Intake Form confidential violates those provisions. *Id.* Count III asserts that the Guidelines violate the Parents' fundamental rights under the Maryland Declaration of Rights to "direct the care, custody, education, welfare, safety, and control of their minor children." *Id.* ¶¶ 57–66. In Count IV, the Parents allege that MCBE's policy "of withholding records from Plaintiff Parents with respect to their children's" gender identity violates the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), as incorporated by Maryland law. *Id.* ¶¶ 67–73. In Count V, the Parents allege that by "questioning a student about gender identity and filling out [the Intake Form]" without parental consent," MCBE violates the Protection of Pupil Rights Amendment, 20 U.S.C. § 1232h ("PPRA"). *Id.* ¶¶ 74–84. In Count VI, the Parents assert that the Guidelines violate the Parents' fundamental right "to direct the care, custody, education, and control of their minor children" under the Fourteenth Amendment to the United States Constitution. *Id.* ¶¶ 85–90. And finally, in Count VII, the Parents seek injunctive, declaratory, and monetary relief under 42 U.S.C. 1983, based on the constitutional and statutory violations they allege in Counts I–VI. *Id.* ¶¶ 91–95; Opp. at 29–30.

Additional facts will be provided below as needed.

STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(6) provides that a complaint must be dismissed if it "fails to state a claim upon which relief can be granted." The purpose of the rule is to test the sufficiency of the complaint, not to address its merits. *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006). To survive a motion to dismiss under Rule 12(b)(6), the complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The claim for relief must be plausible, and "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678–79, 129 S.Ct. 1937.

When reviewing a motion to dismiss, the Court must accept the well pleaded facts in the operative complaint, and also may "consider documents attached to the complaint, as well as documents attached to the motion to dismiss, if they are integral to the complaint and their authenticity is not disputed." *Sposato v. First Mariner Bank*, No. CCB-12-1569, 2013 WL 1308582, at *2 (D. Md. Mar. 28, 2013) (citing *Philips v. Pitt County Memorial Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009)). Significantly, when there is a conflict between the allegations of the complaint and an attached written instrument, "the exhibit prevails." *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991).

DISCUSSION

I. Constitutional claims

A. The nature of the right asserted

The core claims in this action relate to the alleged violation of the Plaintiff Parents' substantive rights under the Due Process Clause of the Fourteenth Amendment to "direct the care, custody, education, and control of their minor children." Compl. ¶ 62. The Fourteenth Amendment's Due Process Clause protects the rights specifically enumerated in the first eight amendments to the United States Constitution, as well as "some rights that are not mentioned in the Constitution" but that are "deeply rooted in this Nation's history and tradition" and that are "implicit in the concept of ordered liberty." *Dobbs v. Jackson Women's Health Org.*, ––– U.S. ––––, ––––, 142 S.Ct. 2228, 213 L.Ed.2d 545 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)).

"The first (and often last) issue" when a plaintiff raises a substantive due process challenge under the Fourteenth Amendment "is the proper characterization of the individual's asserted right," and the determination of whether that right is fundamental. *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 393 (6th Cir. 2005). Government actions that infringe on fundamental constitutional rights are subject to strict scrutiny and must be narrowly tailored in furtherance of a compelling government interest to pass constitutional muster. *Bostic v. Schaefer*, 760 F.3d 352, 377 (4th Cir. 2014). Government actions that do not implicate a fundamental right need only clear the significantly lower hurdle of bearing a "rational" relationship to a "legitimate" government interest. *Cap. Associated*

Indus., Inc. v. Stein, 922 F.3d 198, 210 (4th Cir. 2019).

To identify the nature of the Parents' asserted right, I must look to the Guidelines themselves. The Plaintiff Parents claim that the Guidelines instruct MCPS employees to "withhold[ ] information from parents with respect to their children's" gender identity, and that they implicitly "encourage children to distrust their parents" by asking children whether they wish to disclose their gender identities to their parents, and whether they anticipate receiving parental support. Opp. at 14. The Parents appear, moreover, to argue that the Guidelines reveal that MCBE has an agenda. Specifically, the Parents argue that the Guidelines require school personnel to "hide relevant information from parents because [ ] they do not want parents to have input on the topic [of gender identity] with their children" and that, in so doing, "MCBE has adopted a very definite position on this sensitive topic." Opp. at 17.

Having read the Guidelines carefully, I conclude that the Plaintiffs' reading is unsupported by the Guidelines' plain language for several reasons.

First, the language of the Guidelines makes clear that they are not intended to be inflexibly applied to every transgender and gender nonconforming student. Quite to the contrary, the Guidelines' introduction explicitly states that they "cannot anticipate every situation which might occur" and that "consequently, the needs of each student must be assessed on a case-by-case basis." Guidelines at 3. On the next page, they state again that "each student's needs should be evaluated on a case-by-case basis, and all [gender support] plans should be evaluated on an ongoing basis and revised as needed." *Id.* at 4. The Intake

Form reiterates that "all plans should be evaluated on an ongoing basis and revised as needed." *Id.* at 4. This repeated language demonstrates that the Guidelines are designed to apply flexibly in varied and evolving circumstances which, given the complexity and sensitivity of issues surrounding gender identity, are not conducive to a one size fits all approach.[5] Far from commanding the alleged interference with the parental rights that the Plaintiffs describe, the Guidelines carefully balance the interests of both the parents and students, encouraging parental input when the student consents, but avoiding it when the student expresses concern that parents would not be supportive, or that disclosing their gender identity to their parents may put them in harm's way. Put another way, to borrow from MCBE's Motion, "the Guidelines are just that—Guidelines." Motion at 14.

Second, the Guidelines cannot fairly be read to adopt a policy of excluding parents, inasmuch as they actively encourage familial involvement in the development and implementation of a transgender or

[5] This is further evidenced by the absence of definitive language in the portions of the Guidelines that address confidentiality, *i.e.*, "a student's transgender status, legal name, or sex assigned at birth ***may*** constitute confidential medical information ... The fact that students choose to disclose their status to staff members or other students does not authorize school staff members to disclose a student's status to others, including parents/guardians and other school staff members, ***unless*** legally required to do so or ***unless*** students have authorized such disclosure ... MCPS school staff members ***should*** use the student's legal name ...." (emphasis added).

gender nonconforming student's "Gender Support Plan" whenever possible. The Guidelines advise, for example, that the "principal (or designee), ***in collaboration with the student and the student's family (if the family is supportive of the student)***, should develop a plan to ensure that the student has equal access and equal opportunity to participate in all programs and activities at school[.]" Guidelines at 4 (emphasis added). It is true that the Guidelines advise speaking with transgender and gender nonconforming students before contacting their families "to ascertain the level of support the student either receives or anticipates receiving from home," but it is also clear that familial involvement is preferred and encouraged, unless a student indicates that their family is not supportive of their gender identity. *Id.* The Guidelines caution that "in some cases, transgender and gender nonconforming students may not openly express their gender identity at home because of safety concerns or lack of acceptance." *Id.* Even in those cases, the Guidelines provide that "staff will support the development of a student-led plan that ***works toward inclusion of the family***, if possible, taking safety concerns into consideration, as well as student privacy, and recognizing that providing support for a student is critical, even when the family is nonsupportive." *Id.* (emphasis added). The Guidelines recognize that "matters of gender identity can be complex and may involve familial conflict," and advise providing additional resources in such cases. *Id.* ("If this is the case, and support is required, the Office of School Support and Improvement or the Office of Student and Family Support and Engagement (OSFSE) should be contacted."). In sum, the Guidelines neither mandate nor encourage the exclusion or distrust of

parents, but aim to include parents and other family in the support network they are intended to create.

Finally, the language that the Plaintiff Parents find objectionable must be read in the context of the Guidelines as a whole. The Guidelines were developed in furtherance of MCPS's commitment "to a safe and welcoming school environment where students are engaged in learning and are active participants in the school community because they feel accepted and valued." *Id.* at 3. To that end, the Guidelines state that "all students should feel comfortable expressing their gender identity" and that it "is critical that all MCPS staff members recognize and respect matters of gender identity; make all reasonable accommodations in response to student requests regarding gender identity; and protect student privacy and confidentiality." The Guidelines' purpose of maintaining the comfort, privacy, and safety of transgender and gender nonconforming students must inform how they are read and how they can reasonably be expected to be implemented. And that includes those portions of the Guidelines that advise obtaining a transgender or gender nonconforming student's consent before disclosing their gender identity to their parents.

My review of the Guidelines reveals that the Plaintiff Parents' argument is based on a selective reading that distorts the Guidelines into a calculated prohibition against the disclosure of a child's gender identity that aims to sow distrust among MCPS students and their families. In reality, the Guidelines instruct MCPS staff to keep a student's gender identity confidential until the student consents to the disclosure out of concern for the student's well-being, and as a part of

a more comprehensive gender support plan that anticipates and encourages eventual familial involvement whenever possible.

Accordingly, in assessing the constitutionality of the Guidelines, I must consider whether the Plaintiffs constitutional rights as parents encompasses a fundamental right to be promptly informed of their child's gender identity, when it differs from that usually associated with their sex assigned at birth, regardless of their child's wishes or any concerns regarding the detrimental effect the disclosure may have on that child. As explained below, there is no such fundamental right under the Due Process Clause of the Fourteenth Amendment.

B. The Guidelines are subject to rational basis review, which they satisfy

The Supreme Court has long held that a parent's right to make decisions regarding the care, custody, and control of their children is a "fundamental liberty interest," which includes the right to "direct the upbringing and education of children under their control." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). "The Supreme Court has never been called upon to define the precise boundaries of a parent's right to control a child's upbringing and education," but "it is clear that the right is neither

absolute nor unqualified." *Bailey v. Virginia High Sch. League, Inc.*, 488 F. App'x 714, 716 (4th Cir. 2012) (quoting *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005)).

The Supreme Court first recognized a parent's right to direct the education of their children in *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). In *Meyer*, the Court concluded that parents are constitutionally entitled to seek out a specific kind of education (in *Meyer*, German language instruction) under the Fourteenth Amendment's Due Process Clause. Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), the Supreme Court applied *Meyer* and held that a state law requiring parents to send their children to public school was unconstitutional because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534, 45 S.Ct. 571 (citing *Meyer*, 262 U.S. at 390, 43 S.Ct. 625).

The Plaintiff Parents rely heavily on the broad language in *Meyer* and *Pierce* in support of their argument that strict scrutiny should apply in this case.[6] But subsequent Supreme Court decisions have

---

[6] The Plaintiff Parents also cite to the Supreme Court's more recent opinion in *Troxel v. Granville*, 530 U.S. at 65, 120 S.Ct. 2054. *Troxel* is a plurality opinion, which was decided in a very different context. In *Troxel*, the Court was asked to review what Justice O'Connor characterized as a "breathtakingly broad" statute that allowed "any person" to petition a court for visitation rights, and permitted the court to order visitation with any such person if it was deemed to serve the child's best

emphasized that the rights identified in *Meyer* and *Pierce* are limited. The Court has noted, for example, that *Pierce* "len[ds] no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society." *Runyon v. McCrary*, 427 U.S. 160, 177, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (quoting *Yoder*, 406

---

interests. *Id.* In other words, *Troxel* is a decision related to parent's fundamental right to direct their child's "care, custody, and control,"—it has nothing to do with a parent's right to dictate the actions or inactions of a public school system. At least two federal circuits have distinguished *Troxel* on that basis. *See Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) ("*Troxel* is not so broad as plaintiffs assert. The cases cited by the Court in *Troxel* as establishing this parental right pertain either to the custody of children, which was also the issue in dispute in *Troxel*, or to the fundamental control of children's schooling, as in *Yoder*."); *Leebaert v. Harrington*, 332 F.3d 134, 141–42 (2d Cir. 2003) ("But there is nothing in *Troxel* that would lead us to conclude from the Court's recognition of a parental right in what the plurality called 'the care, custody, and control' of a child with respect to visitation rights that parents have a fundamental right to the upbringing and education of the child that includes the right to tell public schools what to teach or what not to teach[.]"). Furthermore, the plurality in *Troxel* did not identify the level of constitutional scrutiny they applied in concluding that the challenged statute violated the parent's due process rights. *Troxel*, 530 U.S. at 80, 120 S.Ct. 2054 (Thomas, J., concurring in the judgment) ("The opinions of the plurality ... recognize such a right, but curiously none of them articulates the appropriate standard of review.").

U.S. at 239, 92 S.Ct. 1526 (White, J. concurring)). Instead, *Pierce* "held simply that while a State may posit (educational) standards, it may not pre-empt the educational process by requiring children to attend public schools." *Id.* In another subsequent decision, the Court again "stressed the 'limited scope of *Pierce*' " as "simply 'affirm[ing] the right of private schools to exist and to operate.' " *Id.* (quoting *Norwood v. Harrison*, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1972)).[7]

The Fourth Circuit has recognized the limitations on the parental rights established in *Meyer* and *Pierce* and has rejected the application of strict scrutiny to claims regarding a parent's right to direct a child's education that do not include a religious element. The Fourth Circuit explored the relevant law in detail in *Herndon v. Chapel Hill-Carrboro Board of Education*, 89 F.3d 174 (4th Cir. 1996) and concluded that the Supreme Court had never expressly determined the appropriate standard of constitutional review for claims involving parental rights in the educational context.[8] *Herndon v. Chapel Hill-Carrboro Board of*

---

[7] *See also Leebaert v. Harrington*, 332 F.3d 134, 140 (2d Cir. 2003) (explaining that *Meyer* "protected 'the subject matter ... taught at ... private school' and that [ ] [*Pierce*] established a parental right to 'send ... children to a particular private school rather than a public school.' ").

[8] The Fourth Circuit noted that *Meyer* and *Pierce* were both decided in the 1920s, and that the now-familiar "tiered framework" was not articulated until 1961, and "was not expressly embraced by a majority of the [Supreme] Court until 1971." *Id.* (citing *Poe v. Ullman*, 367 U.S. 497, 548, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting); *Graham v. Richardson*, 403 U.S. 365, 375,

Education, 89 F.3d 174 (4th Cir. 1996). The closest the Supreme Court had come, the Fourth Circuit found, was in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), in which the Supreme Court "overturned convictions of Amish parents for removing their children from school before age sixteen." *Herndon*, 89 F.3d at 178. *Yoder* reaffirmed that "parental rights are among the liberties protected by the Constitution," and held that "when those rights combine with First Amendment free exercise concerns ... they are fundamental." *Herndon*, 89 F.3d at 178. It did not, however, determine "whether the parental rights standing alone, in nonreligious contexts, are 'fundamental' in the constitutional sense[.]" *Id.*

Herndon went on to note that both *Yoder* and the Supreme Court's later decision in *Runyon v. McCrary* contain "instructive dicta" indicating that rational basis is the appropriate standard of constitutional review for claims that involve a parent's right to direct their child's public school education in the absence of a related Free Exercise concern.[9] *Id.* (citing *Yoder*, 406 U.S. at 215, 92 S.Ct. 1526) ("We must be careful to determine whether the Amish religious faith and their mode of life are, as they claim,

---

91 S.Ct. 1848, 29 L.Ed.2d 534 (1971)).

[9] There has been "a great deal of discussion and disagreement" among the Circuits Courts regarding "hybrid" claims that allege both an infringement on a parental right and a Free Exercise claim. *Parker*, 514 F.3d at 97–99. Here, the Plaintiff Parents allude to religious concerns but do not raise a Free Exercise claim. *See* Opp. at 26–27.

inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to *reasonable* state regulation of education if it is based on purely secular considerations.") (emphasis provided in *Herndon*); *Runyon*, 427 U.S. at 163, 96 S.Ct. 2586 ("The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by *reasonable* government regulation.") (emphasis provided in *Herndon*). The Fourth Circuit summarized the collective effect of the Supreme Court authority on the subject as follows:

> From *Meyer* to *Runyon*, the Supreme Court has stated consistently that parents have a liberty interest, protected by the Fourteenth Amendment, in directing their children's schooling. Except when the parents' interest includes a religious element, however, the Court has declared with equal consistency that reasonable regulation by the state is permissible even if it conflicts with that interest. **That is the language of rational basis scrutiny.**

Id. at 178 (emphasis added).

Other federal circuits have likewise concluded that the *Meyer-Pierce* line of cases do not establish a "fundamental right" for parents to dictate the nature of their children's education in public schools that requires the application of strict scrutiny. The Sixth Circuit, in rejecting a constitutional challenge to a

school dress code, stated:

> The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child. Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally committed to the control of state and local authorities.

Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395–96 (6th Cir. 2005) (emphasis in original).

The Second Circuit similarly rejected a parent's claim that he was constitutionally entitled to exempt his child from a mandatory health education class and found that "*Meyer, Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught.... [The] recognition of such a fundamental right ... would make it difficult or impossible for any public school authority to administer school curricula responsive to the overall educational needs of the community and its children." *Leebaert*, 332 F.3d at 141. And the Ninth Circuit, affirming the dismissal of a § 1983 action against a public school district for distributing a survey to elementary aged students that included questions about sex, held that "there is no fundamental right of parents to be the *exclusive* provider of information regarding sexual matters to their children, either

independent of their right to direct the upbringing and education of their children or encompassed by it. We also hold that parents have no due process or privacy right to override the determinations of public schools as to the information to which their children will be exposed while enrolled as students." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1200 (9th Cir. 2005).

Discussion of the above-summarized cases is conspicuously absent from the Plaintiff Parents' Opposition. Most notably, the Plaintiff Parents make no attempt to distinguish *Herndon*, which MCBE explicitly, and correctly, cites as controlling authority in this case. Instead, the Plaintiff Parents cite the Eleventh Circuit's decision in *Arnold v. Board of Education of Excambia County, Alabama*, 880 F.2d 305 (11th Cir. 1989) as the case "most analogous" to this one. Opposition at 6–7. The *Arnold* Court summarized the relevant facts as follows:

> On March 10, 1986, Jane Doe and John Doe discovered that Jane was pregnant. On March 27, 1986, Kay Rose summoned Jane to her office for counseling. After speaking with Jane, Rose summoned John Doe to her office where he admitted paternity. At the expense of the school board, Rose procured a pregnancy test for Jane which proved positive. Rose informed [Vice Principal] Powell of Jane's pregnancy on April 2, 1986.
>
> The counselors then allegedly coerced the children to agree to abort the child. Because the children were financially unable to afford the medical services attendant to an abortion, the school officials paid Jane and John to perform

> menial tasks for them. On May 8, 1986, Powell allegedly gave $20.00 to the individual who drove the children to the medical facility in Mobile, Alabama where Jane obtained the abortion.
>
> The complaint alleges that Rose and Powell "coerced" the children "in diverse respects and so fundamentally imposed their wills upon the children that the children were unable to exercise any freedom of choice with regard to the decision whether or not to agree to the termination of the pregnancy." Further, the plaintiffs allege that the school officials "coerced these children to refrain from notifying their parents regarding the matter" and "to maintain the secrecy of their plan" to obtain an abortion for Jane.

Id. at 308–09.

Based on those extreme facts (entirely absent here), the Eleventh Circuit concluded that "a parent's constitutional right to direct the upbringing of a minor is violated when the minor is **coerced** to refrain from discussing with the parent an intimate decision such as whether to obtain an abortion; a decision which touches fundamental values and religious beliefs parents wish to instill in their children." *Id.* at 312 (emphasis added).

Arnold clearly is distinguishable from this case. Here, the Parents allege no specific facts regarding the application of the Guidelines to a particular student, but argue that they nevertheless rise to the same level of coercive interference with the parent-child relationship and familial privacy as a school counselor

actively discouraging students from disclosing their pregnancy, coercing them to obtain an abortion, and assisting them in raising the funds to finance it. The plain language of the Guidelines belies the Parents' position, particularly given that the Guidelines actively *encourage* parental participation in developing a student's gender support plan. *See* Section A, *above*.

Furthermore, the Plaintiff Parents ignore critical language in the *Arnold* opinion that directly undermines their argument. Far from mandating parental notification, the Eleventh Circuit in *Arnold* took pains to emphasize that the decision to notify the parents of the pregnancy rested with the student herself. In other words, the constitutional issue in *Arnold* arose out of school personnel coercing the students not to notify their parents, not from their failure to notify the parents themselves (regardless of the students' wishes). Equally noteworthy is the failure of the Plaintiff Parents to acknowledge the Eleventh Circuit's recognition of the importance of the minor student's own discretion regarding whether to seek parental involvement:

> **[W]e are not, as appellees argue, constitutionally mandating that counselors notify the parents of a minor** who receives counseling regarding pregnancy. We hold merely that the counselors must not coerce minors to refrain from communicating with their parents. **The decision whether to seek parental guidance, absent law to the contrary, should rest within the discretion of the minor**. As a matter of common sense, **not constitutional duty**,

> school counselors should encourage communication with parents regarding difficult decisions such as the one involved here.

Arnold, 880 F.2d at 314.

The Plaintiff Parents also cite as analogous the Third Circuit's decision in *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000). Like *Arnold*, *Gruenke* involves an extreme example of school personnel becoming unduly involved in a student's pregnancy. In *Gruenke*, a high school swim coach forced one of his seventeen-year-old team members to take a pregnancy test, and went on to spread rumors about her pregnancy in the school community, all without informing the teen's parents. *Id.* at 308–09. A guidance counselor was aware of the situation, but did not encourage the swim coach to disclose the pregnancy to the student's parents, and did not inform the parents herself. The Third Circuit, citing *Arnold*, noted it had "considerable doubt about [the school counselor's] right to withhold information of this nature from the parents," and went on to conclude that the swim coach's actions established "an unconstitutional interference" with familial relations and privacy, noting specifically that the coach "was not a counselor whose guidance was sought by a student, but instead, someone who was acting contrary to her express wishes that he mind his own business." *Id.* In that context, the Third Circuit noted:

> School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as

> they are guaranteed by the Constitution. Public schools must not forget that "in loco parentis" does not mean "displace parents."
>
> It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights. State deference to parental control over children is underscored by the [Supreme] Court's admonitions that "[t]he child is not the mere creature of the State," *Pierce,* 268 U.S. at 535, 45 S.Ct. 571, and that it is the parents' responsibility to inculcate "moral standards, religious beliefs, and elements of good citizenship." *Yoder*, 406 U.S. at 233, 92 S.Ct. 1526.

Id.

The Third Circuit's point regarding the primacy of the parents over educators in counseling their children is well taken, but *Gruenke* bears little factual resemblance to this case. Although the Plaintiff Parents claim that the Guidelines "cut [ ] parents out of the action systemically if they are deemed unsupportive," the Guidelines themselves contain no such rigid policy, and the Parents have not alleged any facts that suggest that any member of MCPS staff has applied them in that way, let alone that anyone at MCPS either "coerced" a transgender or gender nonconforming student to withhold information from their parents, or "affirmatively interfered with" any parent's constitutional rights.[10]

---

[10] *See Anspach ex rel. Anspach v. City of Philadelphia, Dep't of Pub. Health*, 503 F.3d 256, 266 (3d

This Opinion should not be read to foreclose the possibility that, under some circumstances, a school actor may impermissibly interfere with the parental role in counseling a transgender or gender nonconforming child. One can envision a scenario in which interference by school personnel might rise to the level described in *Arnold* or *Gruenke*. But due to the nature of the Guidelines, and because the Plaintiff Parents challenge the Guidelines on their face, this case bears a much closer resemblance to those addressing curricular challenges and other public school policy decisions, which are subject to rational basis review.

Additionally, despite the Parents' assertion that they "are not attempting to dictate a curriculum about transgenderism or to change MCBE bullying guidelines," the Plaintiff Parents' Opposition strongly suggests that their objections to the Guidelines are not limited to the portions addressing parental disclosure. The Opposition states that the Guidelines "assume that transgenderism is a normal, and normative, condition," and offers as a counterpoint various "scientific," "philosophical," "medical," and "religious" bases in support of the Plaintiffs' presumably contrary view. But it is clear in the case

---

Cir. 2007) ("We recognized in *Gruenke* that '[s]chool-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children....' **However, that recognition does not extend to circumstances where there is no manipulative, coercive, or restraining conduct by the State**.") (emphasis added).

law that parents do not have a constitutional right to dictate a public school's curriculum or its approach to student counseling, for any of those reasons. *See, e.g.*, *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) (finding no violation of parental rights, privacy rights, or free exercise rights when a public school district included books depicting same sex relationships in its curriculum); *Blau*, 401 F.3d at 395–96. As the Ninth Circuit explained in the context of a challenged sexual education curriculum:

> Neither *Meyer* nor *Pierce* provides support for the view that parents have a right to prevent a school from providing any kind of information—sexual or otherwise—to its students....*Meyer* and *Pierce* do not encompass [the] broad-based right [the parent-plaintiffs seek] *to restrict the flow of information* in the public schools. Although the parents are legitimately concerned with the subject of sexuality, there is no constitutional reason to distinguish that concern from any of the countless moral, religious, or philosophical objections that parents might have to other decisions of the School District—whether those objections regard information concerning guns, violence, the military, gay marriage, racial equality, slavery, the dissection of animals, or the teaching of scientifically-validated theories of the origins of life. Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy.

Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187 (9th Cir. 2006).[11]

Accordingly, in light of the authority summarized above, I conclude that MCBE correctly argues that rational basis review applies to this claim regarding the Guidelines' alleged violation of the Plaintiff Parents' right to direct their children's education. And because the Guidelines are subject to rational basis review, the Guidelines need only "bear some rational relationship to a legitimate state interest" to pass constitutional muster. *Herndon*, 89 F.3d at 179 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 32, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973)).

MCBE easily meets that standard. MCBE certainly has a legitimate interest in providing a safe and supportive environment for all MCPS students, including those who are transgender and gender

---

[11] *See also C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 (3d Cir. 2005) ("Further, while it is true that parents, not schools, have the primary responsibility to inculcate moral standards, religious beliefs, and elements of good citizenship, a myriad of influences surround middle and high school students everyday, many of which are beyond the strict control of the parent or even abhorrent to the parent.... A **parent whose middle or high school age child is exposed to sensitive topics or information in a survey remains free to discuss these matters and to place them in the family's moral or religious context**, or to supplement the information with more appropriate materials.") (emphasis added).

nonconforming. And the Guidelines are certainly rationally related to achieving that result.

Even assuming momentarily that the Guidelines *were* subject to strict scrutiny (they are not), I would conclude that they satisfy that standard as well. To survive strict scrutiny, MCBE would be required to demonstrate that the Guidelines are narrowly tailored in furtherance of a compelling government interest. *Bostic*, 760 F.3d at 377. MCBE argues that the Guidelines further their compelling interest in: (1) "protecting their students' safety and ensuring a 'safe, welcoming school environment where students ... feel accepted and valued' "; (2) "not discriminating against transgender and gender nonconforming students"; and (3) "protecting student privacy." Motion at 18–20.

The law cited by MCBE supports finding that its interest is compelling. The Supreme Court has found it "evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling," and as a result has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 756, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (internal quotations and citations omitted). More recently, the Supreme Court has held that transgender individuals are protected from discrimination under Title VII. *Bostock v. Clayton County*, ––– U.S. ––––, 140 S. Ct. 1731, 207 L.Ed.2d 218 (2020). Guided by that conclusion, the Fourth Circuit has held that the same is true under Title IX, and held that a school's policy requiring a transgender student to use the bathroom based on his

sex assigned at birth to be in violation of the statute. *Grimm v. Gloucester Cnty School Bd.*, 972 F.3d 586 (4th Cir. 2020). In that same decision, the Fourth Circuit also found, applying intermediate scrutiny, that the school's bathroom policy violated the student's rights under the Equal Protection Clause, and it recognized a school's "interest in protecting student's privacy" as "important." *Id.*; *see also Anspach ex rel. Anspach v. City of Philadelphia, Dep't of Pub. Health*, 503 F.3d 256, 271 (3d Cir. 2007) (recognizing that "minors are individuals who enjoy constitutional rights of privacy under substantive due process.").

Furthermore, MCBE's concerns about the safety and well-being of transgender and gender nonconforming students in particular are neither theoretical nor fanciful. Research demonstrates that transgender and gender nonconforming students are substantially more likely to be bullied or harassed than their cisgender peers. *See, e.g.,* Amicus Brief at 6 and sources cited therein.[12] The Plaintiff Parents themselves acknowledge that transgender and gender nonconforming students are at a heightened risk of

---

[12] The Fourth Circuit, too, recognizes these heightened risks. *Grimm*, 972 F.3d at 597 ("77% of respondents who were known or perceived as transgender in their K-12 schools reported harassment by students, teachers, or staff."). Just this week, the Fourth Circuit reiterated that individuals suffering from gender dysphoria (which, as the Fourth Circuit explains, is not the same thing as simply being transgender) are at risk of depression, substance abuse, self-harm, and suicide. *Williams v. Kincaid*, 45 F.4th 759, 767-68 (4th Cir. 2022).

suicide. Compl. ¶ 15; Motion at 26. The Maryland Department of Education noted in its 2015 "Guidelines for Gender Identity Non-discrimination," that "research indicates that 80 percent of transgender students feel unsafe a school because of who they are," leaving students unable to focus on their education, and leading some students to miss classes or leave school entirely.[13] And all of these concerns are compounded when a student also lacks support at home. *See* Amicus Brief at 9–13. For those reasons, I agree with MCBE that the Guidelines further a compelling state interest.

I also agree that the Guidelines are narrowly tailored in furtherance of that interest. The Guidelines do not aim to exclude parents, but rather anticipate and encourage family involvement in establishing a gender support plan. Guidelines at 4. Even where family support is lacking, the inclusion of family is identified as an eventual goal. *Id.* The Guidelines, on their face, are noncoercive, and serve primarily as a means of creating a support system and providing counseling to ensure that transgender children feel safe and well at school. And, importantly, they apply

---

[13] These Maryland Department of Education guidelines, which MCBE's Guidelines substantially track, advise that transgender and gender nonconforming students should be permitted "to discuss and express their gender identity openly and to decide, when, with whom, and how much private information may be shared." Md. State Dep't of Educ., Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination, (2015), available at https://www.marylandpublicschools.org/about/Documents/DSFSS/SSSP/ProvidingSafeSpaces TransgendergenderNonConformingYouth012016.pdf

to each student on a case by case basis.[14] By advising

[14] The Parents filed a Notice of Supplemental Authority, ECF No. 58, directing my attention to the District of Kansas's decision in *Ricard v. USD 475 Geary Cnty, KS, School Board*, No. 522CV04015HLTGEB, 2022 WL 1471372 (D. Kan. May 9, 2022), in which the District of Kansas granted a preliminary injunction to a teacher on First Amendment grounds. The teacher in that case argued that the policy of prohibiting the disclosure of a student's gender identity at school (if it differs from that usually associated with their sex assigned at birth) absent the student's consent violated her Christian beliefs that "the Bible prohibits dishonesty and lying." *Id.* at *4. Although the opinion was decided on First Amendment grounds, the District of Kansas noted in its analysis, citing *Troxel*, 530 U.S. at 65, 120 S.Ct. 2054, that "parents have a constitutional right to control the upbringing of their children," identified that right as fundamental, and therefore concluded that "whether the [school district] likes it or not, that constitutional right includes the right of a parent to have a say in what a minor child is called and by what pronouns they are referred." *Id.* at *8. But there is nothing in the MCBE Guidelines that divests parents from having a say in what a minor child is called or by what pronoun they are referred. I note as well that the court in *Ricard* specifically observed that "the Court can envision that a school would have a compelling interest in refusing to disclose information about [ ] names or pronouns when there is a particularized and substantiated concern that disclosure to a parents could lead to child abuse, neglect, or some other illegal conduct" and that an "appropriately tailored policy would, instead, make an individualized assessment whether there is a particularized and substantiated concern of real harm—as opposed to a generalized concern of parental

that school personnel keep a transgender or gender nonconforming student's gender identity confidential unless and until that student consents to disclosure, they both protect the student's privacy and create, as MCBE puts it "a zone of protection ... in the hopefully rare circumstance when disclosure of [the student's] gender expression while at school could lead to serious conflict within the family, and even harm." Motion at 28. If the Guidelines mandated parental disclosure as the Plaintiff Parents urge, their primary purpose of providing transgender and gender nonconforming students with a safe and supportive school environment would be defeated. A transgender child could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to their parents, regardless of their own wishes or the consequences of the

---

disagreement—and prohibit disclosure only in those limited instances." *Id.* at *8. The Guidelines in this case closely resemble the "appropriately tailored" policy imagined by the court in *Ricard.*

The Parents more recent Notice of Supplemental Authority, ECF No. 57, cites a dissenting opinion from the Supreme Court of Wisconsin, which is, obviously, not binding on this Court (or any other). *See Doe 1 v. Madison Metro. Sch. Dist.*, 403 Wis.2d 369, 976 N.W.2d 584 (2022). It also cites the opinion of the Middle District of Alabama in *Eknes-Tucker v. Marshall*, No. 2:22-CV-184-LCB, 603 F.Supp.3d 1131, 1141–42 (M.D. Ala. May 13, 2022), which affirmed a parent's fundamental right to direct their children's medical care and enjoined the enforcement of a statute that forbade treating transgender children with medically prescribed hormones. That issue is not before me in this case.

disclosure. Accordingly, I find that, although they are subject only to rational basis review, the Guidelines also satisfy both prongs of the strict scrutiny analysis.

For those reasons, I conclude that the Plaintiff Parents' facial challenge under the Due Process Clause of the Fourteenth Amendment fails as a matter of law and must be dismissed. And because amendment would be futile, it is dismissed with prejudice.

C. The Plaintiffs have failed to plead an as applied challenge

The Plaintiff Parents allege in their Complaint that they challenge the Guidelines on their face and as applied. Compl. ¶ 11. As discussed above, however, both the Complaint and the Parents' Opposition to MCBE's Motion to Dismiss are devoid of any specific factual allegations that might support an as applied challenge. The closest the Parents have come to asserting facts challenging any specific application of the Guidelines relating to them is to allege in their Complaint that, "[u]pon information and belief, MCBE has instructed MCPS personnel not to make completed MCPS Form[ ] 560-80 [(the Intake Form)] available to the parents of minor children ... unless the minor child consents to its disclosure to the parents" and to allege that "MCPS personnel have been trained in the MCPS Policy and have conformed their behavior and practices with the MCPS Policy, including by withholding information from parents about their child's transgender election at school if the child has not desired that information to be transmitted to the parents and by keeping such information out of the school records to which parents are given access." Compl. ¶¶ 26–28. These

generalized allegations are plainly insufficient to challenge the Guidelines as applied.

Fed. R. Civ. P. 11(b)(3) instructs that when an attorney presents the court with a "pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it," that attorney "certifies that to the best of [their] knowledge, information, and belief, formed after reasonable inquiry under the circumstances ... the factual contentions have evidentiary support or, ***if specifically so identified***, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]" *Id.* (emphasis added). This rule "was not intended to allow naked speculation or to relieve parties from their duties to perform a pre-submission investigation. Rather, it simply recognizes that there will be times when parties 'have good reason to believe that a fact is true' but need further factfinding or discovery to assemble the supporting proof." Steven S. Gensler & Lumen N. Mulligan, Federal Rules of Civil Procedure Rules and Commentary 274 (2022 Ed.) (citing Fed. R. Civ. P. 11 advisory committee's note (1993)). "To rely on this provision, the party must specifically identify that the factual contention is being made on that basis." *Id.*

The Plaintiff Parents were afforded but declined the opportunity to amend their Complaint to address its alleged deficiencies before MCBE filed its Motion to Dismiss. ECF No. 29, Paperless Order Memorializing 1/19/21 Pre-Motion Conference. And they did not indicate either in their Complaint or their Opposition to MCBE's Motion to Dismiss that obtaining the evidentiary support for their allegations related to the application of the Guidelines would require further

investigation or discovery. Accordingly, because they failed to invoke Rule 11(b) and failed to plead sufficient facts to support an as applied challenge, their as applied challenge must be dismissed. The Plaintiffs' as applied challenge is dismissed without prejudice, but without leave to amend. *See Britt v. DeJoy*, 45 F.4th 790 (4th Cir. 2022), *on reh'g en banc.*

D. The Plaintiffs have failed to state a claim under 42 U.S.C. § 1983

Because the Plaintiffs have failed to plead a federal constitutional violation, Count VII of the Complaint, which alleges a violation of 42 U.S.C. § 1983, must likewise be dismissed. Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]" Section 1983 "does not confer any substantive rights; rather, it supplies a remedy for rights conferred by other federal statutes or by the Constitution." *Clear Sky Car Wash LLC v. City of Chesapeake, Va.*, 743 F.3d 438, 444 (4th Cir. 2014). In other words, Section 1983 simply provides the "mechanism" for an injured party to recover damages from the person who, acting under color of law, violated their rights under the U.S. Constitution or federal statute. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 288–290, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). Therefore, a plaintiff seeking relief under Section 1983 must first demonstrate the violation of the Constitution or federal statute.

The only federal claim in the Plaintiff Parents'

Complaint (aside from their Section 1983 claim) is Count VI, alleging MCBE violated the Parents' parental rights under the United States Constitution. As explained in the preceding sections, Count VI is dismissed because the Parents' facial challenge to the Guidelines fails as a matter of law, and the Parents have failed to plead an as applied challenge. Accordingly, without any violation of federal law to form the basis for a Section 1983 claim, Count VII must also be dismissed without prejudice and without leave to amend. *See Britt v. DeJoy*, 45 F.4th 790 (4th Cir. 2022), *on reh'g en banc.*

E. The Guidelines do not violate the Maryland Declaration of Rights

The Plaintiff Parents argue next that Count III, which asserts a violation of the Maryland Declaration of Rights, must survive MCBE's Motion to Dismiss because Article 24 provides broader protections than the Fourteenth Amendment's Due Process Clause, its federal equivalent. Compl. ¶¶ 57–66; Opp. at 25–26. The Plaintiff Parents cite no law identifying the contours of Article 24's greater protections in the context of this case, but instead urge the Court to "certify the issue[ ] for definitive resolution by the Maryland Court of Appeals." Opp. at 2–3.

"Pursuant to Maryland law, a court of the United States may certify a question to the Court of Appeals of Maryland if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of [Maryland]." *Antonio v. SSA Sec., Inc.*, 749 F.3d 227, 234 (4th Cir. 2014) (quoting Md. Code, § 12–603 of the Courts and Judicial Proceedings Article). "It is well established

that the decision to certify a question to the Court of Appeals of Maryland is not obligatory and 'rests in the sound discretion of the federal court.' " *Hafford v. Equity One, Inc.*, No. CIV.A. AW-06-0975, 2008 WL 906015, at *4 (D. Md. Mar. 31, 2008). "Only if the available state law is clearly insufficient should the court certify the issue to the state court." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994). When there is guidance available from which a federal court may make a "reasoned and principled conclusion," the federal court should decide the case itself. *Hafford*, 2008 WL 906015, at *4.

There is no question that the scope of the protections of Article 24 is determinative of issues pending in this case. If Article 24 provides the protections urged by the Plaintiff Parents, their claims grounded in Article 24 survive MCBE's Motion to Dismiss. If Article 24 provides the same protections as the Due Process Clause of the Fourteenth Amendment, they do not. The remaining question is whether there is sufficient guidance under Maryland law regarding Article 24's application in this case to decide the issue in this Court.

The Maryland Court of Appeals' "precedent states clearly that the Maryland and Federal due process provisions have been read '*in pari materia*'." *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171, 194 (2007) (collecting cases). The Court has also been clear, though, that "this principle of reading the provisions in a like manner does not [ ] reduce [its] analysis to a mere echo of the prevailing Fourteenth Amendment jurisprudence." *Id.* In certain instances, Maryland's high court has, indeed, "read Maryland's due process clause more broadly than the federal constitution." *Id.*

MCBE acknowledges that Article 24 is not always coextensive with substantive due process under Fourteenth Amendment, but correctly observes that "Plaintiffs cite nothing establishing that Article 24 has a broader reach in *this* context, where parents seek to override the reasonable educational judgments of school authorities." Reply at 18.

The Plaintiff Parents rely on the Maryland Court of Appeals' decision in *Koshko v. Haining*, in which the Court of Appeals noted the broader protections of Article 24 in the context of child custody and visitation. Opp. at 35. The Parents cite no law, and I have found none, that suggest that Article 24 creates broader protections in the different context of a parent challenging matters of public school policy or curriculum. To the contrary, the Maryland Court of Appeals emphasized in *In re Gloria H.* that Maryland public school systems and boards of education "are vested with control over educational matters .... the local authorities are empowered to determine the educational policies within their own school districts." 410 Md. 562, 979 A.2d 710, 721 (2009) (quoting *Hornbeck v. Somerset Co. Bd. of Educ.*, 295 Md. 597, 458 A.2d 758 (1983)). In the same decision, although it is not itself a constitutional case, the Court of Appeals quoted with approval the following language from the Sixth Circuit's decision in *Blau*, which in turn relies on the Fourth Circuit's decision in *Herndon*:

> The critical point is this: While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child.

> Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally "committed to the control of state and local authorities."

Blau, 401 F.3d at 395–96 (collecting cases and citing *Herndon*, 89 F.3d at 176).

This case involves "how" the MCPS teaches its students, and not the issue of the Parent Plaintiffs' fundamental right to decide "whether" to send their children to public school. Further, it does not involve parental rights regarding child custody or visitation. Therefore, it falls squarely within the realm of cases where the Maryland Court of Appeals has favorably cited federal cases, thereby supporting the conclusion that the protections afforded by Article 24 are no broader than are afforded under the Fourteenth Amendment in this context.

Accordingly, I conclude that the fact that Article 24 provides broader protections in contexts unrelated to the issues in this case does not warrant certification and deferral of the state constitutional question in light of the well-established deference to public schools' educational decisions under Maryland law. And, because the Parent Plaintiffs' Fourteenth Amendment claims fail, so too do their Article 24 claims. They are dismissed with prejudice.

II. Statutory Claims

A. Maryland Code § 5-203 of the Family Law Article

In Count I of their Complaint, the Plaintiff Parents allege that "the MCPS Policy of withholding information from parents directly related to their minor children's support, care, nurture, welfare, and education have violated § 5-203 of the Family Article and have directly hindered Plaintiff Parents from carrying out their statutory duties under that section." Compl. ¶ 49. The Parents specifically cite the following subsection:

> (a)(1) The parents are the joint natural guardians of their minor child.

....

> (b) The parents of a minor child, as defined in § 1-103 of the General Provisions Article:
>
> > (1) are jointly and severally responsible for the child's support, care, nurture, welfare, and education; and
> >
> > (2) have the same powers and duties in relation to the child.

Md. Code, Fam. Law § 5-203 ("FL").

Based on that language, the Parents assert that they "have the power under the statute to deal with their children's gender dysphoria and to complain when public schools take affirmative steps to restrict their right to do so." Opp. at 27. From there, the Plaintiffs reason that "Section 5-203(b) thus carries with it a common-law right of action for damages and other appropriate relief when violated, just as the parallel constitutional right does." *Id.* MCBE counters that Maryland courts have only cited Section 5-203 and the rights it memorializes in connection with child

custody disputes, and "to hold parents responsible for failing to obtain necessary treatment for their children." Motion to Dismiss at 35.

Section 5-203(b) "defines globally the role of a parent," and the powers and duties identified in Section 5-203(b) are "closely associated" with the Maryland Court of Appeals' "long-standing recognition that parents are presumed to act in their children's best interests." *BJ's Wholesale Club, Inc. v. Rosen*, 435 Md. 714, 80 A.3d 345, 353 (2013). The Court has explained that there are "clear societal expectations" under Maryland law that "parents should make decisions pertaining to their children's welfare, and that those decisions are generally in the child's best interest." *Id.* Those expectations are "manifest in statutes that enable parents to exercise their authority on behalf of their minor child in the most important aspects of a child's life, including significant physical and mental health decisions" as well as "the most significant decisions pertaining to a child's education and employment." *Id.* at 354. Regarding those "most significant" educational decisions, the Court of Appeals stated that "parents may: choose to home school their children; and choose to defer compulsory schooling for one year if a parent determines that the child is not mature enough to begin schooling." *Id.* (citing Md. Code § 7-301 of the Education Article). But the Court did not elaborate any further. This appears to be the closest Maryland courts have come to finding that Section 5-203(b) establishes an actionable right associated with a parent's responsibility for their children's education. The Plaintiff Parents cite no law, and I have found none, invoking Section 5-203(b) to establish a common-law right of action against a public school based on a disagreement with a school's

curriculum or counseling policy.

Aside from broadly defining the role of parents, the primary function of Section 5-203 is to establish one parent's rights and obligations vis-à-vis the other. Subsection (a) memorializes the parents' status as "joint natural guardians of their minor child." FL § 5-203(a). Subsection (b) explains that each parent has the "same powers and duties" in relation to their child, and that they are "jointly and severally liable for the child's support, care, nurture, and welfare." FL § 5-203(b). And subsection (d) addresses child custody rights as between two parents, stating that neither is presumed to have a superior right, and that a court may award custody to either parent, or jointly to both.[15] FL § 5-203(d).

Section 5-203(b)'s function is borne out in the caselaw that cites it, which primarily concerns issues regarding child custody, child support, and a parent's obligations to attend to their children's medical needs. *See, e.g.*, *Petrini v. Petrini*, 336 Md. 453, 648 A.2d 1016, 1018–19 (1994) ("That both parents have a legal as well as a moral obligation to support and care for their children is well-settled in Maryland"). In light of the statutory language of section 5-203(b), its application by Maryland courts in contexts unrelated to the facts of this case, Maryland's well-established deference to public schools' educational decisions (*see* Section I.D., above), and the dearth of on point

---

[15] Section 5-203(c) addresses the "duties of parents of minor parents" and is not relevant to the issues presented in this case. It does note, however, that those responsibilities, too, are borne "jointly and severally." FL § 5-203(c).

authority, there is no reason to believe that Maryland courts would read 5-203(b) so broadly as to create the common-law right that the Plaintiff Parents seek to pursue in this case.[16]

Accordingly, Count I of the Parents' Complaint is dismissed, and because amendment would be futile, it is dismissed with prejudice.

B. FERPA and PPRA

Count IV of the Parents' Complaint alleges that the "MCPS Policy in withholding records from Plaintiff Parents with respect to their children's" gender

---

[16] The Plaintiff Parents further note, without elaboration, that the "Maryland Court of Appeals has repeatedly held that medical care of minor children by their parents is included in its broad scope, *see Garay v. Overholtzer*, 332 Md. 339, 366-69, 631 A.2d 429, 442-44 (1993) (collecting cases), and there is no reason to doubt that that includes gender dysphoria." Opp. at 36. Their Opposition also notes that "[t]ransgenderism, like other medical conditions, although it may need to be addressed while the child is in school, is not part of the primary educational mission for which parents have entrusted their children to the public schools." *Id.* at 18. But the Guidelines do not address medical treatment, and the Plaintiffs do not allege that any MCPS personnel have taken any action to make medical decisions for any transgender or gender nonconforming student. Furthermore, the Guidelines specifically note that MCPS "will ensure that all medical information, including that relating to transgender students, is kept confidential *in accordance with applicable state, local, and federal privacy laws*." Guidelines at 4 (emphasis added).

identity "is in violation of Family Educational Rights and Privacy Act ('FERPA') and Maryland law that implements FERPA." Compl. ¶ 73. Similarly, in Count V, the Parents assert that the Guidelines are "in contravention of" the Protection of Pupil Rights Amendment ("PPRA") "and its implementing regulations and Maryland law by its incorporation through Article 2 of the Declaration of Rights." *Id.* ¶ 84. MCBE argues that both of these claims fail "as a matter of law because Plaintiffs have no private right of action to enforce" FERPA or PPRA under state or federal law. Motion at 22–25. The Parents concede that "FERPA does not provide a federal private right of action" but argue that they have brought their FERPA and PPRA[17] claims "under Maryland law and have sought only declaratory relief related to it." Opp. at 39.

The Parents ground their argument in Article 2 of the Maryland Declaration of Rights, which is Maryland's equivalent of the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2. Article 2 provides that "the Laws made ... under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding." Md. Decl. Rts.

---

[17] The Parents do not concede but also do not dispute that there is no private right of action under PPRA. Because they have not asserted a claim under PPRA directly, this issue is not before me. *But see Ashby v. Isle of Wight Cnty. Sch. Bd.*, 354 F. Supp. 2d 616, 623 n. 9 (E.D. Va. 2004) (noting that PPRA does not "create private causes of action....").

art. 2. The Parents reason that Article 2 "incorporates the federal and state regulations" under FERPA and PPRA, "both of which provide rights expressly to the parents," and that because the Parents "are in the class of those directly affected or protected" by those regulations, they "have standing to complain of its violation by public officials and to seek declaratory relief" under Maryland law. Opp. at 39 (citing Md. Code § 3-409(a)(1) of the Courts and Judicial Proceedings Article; *Pizza di Joey, LLC v. Mayor of Balt.*, 470 Md. 308, 235 A.3d 873, 891 (2020)).

The Plaintiff Parents do not cite, and I have not found, any Maryland authority that supports their position that Article 2 adopts federal law as state law and creates a private right of action where none exists under the federal statute (or, for that matter, state statute). The closest the Maryland Court of Appeals appears to have come to endorsing that theory is to note that the argument posed "an interesting question," but one that was irrelevant in the case in which it was presented. *See Thomas v. Gladstone*, 386 Md. 693, 874 A.2d 434, 437 (2005).

MCBE relies in its Motion to Dismiss on Judge Messitte's opinion in *Bauer v. Elrich*, 468 F. Supp. 3d 704 (D. Md. 2020), which has since been affirmed by the Fourth Circuit, 8 F.4th 291 (4th Cir. 2021). The plaintiffs in *Bauer* were taxpayers who took issue with Montgomery County's Emergency Assistance Relief Payment Program ("EARP") because it provided cash assistance to county resident's "including foreign nationals present in the country without documentation, who meet certain income requirements and do not qualify for state or federal pandemic-related aid." 8 F. 4th at 295. The plaintiffs

in *Bauer* claimed that the EARP violated a federal statute that generally prohibits undocumented persons from receiving state and local benefits. *See* 8 U.S.C. § 1621(a) ("Section 1621"). Undeterred by the conceded lack of a private right of action in Section 1621, the *Bauer* plaintiffs "styled their claim as arising under the Maryland common law doctrine of taxpayer standing, which permits taxpayers to seek the aid of courts, exercising equity powers, to enjoin" illegal acts by state officials that are "reasonably likely to result in pecuniary loss to the taxpayer." 8 F.4th at 295. Both this Court and the Fourth Circuit flatly rejected the plaintiffs' argument. *Id.*

The Fourth Circuit in *Bauer* concluded that the "lack of a private right of action in Section 1621 is fatal to the plaintiffs' claim." 8 F.4th at 299. The Court went on to explain that the power to create a private right of action with respect to a federal statute rests solely with Congress:

> Because federal law creates the substantive requirement that the plaintiffs seek to enforce, **we look to federal law to determine whether a private remedy is authorized**. The existence of a private right of action in a federal statute is a pure question of Congressional intent. Given this exclusively legislative role, "courts may not create" a private remedy without evidence of Congress' intent to do so.... **The plaintiffs cannot evade this fundamental principle by invoking Maryland's taxpayer standing doctrine to excuse the lack of a Congressionally authorized right of action**. As the Supreme Court recently

> emphasized, "like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." State courts are not free to ignore the Congressional decision whether to couple a substantive federal requirement with a private right of enforcement; the Supremacy Clause binds state courts to follow Congressional directives embodied in federal statutes. **Were we to agree with the plaintiffs' view, state common law would govern whether and how a federal statute may be enforced, irrespective of Congressional intent. Such a rule not only would run afoul of common sense, but also would violate basic constitutional principles**.

Id. (citations omitted) (emphasis added).

The same is true in this case. The Plaintiff Parents concede that no private right of action is established by FERPA, and they do not pursue a claim directly under the PPRA. The Parents' attempt to invoke Article 2 to establish an implied right of action for private citizens under Maryland common law for violations of those statutes is directly at odds with the Fourth Circuit's decision in *Bauer*. *See also Astra USA, v. Santa Clara Cnty., Cal.*, 563 U.S. 110, 114, 131 S.Ct. 1342, 179 L.Ed.2d 457 (2011).

Accordingly, in light of the dearth of relevant Maryland authority[18] and the Fourth Circuit's

---

[18] Subject to the limitations of preemption, Maryland may be free to adopt its own version of the remedies that the Parents seek via Article 2. But I have found no indication that Maryland has done so. *See*

decision in *Bauer*, there is simply no basis to find a common law right of action for the private enforcement of FERPA or PPRA under Maryland law. And because the Plaintiff Parents have no private right of action under those statutes, their request for declaratory relief likewise fails. *See Qwest Commc'ns Corp. v. Maryland-Nat'l Cap. Park & Plan. Comm'n*, No. RWT 07CV2199, 2010 WL 1980153, at *11 (D. Md. May 13, 2010) ("The Declaratory Judgment Act cannot be used to circumvent Congress' intent not to provide ... a private cause of action.").

Accordingly, Counts IV and V of the Complaint must be dismissed, and because amendment would be futile, they are dismissed with prejudice.

C. COMAR

Finally, in Count II of their Complaint, the Plaintiff Parents assert that the Guidelines violate sections of the Maryland Code of Regulations ("COMAR") that govern parental access to student educational records. Compl. ¶¶ 50–56. MCBE argues that the Guidelines do not violate COMAR, and furthermore that there is no private right of action to enforce the relevant regulations under Maryland law.

My review of the relevant regulations indicates that, read in the light most favorable to the Parents, the Guidelines may advise MCPS personnel to withhold student records in violation of COMAR §

Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 325, 135 S.Ct. 1378, 191 L.Ed.2d 471 (2015) (noting that the Supremacy Clause is "not the source of any federal rights, and certainly does not create a cause of action.").

13a.08.02.04. COMAR § 13a.08.02.03(C) broadly defines "student records" as those records that are "[d]irectly related to a student; and [ ] [m]aintained by an educational agency or institution." And § 13a.08.02.04 provides that "[r]ecords of a student maintained under the provisions of this title, **including confidential records**, shall be available to that student's parent or parents ... or legal guardians in conference with appropriate school personnel." (emphasis added). Withholding the Intake Form from parents requesting access to their child's records might well violate the regulations granting parents access to confidential student records in conference with appropriate school personnel. That said, I agree with MCBE that there is no private right of action for MCBE's alleged violation of the COMAR provisions governing access to student records, and Count II must therefore be dismissed.

The Plaintiffs again assert that there is an "implied right of action" under Maryland law for the alleged regulatory violations. In support of that claim, the Parents cite *Fangman v. Genuine Title, LLC*, 447 Md. 681, 136 A.3d 772, 779 (2016), in which the Maryland Court of Appeals outlined the applicable three-part test to determine whether a state *statute* contains an implied private right of action under Maryland law. *Id.* (citing *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)).[19] Here, though, the Plaintiff

[19] In such cases, Maryland courts assess: (1) whether the statutory language confers a beneficial right on a particular class of persons; (2) whether there is any indication of legislative intent to either create or deny such a remedy; and (3) whether it would be consistent with the

Parents do not ask me to find a right of action implied in a statute, but in a State Board of Education regulation. As MCBE points out, "state agencies do not have authority to create a private right of action." Reply at 29. In contexts in which there *is* a private right of action for the violation of Maryland regulations, that cause of action is, as it must be, created by the Maryland legislature and codified in a statute. *See, e.g.*, Md. Code § 11-703 of the Corporations and Associations Article. The Parents have not identified, and I have not found, any Maryland statute authorizing a private right of action for the violation of the relevant regulations.

Furthermore, the Plaintiffs are mistaken in their claim that "judicial declaratory relief" is "the only effective relief available to vindicate the parents' rights protected by the regulation." Opp. at 38. COMAR provides that "[e]ach local school system ... shall give parents or guardians of students ... annual notice by such means as are reasonably likely to inform them of their right to: ... File complaints with the United States Department of Education concerning alleged failures by the local school system ... to comply with the requirements of [FERPA]." COMAR 13A.08.02.10(A)(4). The Parents do not allege that they have pursued that administrative avenue for relief.

Accordingly, Count II of the Complaint must be dismissed, and because amendment would be futile, it

---

overall legislative scheme to imply a right of action for the plaintiff. *Id. Fangman* also provides that violations of COMAR may be used to establish the standard of care in a negligence actions. *Id.*

is dismissed with prejudice.

CONCLUSION

For the reasons identified in this Memorandum Opinion, MCBE's Motion to Dismiss is GRANTED. A separate order will be issued contemporaneously herewith.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

JOHN and JANE PARENTS 1, JOHN PARENT 2,[1] Plaintiffs, v. MONTGOMERY COUNTY BOARD OF EDUCATION Serve: Hon. Brian E. Frosh Attorney General of Maryland 200 St. Paul Place) Baltimore, Md. 21202 SHEBRA L. EVANS, BRENDA WOLFF, JEANETTE E. DIXON, JUDITH DOCCA, PATRICIA B. O'NEILL, KARLA SILVESTRE, and REBECCA SMONDROWSKI, individually and in their official capacities as Members of the Montgomery County Board of Education) Serve all at: 850 Hungerford Drive, Rockville, Md. 20850 JACK R. SMITH, individually and in his official capacities as a member of the Montgomery County Board of Education and Montgomery County Superintendent of Schools	)	No. _______

Serve at: 850 Hungerford Drive,)
Rockville, Md. 20850)
)
Defendants.)
)

COMPLAINT

Plaintiffs John and Jane Parents 1 and John Parent 2[1] (collectively, "Plaintiff Parents") allege as their complaint as follows:

Nature of the Case

1. Plaintiff Parents have brought this action to enforce their rights to access certain information generated and retained about their minor children by the defendants and their agents, to whom the Plaintiff Parents have entrusted their children for their education, and to enforce their right to provide consent on behalf of their minor children. These rights are founded on Maryland statutory and regulatory provisions, as well as the State and Federal Constitutions and federal laws, which recognize the fundamental right of parents to direct the upbringing of their children, to be primarily responsible for their children's health and safety, and to decide what is in their minor children's best interests.

[1] Plaintiff Parents file this case anonymously, using pseudonyms, as other plaintiffs have done in similarly sensitive cases. Shortly after this Court assigns a case number, Plaintiff Parents will file a motion to proceed using pseudonyms.

2. The Montgomery County Board of Education ("MCBE") has violated these rights by adopting a Policy (defined below) expressly designed to circumvent parental involvement in a pivotal decision affecting the Plaintiffs Parents' minor children's care, health, education, and future. The Policy enables MCBE personnel to evaluate minor children about sexual matters and allows minor children, of any age, to transition socially to a different gender identity at school without parental notice or consent. The Policy further requires school personnel to enable this transition, including by using pronouns other than those consistent with the child's birth gender. The Policy then prohibits personnel from communicating with parents about this potentially life-altering and dangerous choice, unless the minor child consents to parental disclosure. MCBE in its guidelines and corresponding intake form even goes so far as to direct its teachers and staff to deceive parents by reverting to the child's birth name and corresponding pronouns whenever the child's parents are present and to keep information about the child's gender transformation out of the school files to which the parents have access under Maryland regulations and the federal Family Educational Rights and Privacy Act ("FERPA").

Parties

3. Plaintiffs John and Jane Parents 1 are residents of Montgomery County, Maryland. They are the parents of several minor children, the two eldest of which attend a high school in the Montgomery County Public School ("MCPS") system. Plaintiffs John and Jane Parents 1 intend to enroll their remaining children in MCPS schools at some

time during their elementary and secondary education. Plaintiffs John and Jane Parents 1 are adult parents of minors as described in § 1-103 of the General Provisions and § 5-203 of the Family Article of the Code of Maryland; in Chapter 13a.08.02.03 of the Maryland Code of Regulations; in FERPA, 20 U.S.C. § 1232g; and in the Protection of Pupil Rights Act, 20 U.S.C. § 1232h. All their children are unemancipated, minor children as defined in these provisions. Plaintiffs John and Jane Parents 1 are not mental health or child care practitioners.

4. Plaintiff John Parent 2 is a resident of Montgomery County, Maryland. He is the parent of several minor children, the eldest of which attends a high school in the MCPS system. Plaintiff John Parent 2 intends to enroll his remaining children in MCPS schools at some time during their elementary and secondary education. Plaintiff John Parent 2 is an adult parent of minors as described in § 1-103 of the General Provisions and § 5-203 of the Family Article of the Code of Maryland; in Chapter 13a.08.02.03 of the Maryland Code of Regulations; and in FERPA, 20 U.S.C. § 1232g; and in the Protection of Pupil Rights Act, 20 U.S.C. § 1232h. All his children are unemancipated, minor children as defined in these provisions. Plaintiff John Parent 2 is not a mental health or child care practitioners.

5. Plaintiff Parents are using pseudonyms to protect their privacy and the privacy of their minor children and to prevent retaliation against them and their children for raising this issue. The identities of Plaintiff Parents and their children are not relevant to the legal issues in this case, so anonymity will not prejudice the defendants in any way.

6. Defendant MCBE is a public entity that, pursuant to § 4-101 of the Education Article of the Code of Maryland, controls educational matters that affect Montgomery County. Pursuant to § 4-108(3) of the Education Article, MCBE is authorized to adopt educational policies for MCPS, but not if those rules and regulations are inconsistent with State law. Pursuant to § 4-108(4) of the Education Article, MCBE is authorized to adopt rules and regulations for the conduct and management of MCPS, but not if those rules and regulations are inconsistent with State law. MCBE's principal place of business is located at 850 Hungerford Drive, Rockville, Maryland.

7. MCPS is a "local school system" and "educational institution" as each is defined in Chapter 13a.08.02.03 of the Code of Maryland Regulations. MCPS is an "educational agency or institution" as defined in FERPA, 20 U.S.C. § 1232g, and is also subject to the Protection of Pupil Rights Act ("PPRA"), 20 U.S.C. § 1232h.

8. MCPS, as directed by MCBE, has adopted and put into effect the MCPS Policy challenged in this case and is training its personnel to conform to the MCPS Policy. MCPS's offices and principal place of business are located at 850 Hungerford Drive, Rockville, Maryland 20850.

9. Defendants Sherbra L. Evans, Branda Wolff, Jeanette E. Dixon, Judith Docca, Patricia B O'Neill, Karla Silvestre, Rebecca Smondrowski, and Jack R. Smith (collectively, "MCBE Members") are members of the Montgomery County Board of

Education. They are all sued in both their official and individual capacities. They either approved, adopted, or put into effect the MCPS Policy challenged in this case and directed that MCPS train its personnel to conform to the MCPS Policy or they have retained the challenged MCPS Policy and have continued to direct that MCPS train its personnel to conform to the MCPS Policy.

10. Defendant Jack R. Smith is the Montgomery County Superintendent of Schools. He is sued in both his official and individual capacities. Pursuant to § 4-102 of the Education Article of the Code of Maryland, Defendant Smith is the executive officer, secretary, and treasurer of MCBE. At all times relevant to this complaint, Defendant Smith was responsible for implementing and enforcing policies, rules, and regulations adopted by MCBE, including the MCPS Policy challenged in this case.

Jurisdiction and Venue

11. This is an action for monetary, injunctive, and declaratory relief. This Court has jurisdiction pursuant to §§ 1-501, 3-402, 3-403, and 3-409 of the Courts and Judicial Proceedings Article of the Code of Maryland. Plaintiff Parents seek relief, *inter alia*, under the Maryland Uniform Declaratory Judgments Act and §§ 1983 and 1988 of title 42 of the United States Code.

12. Venue in this Court is proper pursuant to § 6-201 of the Courts and Judicial Proceedings Article, as the defendants reside and carry on regular business in Montgomery County.

Statement of the Facts

Background on Gender Dysphoria in Minor Children

13. The American Psychological Association ("APA") defines *transgender* as "an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth. *Gender identity* refers to a person's internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics." *See* APA, *Transgender People, Gender Identity and Gender Expression: What Does Transgender Mean?*, available at https://www.apa. org/topics/lgbt/transgender.

14. The World Professional Association for Transgender Health ("WPATH"), a transgender advocacy organization that has produced a set of guidelines for transgender care, has defined "gender dysphoria" as the psychological distress often associated with the mismatch between a person's biological sex and his or her perceived gender identity. *See* WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* at 2 (version 7, 2012), available at https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf (hereinafter, "WPATH Guidelines").

15. Those "transitioning" to the gender other than their birth sex have demonstrated significantly

higher rates of suicide ideation, suicide attempts, and suicide, both with respect to the average population and to those of a homosexual sexual orientation. A study published in the September 2018 issue of *Pediatrics* presented these findings: Nearly 14% of all adolescents reported a previous suicide attempt, 50.8% of female to male transgender adolescents did so, 41.8% of adolescents who identified as not exclusively male or female did so, and 29.9% of male to female transgender adolescents did so. Https://pediatrics.aappublications.org/content/142/4/e20174218?sso=1&sso_redirect_count=2&nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3A%20No%20local%20token.

16. Multiple studies have found that the vast majority of children (roughly 80-90%) who experience gender dysphoria ultimately find comfort with their biological sex and cease experiencing gender dysphoria as they mature (assuming they do not transition). *See* WPATH Guidelines at 11 (listing studies).

17. WPATH notes that there is insufficient evidence at this point "to predict the long-term outcomes of completing a gender role transition during early childhood." WPATH Guidelines at 17.

18. There is significant consensus that children with gender dysphoria and their parents can substantially benefit from professional assistance and counseling "as they work through the options and implications." *See* WPATH Guidelines at 13-17.

The MCBE Transgender Policy

19. Prior to the 2020-2021 school year, MCBE through the MCBE Members adopted for MCPS the "2020-2021 Guidelines for Gender Identity for Montgomery County Public Schools." ("MCPS Guidelines," a true and accurate copy of which is attached as Exhibit 1.) The MCPS Guidelines, together with MCPS Form 560-80 (discussed below) and related training regarding gender identity transformation by students reflect the official policy of Defendants ("Policy" and "MCPS Policy").

20. The MCPS Guidelines provide the following definitions:

> GENDER IDENTITY A person's deeply held internalized sense or psychological knowledge of the person's own gender. One's gender identity may be the same as or different from the sex assigned at birth. Most people have a gender identity that matches their sex assigned at birth. For some, however, their gender identity is different from their sex assigned at birth. All people have gender identity, not just persons who are transgender or gender nonconforming people. For the purposes of this guidance, a student's gender identity is that which is consistently asserted at school.
>
> . . . .
>
> SEX ASSIGNED AT BIRTH The sex designation recorded on an infant's birth certificate, should such a record be provided at birth.
>
> . . . .

TRANSGENDER An adjective describing a person whose gender identity or expression is different from that traditionally associated with the person's sex assigned at birth. Other terms that can have similar meanings are "transsexual" and "trans."

21. With respect to privacy and disclosure of information and the use of names/pronouns for transgender students, the MCPS Guidelines provide as follows:

PRIVACY AND DISCLOSURE OF INFORMATION

All students have a right to privacy. This includes the right to keep private one's transgender status or gender nonconforming presentation at school.

Information about a student's transgender status, legal name, or sex assigned at birth may constitute confidential medical information. Disclosing this information to other students, their parents/guardians, or third parties may violate privacy laws, such as the federal Family Educational Rights and Privacy Act (FERPA).

Schools will ensure that all medical information, including that relating to transgender students, is kept confidential in accordance with applicable state, local, and federal privacy laws.

Please note that medical diagnosis, treatment, and/or other documentation are not required for a school to accommodate requests regarding gender presentation, identity, and diversity.

Transgender and gender nonconforming students have the right to discuss and demonstrate their gender identity and expression openly and decide when, with whom, and how much to share private information. The fact that students choose to disclose their status to staff members or other students does not authorize school staff members to disclose students' status to others, including parents/guardians and other school staff members, unless legally required to do so or unless students have authorized such disclosure. It is inappropriate to ask transgender or gender nonconforming students more questions than are necessary to support them at school.

STAFF COMMUNICATION

. . . .

Unless the student or parent/guardian has specified otherwise, when contacting the parent/guardian of a transgender student, MCPS school staff members should use the student's legal name and pronoun that correspond to the student's sex assigned at birth.

22. The MCPS Guidelines and MCPS Policy apply to all students of all ages in the MCPS system. It is not limited to secondary school students.

23. As quoted above, the MCPS Guidelines contain specific provisions that interfere with the rights of parents to be fully informed and involved in addressing issues relating to gender transformation with their minor children and that are designed to hinder parents from deciding what is in their minor children's best interests. The MCPS Guidelines contain provisions that require school officials to withhold information from parents about their minor child's professed transgender status if the child does not consent to disclosure.

24. The MCPS Guidelines suggest that providing information "about a student's transgender status" to "their parents/guardians . . . may violate privacy laws, such as the federal Family Educational Rights and Privacy Act (FERPA)." This is incorrect. Withholding such information from parents violates both state law and FERPA.

25. MCPS has generated a MCPS Form 560-80, updated June 2020, entitled "Intake Form: Supporting Student Gender Identity," to facilitate the MCPS Guidelines. Form 560-80 contains the following instructions:

> **Instructions:** The school administrator, counselor, or psychologist should complete this form with the student. Parents/guardians may be involved if the student states that they are aware of and supportive of the student's gender identity. This form should be kept in a secure,

> confidential location. See distribution information on Page 2. **This form is not to be kept in the student's cumulative or confidential folders.** All plans should be evaluated on an ongoing basis and revised as needed.

The distribution stated for the form is as follows:

> Copy 1/ School Confidential folder (in principal's office)
> Copy 2/ Student Welfare and Compliance Unit, via scan to COS-StudentWelfare@mcpsmd.org, or via pony to CESC, Room 162, in a [sic] envelope marked confidential

(A true and accurate copy of MCPS Form 560-80 is attached as Exhibit 2.)

26. Form 560-80 requires an evaluation of minor students by MCPS personnel, and, among other things requests a "yes" or "no" response by the minor students to, "Is parent/guardian aware of your gender identity?" Form 560-80 then requires minor students exhibiting transgender inclinations or actions to identify a "Support Level" they believe would be provided by their parents, to be ranked from "(None) 1" to "10 (High)." It does not specify the score needed for a parent to be considered "supportive" as stated in the instructions. However, it does continue, "If [parental] support level is low, what considerations must be accounted for in implementing this plan?," leaving a space to be filled in. Upon information and belief, such "considerations" would include withholding information from parents about their minor children and using pronouns when speaking to

the parents about their children that conform to the children's birth gender, even though other pronouns are used at school.

27. Upon information and belief, the limited distribution of MCPS Form 560-80 as specified by the form is designed, in part, to withhold review of the form by the parents of the minor child if the child does not consent to its disclosure to the parents. Upon information and belief, MCBE has instructed MCPS personnel not to make completed MCPS Forms 560-80 available to the parents of minor children concerning whom the forms have been filled out unless the minor child consents to its disclosure to the parents.

28. The evaluation by MCPS personnel of minor students as required by the MCPS Policy and Form 560-80 is deliberately not performed with prior parental consent.

29. Upon information and belief, MCPS personnel have been trained in the MCPS Policy and have conformed their behavior and practices with the MCPS Policy, including by withholding information from parents about their child's transgender election at school if the child has not desired that information to be transmitted to the parents and by keeping such information out of the school records to which parents are given access.

30. Upon information and belief, without the relief requested from this Court, MCPS personnel will continue to conform their behavior and practices with the MCPS Policy, including by withholding information from parents about their child's

transgender election at school if the child has not desired that information to be transmitted to the parents and by keeping such information out of the school records to which parents are given access.

31. Upon information and belief, the large majority of MCPS personnel acting pursuant to the Policy and interacting with students who experience gender dysphoria are not professionally trained, certified, or licensed in the diagnosis or treatment of gender dysphoria.

Irreparable Harm

32. Plaintiff Parents bring this action as both a facial and as-applied challenge to the MCPS Policy. There is no set of facts by which the MCPS's Policy of withholding information from the parents about their minor children's transsexual inclinations or behaviors is lawful.

33. Pursuant to the MCPS Policy, MCPS will withhold information from the Plaintiff Parents about their children's gender dysphoria, even if the Plaintiff Parents specifically request such information. Plaintiff Parents cannot wait to challenge the MCPS Policy until they learn that one of their children experiences gender dysphoria. By the time Plaintiff Parents learn the truth, MCBE personnel, acting pursuant to the MCPS Policy, may have already enabled their child(ren) to go through the process of transitioning socially to a different gender identity without Plaintiff Parents being able to counsel and advise their child(ren) and without allowing the child(ren) to take advantage of professional assistance the Plaintiff Parents may

believe it in their child(ren)'s best interest to provide, to their minor child(ren)'s immediate and permanent injury.

34. Pursuant to the MCPS Policy, MCPS is taking over the rightful position of the Plaintiff Parents and intentionally hindering them from counseling their own minor children concerning an important decision that will have lifelong repercussions and from providing additional professional assistance to their children that the parents may deem appropriate. This decision directly relates to the Plaintiff Parents' primary responsibilities to determine what is in their minor children's best interests with respect to their support, care, nurture, welfare, safety, and education.

35. Pursuant to the MCPS Policy, MCPS is determining that minor children have a "right" to withhold information from their parents in all situations relating to transgender relations, even though the minor has informed unrelated third parties of the information, and that MCPS will honor that "right" by withholding information from the minor's parents.

36. Because of the secretive nature of the MCPS Policy, Plaintiff Parents and their minor children could be irreparably harmed before Plaintiff Parents are aware of the injuries of which they have right to complain. The explicit purpose of the challenged MCPS Policy is to secrete from parents information related to their minor children, such that parents will have no occasion timely to be informed or complain of such actions and inactions of the Defendants.

37. By hiding from parents that their children may be dealing with gender dysphoria, the MCPS Policy interferes with Plaintiff Parents' ability to provide acceptance, support, understanding, and professional assistance to their children.

38. By hiding from parents that their children may be dealing with gender dysphoria, the MCPS Policy interferes with Plaintiff Parents' ability to facilitate their children's coping, social support, and identity exploration and development of their sexual orientation.

39. By hiding from parents that their children may be dealing with gender dysphoria, the MCPS Policy interferes with Plaintiff Parents' ability to provide neutral interventions to prevent or address unlawful conduct or unsafe sexual practices to which transgender youth show greater susceptibility.

40. By hiding from parents that their children may be dealing with gender dysphoria, the MCPS Policy interferes with Plaintiff Parents' ability to provide expert professional assistance their children may need.

41. Issues regarding whether and how children perform a gender transformation are of fundamental importance, and their improper handling could have long-lasting, negative ramifications for a child's physical, mental, and spiritual well-being.

42. Professionals have concluded that many children with gender dysphoria can benefit by

assistance that only their parents can provide. *See* WPATH Guidelines at 16-17.

43. The public interest supports the grant of relief in this action.

Causes of Action

Count I

Violation of Maryland Family Law

44. Plaintiff Parents incorporate by reference all other allegations in this Complaint.

45. Section 5-203 of the Family Article of the Maryland Code provides in relevant part as follows:

> (a) (1) The parents are the joint natural guardians of their minor child.
>
> . . . .
>
> (b) The parents of a minor child, as defined in § 1-103 of the General Provisions Article:
>
> > (1) are jointly and severally responsible for the child's support, care, nurture, welfare, and education; and
> >
> > (2) have the same powers and duties in relation to the child.

46. Section 1-103(b) of the General Provisions Article of the Maryland Code provides as follows:

> Except as provided in § 1-401(b) of this title, as it pertains to legal age and capacity, "minor" means an individual under the age of 18 years.

47. Section 1-401 of the General Provisions Article of the Maryland Code provides in relevant part as follows:

> (b) An individual who has attained the age of 18 years and who is enrolled in secondary school has the right to receive support and maintenance from both of the individual's parents until the first to occur of the following events:
>
> (i) The individual dies;
>
> (ii) The individual marries;
>
> (iii) The individual is emancipated;
>
> (iv) The individual graduates from or is no longer enrolled in secondary school; or
>
> (v) The individual attains the age of 19 years.

48. Plaintiff Parents are "parents" of "minor children" as defined in the Maryland Code. They continue to provide for their children's support, care, nurture, welfare, and education. None of their children are married or emancipated, and none has attained the age of 19 years.

49. MCBE and the MCBE Members by promulgation of, and putting into effect, the MCPS Policy of withholding information from parents directly related to their minor children's support, care, nurture, welfare, and education have violated § 5-203 of the Family Article and have directly hindered

Plaintiff Parents from carrying out their statutory duties under that section.

WHEREFORE, Plaintiff Parents request that this Court provide them with the relief requested in their Requests for Relief.

Count II

Violation of Maryland Code of Regulations

50. Plaintiff Parents incorporate by reference all other allegations in this Complaint.

51. Chapter 13a.08.02 of the Maryland Code of Regulations provides in relevant part as follows:

Sec. 13a.08.02.03. Definitions

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

. . . .

(5) "Eligible student" means a student who is 18 years old or older or is attending an institution of postsecondary education.

. . . .

(10) Parent.

(a) "Parent" means a parent of a student.

(b) "Parent" includes:

(i) A natural parent;

(ii) A guardian; or

(iii) An individual acting as a parent in the absence of a parent or guardian.

. . . .

B. Student Records.

(1) "Student records" means those records that are:

(a) Directly related to a student; and

(b) Maintained by an educational agency or institution or by a party acting for the agency or institution.

(2) "Student records" includes, but is not limited to:

(a) Records concerning disciplinary actions taken against students; and

(b) Records relating to an individual in attendance at the agency or institution who is employed as a result of the individual's status as a student and not excepted under §C(3)(c) of this regulation.

(3) "Student records" does not include:

(a) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

(b) Records maintained by a law enforcement unit of the educational

agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

. . . .

(d) Records on a student who is 18 years old or older, or is attending an institution of postsecondary education, that are:

(i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's professional capacity or assisting in a paraprofessional capacity,

(ii) Made, maintained, or used only in connection with treatment of the student, and

(iii) Disclosed only to individuals providing the treatment; or

(e) Records that only contain information about an individual after the individual is no longer a student at that agency or institution.

Sec. 13a.08.02.04. General Provisions

. . . .

C. Access of Records. Records of a student maintained under the provisions of this title, including confidential records, shall be available to that student's parent or parents . . . or legal guardians in conference with appropriate school personnel. For purposes of this regulation, the term "records" does not include an education department employee's personal notes which are not made available to any other person.

. . . .

Sec. 13a.08.02.13. Right to Review and Inspect Educational Records

A. Except as limited under Regulation .12 of this chapter [relating to waiver], a parent, guardian, or eligible student shall be given the opportunity to inspect and review the student records. This applies to:

(1) Any local school system or educational institution; and

(2) A State educational agency and its components.

B. The local school system or educational agency or institution shall comply with a request for access to student records not more than 45 calendar days after the request has been made. For purposes of this section, a State educational agency and its components:

(1) Constitute an educational agency or institution; and

(2) Are subject to this section if the State educational agency maintains student records on students who are or have been in attendance at any school of a local school system, an educational agency, or educational institution subject to the Act and this chapter.

C. The local school system or educational institution shall respond to reasonable requests for explanations and interpretations of the student records.

D. If circumstances effectively prevent the parent, guardian, or eligible student from exercising the right to inspect and review the student records, the local school system or educational institution, or State educational agency or its component, shall:

(1) Provide the parent, guardian, or eligible student with a copy of the student records requested; or

(2) Make other arrangements for the parent, guardian, or eligible student to inspect and review the requested student records.

Sec. 13a.08.02.29. Rights of Parents to Examine Records

. . . .

> B. A local school system or educational institution may presume that either parent or legal guardian of the student has authority to inspect and review the student records unless the local school system or educational institution has been provided with a copy of a court order or legally binding instrument such as a separation agreement, or the relevant parts of the document, which provides that the noncustodial parent may not have access to the student records.

52. Plaintiff Parents are "parents" as defined in § 13a.08.02.03, and none of their children is an "eligible student" as defined in that section.

53. MCPS Form 560-80 and other written information about student gender identity are a "student record" as defined in § 13a.18.02.03.

54. Chapter 13a.08.02 of the Maryland Code of Regulations has the force and effect of law.

55. MCBE and the MCBE Members by promulgation of, and by putting into effect, the MCPS Policy of withholding information from parents directly related to their minor children's support, care, nurture, welfare, and education have violated Chapter 13a.08.02 of the Maryland Code of Regulations and have directly hindered Plaintiff Parents from gaining access to their children's student records and from exercising their rights under that chapter.

56. Upon information and belief, MCBE and the MCBE Members by promulgating and putting into effect MCPS Form 560-80 and by distributing the form have specifically intended to avoid complying with the provisions of Chapter 13a.18.02 of the Maryland Code of Regulation.

WHEREFORE, Plaintiff Parents request that this Court provide them with the relief requested in their Requests for Relief.

Count III

Violation of the Maryland Constitution–Parental Rights

57. Plaintiff Parents incorporate by reference all other allegations in this Complaint.

58. Article 2 of the Declaration of Rights of the Maryland Constitution provides, in relevant part, "The Constitution of the United States . . . [is] and shall be the Supreme Law of the State . . . ."

59. Article 5(a)(1) of the Declaration of Rights of the Maryland Constitution provides, in relevant part, "That the Inhabitants of Maryland are entitled to the Common Law of England . . . ."

60. Article 19 of the Declaration of Rights of the Maryland Constitution provides, in relevant part, "That every man, for any injury done to him in his person or property, ought to have remedy by the course of the law of the Land . . . ."

61. Article 24 of the Declaration of Rights of the Maryland Constitution provides, in relevant part, "That no man ought to be taken or . . . disseized of his freehold, liberties or privileges, . . . or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

62. Maryland, through the provisions quoted above and otherwise in its Constitution, protects parents' fundamental rights to direct the care, custody, education, welfare, safety, and control of their minor children. These fundamental rights include, but are not limited to, the rights of parents to counsel their children on important decisions regarding their health and safety and to decide what is in the best interests of their minor children. These fundamental rights of parents are based both in the Common Law of England and in the United States Constitution's Privileges and Immunities, Due Process, and Equal Protection Clauses.

63. MCBE and the MCBE Members, by promulgation and putting into effect the MCPS Policy of withholding information from parents directly related to their minor children's support, care, nurture, welfare, safety, and education, have violated and have directly hindered Plaintiff Parents from carrying out their fundamental rights protected under the Maryland Constitution.

64. The State may not abridge or hinder parents in the exercise of their fundamental rights with respect to their minor children unless there are compelling reasons and the remedy is narrowly tailored to the circumstances.

65. MCBE and the MCBE Members have no compelling interest in withholding information from Plaintiff Parents with respect to their children's desire to consider becoming transsexual or that their children have taken actions in that regard.

66. The MCPS Policy in withholding information from Plaintiff Parents with respect to their children's desire to consider becoming transsexual or that their children have taken actions in that regard, even if MCBE and the MCBE Members had a compelling interest to do so, is not narrowly tailored to the circumstances.

WHEREFORE, Plaintiff Parents request that this Court provide them with the relief requested in their Requests for Relief.

Count IV

Violation of FERPA as Incorporated by Maryland Law

67. Plaintiff Parents incorporate by reference all other allegations in the Complaint.

68. Article 2 of the Declaration of Rights of the Maryland Constitution provides, in relevant part, "The . . . Laws made, or which shall be made, . . . under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby . . . ."

69. FERPA, 20 U.S.C. § 1232g, is a law made under the authority of the United States and is

incorporated as part of the law of Maryland. The substantive provisions of FERPA are also codified in Chapter 13a.18.02 of the Maryland Code of Regulations.

70. FERPA provides, in relevant part, as follows:

> (a) (1) (A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . .
>
> (2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4) (A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

71. MCBE and MCPS are each an "educational agency or institution" as that term is defined in FERPA.

72. Records referring to a change or proposed change in gender identity by minor children attending MCPS schools, including but not limited to MCPS Form 560-80, are "education records" as that term is defined in FERPA.

73. The MCPS Policy in withholding records from Plaintiff Parents with respect to their children's desire to consider becoming transsexual or that their children have taken actions in that regard is in violation of FERPA and Maryland law that implements FERPA.

WHEREFORE, Plaintiff Parents request that this Court provide them with the relief requested in their Requests for Relief.

Count V

Violation of PPRA as Incorporated by Maryland Law

74. Plaintiff Parents incorporate by reference all other allegations in the Complaint.

75. Article 2 of the Declaration of Rights of the Maryland Constitution provides, in relevant part, "The . . . Laws made, or which shall be made, . . . under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby . . . ."

76. The Protection of Pupil Rights Act, 20 U.S.C § 1232h, is a law made under the authority of the United States and is incorporated as part of the law of Maryland. The federal regulations implementing PPRA, found in 34 C.F.R. § 98.4, are also law made under the authority of the United States and incorporated as part of the law of Maryland.

77. PPRA provides in relevant part as follows:

> (b) Limits on survey, analysis, or evaluations. No student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning—

. . .

(3) sex behavior or attitudes;

. . .

without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

. . . .

(6) Definitions. As used in this subsection:

. . .

(D) Parent. The term "parent" includes a legal guardian or other person standing in loco parentis (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the welfare of the child).

. . .

(F) Student. The term "student" means any elementary school or secondary school student.

(G) Survey. The term "survey" includes an evaluation.

78. PPRA is implemented by regulations of the Department of Education, which, as provided in 34 CFR § 98.4, in relevant part provides as follows:

(a) No student shall be required . . . to submit without prior consent to psychiatric examination, testing, or treatment, or psychological examination, testing, or

treatment, in which the primary purpose is to reveal information concerning one or more of the following:

. . .

(3) Sex behavior and attitudes;

. . . .

(b) As used in paragraph (a) of this section, prior consent means:

(1) Prior consent of the student, if the student is an adult or emancipated minor; or

(2) Prior written consent of the parent or guardian, if the student is an unemancipated minor.

(c) As used in paragraph (a) of this section:

(1) Psychiatric or psychological examination or test means a method of obtaining information, including a group activity, that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings; and

(2) Psychiatric or psychological treatment means an activity involving the planned, systematic use of methods or techniques that are not directly

related to academic instruction and that is designed to affect behavioral, emotional, or attitudinal characteristics of an individual or group.

79. Questioning a student about gender identity and filling out Form 560-80 and other actions taken with a student as part of the MCPS Policy relate to a student's "sex behavior and attitudes" as specified in PPRA and its implementing regulations.

80. Questioning a student about gender identity and filling out Form 560-80 and other actions taken with a student as part of the MCPS Policy are a "survey" as that term is used in PPRA.

81. Questioning a student about gender identity and filling out Form 560-80 and other actions taken with a student as part of the MCPS Policy are a "psychiatric or psychological examination or test" as that term is used in the PPRA regulations, 34 C.F.R. § 98.4(c)(1).

82. Questioning a student about gender identity and filling out Form 560-80 and other actions taken with a student as part of the MCPS Policy are a "psychiatric or psychological treatment" as that term is used in the PPRA regulations, 34 C.F.R. § 98.4(c)(2).

83. Questioning a student about gender identity and filling out Form 560-80 and other actions taken with a student as part of the MCPS Policy are done without the "consent" of the "parents," as those terms are defined in PPRA and its implementing regulations.

84. By requiring the questioning of a student about gender identity and the filling out of Form 560-80 and other actions taken with a student as part of the MCPS Policy without consent as provided for by PPRA and its implementing regulations, the MCPS Policy is in contravention of the PPRA and its implementing regulations and Maryland law by its incorporation through Article 2 of the Declaration of Rights.

WHEREFORE, Plaintiff Parents request that this Court provide them with the relief requested in their Requests for Relief.

Count VI

Violation of the United States Constitution – Parental Rights

85. Plaintiff Parents incorporate by reference all other allegations in this Complaint.

86. Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

87. The fundamental rights of parents to direct the care, custody, education, and control of their minor children are protected under the

Fourteenth Amendment. These fundamental rights include, but are not limited to, the right of parents to counsel their children on important decisions related to their health and safety and to determine what is in the best interests of their minor children.

88. Maryland may not abridge or hinder parents in the exercise of their fundamental rights with respect to their minor children that are protected under the United States Constitution unless there are compelling reasons and the remedy is narrowly tailored to the circumstances.

89. MCBE and the MCBE Members have no compelling interest in withholding information from Plaintiff Parents with respect to their children's desire to consider becoming transsexual or that their children have taken actions in that regard.

90. The MCPS Policy in withholding information from Plaintiff Parents with respect to their children's desire to consider becoming transsexual or that their children have taken actions in that regard, even if MCBE and the MCBE Members had a compelling interest to do so, is not narrowly tailored to the circumstances.

WHEREFORE, Plaintiff Parents request that this Court provide them with the relief requested in their Requests for Relief.

Count VII

Violation of 42 U.S.C. § 1983

91. Plaintiff Parents incorporate by reference all other allegations of this Complaint.

92. Section 1983 of Title 42 of the United States Code is incorporated by reference into the laws of Maryland by Article 2 of the Declaration of Rights of the Maryland Constitution.

93. Section 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

94. MCBE and the MCBE Members have, under color of law, deprived Plaintiff Parents of their rights, privileges, or immunities secured by the United States and Maryland Constitutions and federal and state laws and regulations by execution, adoption, enforcement, and application of the MCPS Policy with respect to withholding and secreting from Plaintiff Parents information concerning transgender inclinations and behavior of their minor children.

95. MCBE and the MCBE Members violated clearly established law when depriving Plaintiff Parents of their rights, privileges, or immunities secured by the United States and Maryland

Constitutions and federal and state laws and regulations by execution, adoption, enforcement, and application of the MCPS Policy with respect to withholding and secreting from Plaintiff Parents information concerning transgender inclinations and behavior of their minor children.

WHEREFORE, Plaintiff Parents request that this Court provide them with the relief requested in their Requests for Relief.

Requests for Relief

Plaintiff Parents request the following relief:

1. a declaration that the MCPS Policy with respect to withholding from parents knowledge of and information about their minor children's transgender inclinations and behaviors and all records thereof violates § 5-203 of the Family Article of the Maryland Code;

2. a declaration that the MCPS Policy with respect to withholding from parents knowledge of and information about their minor children's transgender inclinations and behaviors and all records thereof violates Chapter 13a.08.02 of the Maryland Code of Regulations;

3. a declaration that the MCPS Policy with respect to withholding from parents knowledge of and information about their minor children's transgender inclinations and behaviors and all records thereof violates the Maryland Constitution and its incorporation of the fundamental rights of parents to

direct the care, custody, education, safety, and control of their minor children;

4. a declaration that the MCPS Policy with respect to withholding from parents records about their minor children's transgender inclinations and behaviors violates FERPA as incorporated in Maryland law;

5. a declaration that the MCPS Policy with respect to performing surveys and evaluations, without parental consent, of minor children's transgender inclinations and behaviors violates PPRA as incorporated in Maryland law;

6. a declaration that the MCPS Policy with respect to withholding from parents knowledge of and information about their minor children's transgender inclinations and behaviors and all records thereof violates the fundamental rights of parents to direct the care, custody, education, safety, and control of their minor children as guaranteed by the United States Constitution;

7. a declaration that the MCPS Policy with respect to withholding from parents knowledge of and information about their minor children's transgender inclinations and behaviors and all records thereof violates § 1983 of Title 42 of the United States Code;

8. a declaration that the MCPS Policy violates Maryland law and regulation and both the Maryland and United States Constitutions to the extent that it (a) enables minor children to change gender identity at school by selecting new names and pronouns without parental consent; (b) prohibits

MCPS personnel from communicating with parents about their minor children's gender dysphoria, including any desired change in name and pronouns, without first obtaining the child's consent; (c) instructs MCPS personnel to deceive parents by, among other ways, using different names and pronouns around parents than in school; and (d) instructs MCPS personnel to survey and evaluate minors regarding their sex behavior and attitudes without prior parental consent;

9. a declaration that, notwithstanding the MCPS Policy, MCPS personnel (a) may not evaluate or facilitate a child's social transition to a different gender identity at school without prior parental consent; and (b) may not attempt to deceive parents by, among other things, using different names and pronouns when communicating with parents than they use for the parents' child in school;

10. an injunction prohibiting MCBE and the individual defendants from evaluating and then enabling children to transition socially to a different gender identity at school by selecting new names and pronouns without prior parental notice and consent;

11. an injunction prohibiting MCBE and the individual defendants from preventing its personnel, without first obtaining the child's consent, from communicating with parents that their child may be dealing with gender dysphoria or that their child has or wants to change gender identity and from training its personnel to follow such a policy;

12. an injunction prohibiting MCBE and the individual defendants and its personnel from

actively deceiving parents by, among other things, using different names for their child(ren) around parents than they do in the school setting;

13. an injunction requiring MCBE and the individual defendants to retrain MCPS personnel in accordance with this Court's holding in this case;

14. an award of nominal damages in the amount of $1.00;

15. an award of attorney's fees and the expenses of this litigation; and

16. such other relief as this Court deems proper.

Respectfully submitted,

/s/ David A. Bruce
David A. Bruce (CPFN: 7905010014)

205 Vierling Dr.
Silver Spring, Md. 20904
301-704-2918
dabruce76@gmail.com

Attorney for Plaintiffs

Of Counsel

Frederick W. Claybrook, Jr. (DC 935593)[2]
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001
(202) 250-3833
Rick@Claybrooklaw.com

Steven W. Fitschen (VA Bar #44063)[3]
James A. Davids (VA Bar # 69997)[4]
National Legal Foundation
524 Johnstown Road
Chesapeake, Va. 23322
(757) 463-6133
sfitschen@nationallegalfoundation.org
jimdavids@gmail.com

October 20, 2020

---

[2] Active member of the D.C. Bar who will be filing a motion for admission *pro hac vice.*
[3] Active member of Virginia Bar who will be filing a motion for admission *pro hac vice.*
[4] Active member of Virginia Bar who will be filing a motion for admission *pro hac vice.*

2020–2021

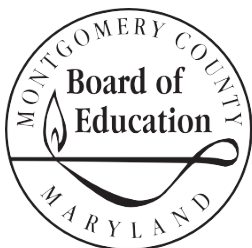
Guidelines for Student

GENDER IDENTITY

in Montgomery County Public Schools

www.montgomeryschoolsmd.org

Maryland's Largest School District
MONTGOMERY COUNTY PUBLIC SCHOOLS



VISION

We inspire learning by providing the greatest public education to each and every student.

MISSION

Every student will have the academic, creative problem solving, and social emotional skills to be successful in college and career.

CORE PURPOSE

Prepare all students to thrive in their future.

CORE VALUES

Learning
Relationships
Respect
Excellence
Equity

Board of Education

Mrs. Shebra L. Evans
President

Ms. Brenda Wolff
Vice President

Ms. Jeanette E. Dixon

Dr. Judith R. Docca

Mrs. Patricia B. O'Neill

Ms. Karla Silvestre

Mrs. Rebecca K. Smondrowski

Mr. Nicholas W. Asante
Student Member

Montgomery County Public Schools (MCPS) Administration

Jack R. Smith, Ph.D.
Superintendent of Schools

Monifa B. McKnight, Ed.D.
Deputy Superintendent

Henry R. Johnson, Jr., Ed.D.
Chief of Staff

Derek G. Turner
Chief of Engagement, Innovation, and Operations

Janet S. Wilson, Ph.D.
Chief of Teaching, Learning, and Schools

850 Hungerford Drive
Rockville, Maryland 20850
www.montgomeryschoolsmd.org

Montgomery County Public Schools (MCPS) is committed to a safe, welcoming school environment where students are engaged in learning and are active participants in the school community because they feel accepted and valued. To this end, all students should feel comfortable expressing their gender identity, including students who identify as transgender or gender nonconforming.[1] It is critical that all MCPS staff members recognize and respect matters of gender identity; make all reasonable accommodations in response to student requests regarding gender identity; and protect student privacy and confidentiality. To assist in these efforts, MCPS has developed the following guidelines for student gender identity that are aligned with the Montgomery County Board of Education's core values, guidance from the Maryland State Department of Education[2], and the Montgomery County Board of Education Policy ACA, *Nondiscrimination, Equity, and Cultural Proficiency*, which prohibits discrimination, stigmatization, and bullying based on gender identity, as well as sex, gender, gender expression, and sexual orientation, among other personal characteristics. These guidelines cannot anticipate every situation which might occur. Consequently, the needs of each student must be assessed on a case-by-case basis.

GOALS

- Support students so they may participate in school life consistent with their asserted gender identity;
- Respect the right of students to keep their gender identity or transgender status private and confidential;
- Reduce stigmatization and marginalization of transgender and gender nonconforming students;
- Foster social integration and cultural inclusiveness of transgender and gender nonconforming students; and
- Provide support for MCPS staff members to enable them to

---

[1] Related Montgomery County Board of Education Policies and MCPS Regulations: ACA, ACF, JHF, JHF-RA, ACA-RA, ACF-RA, COA, COA-RA

[2] For more information and lists of additional resources, see: *Maryland State Department of Education, Providing Safe Spaces for Transgender and Gender Non-Conforming Youth: Guidelines for Gender Identity Non-Discrimination* (October 2015), available at *marylandpublicschools.org/about/Documents/DSFSS/SSSP/ProvidingSafeSpacesTransgendergender NonConformingYouth012016.pdf*.

appropriately and consistently address matters of student gender identity and expression.

DEFINITIONS

The definitions provided here are not intended to label students but rather to assist in understanding transgender and gender nonconforming students. Students might or might not use these terms to describe themselves.[3][4]

AGENDER Without a gender (also "nongendered" or "genderless").

CISGENDER A person whose gender identity and gender expression align with the person's sex assigned at birth; a person who is not transgender or gender nonconforming.

GENDER EXPRESSION The manner with which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice, speech and word choices, or mannerisms.

GENDER FLUID A person whose gender identity or gender expression is not fixed and shifts over time, depending on the situation.

GENDER IDENTITY A person's deeply held internalized sense or psychological knowledge of the person's own gender. One's gender identity may be the same as or different from the sex assigned at birth. Most people have a gender identity that matches their sex assigned at birth. For some, however, their gender identity is different from their sex assigned at birth. All people have gender identity, not just persons who are transgender or gender nonconforming people. For the purposes of this guidance, a student's gender identity is that which is consistently asserted at school.

---

[3] Terminology used in these guidelines is intended to be as inclusive as possible; however, it is understood that terms and language are evolving and may become outdated quickly.

[4] Definitions were informed by the following sources: American Civil Liberties Union; American Psychological Association; Baltimore City Schools; California School Boards Association; Chicago Public Schools; District of Columbia Public Schools; Gay, Lesbian, and Straight Education Network; Howard County Public Schools; Human Rights Campaign; Lambda Legal; Maryland State Department of Education; Maryland Public Secondary Schools Athletic Association; Massachusetts Department of Elementary and Secondary Education; National Collegiate Athletic Association; National School Boards Association; New York City Department of Education; PFLAG; and Trevor Project.

GENDER NONCONFORMING A term for individuals whose gender expression differs from conventional or stereotypical expectations, such as "feminine" boys, "masculine" girls, and those whose gender expression may be androgynous. This includes people who identify outside traditional gender categories or identify as two or more genders. Other terms that can have similar meanings include "gender diverse" or "gender expansive."

INTERSEX A range of conditions associated with the development of physical sex characteristics that do not fit the typical definition of male or female.

LGBTQ An acronym for the Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning community. This acronym often is written as LGBTQ+ in an effort to be more inclusive. It is also stated as LGBTA to include people who are asexual, or LGBTI, with the I representing intersex, or LGBTQIA to represent all of the above.

NON-BINARY A person who transcends commonly held concepts of gender through their own expression and identity (e.g., gender expansive, gender creative, or gender queer). Some non-binary people are also transgender.

SEX ASSIGNED AT BIRTH The sex designation recorded on an infant's birth certificate, should such a record be provided at birth.

SEXUAL ORIENTATION Describes a person's emotional, romantic, or sexual attraction to other people. Some examples of sexual orientation are gay, lesbian, bisexual, asexual or pansexual.

TRANSGENDER
An adjective describing a person whose gender identity or expression is different from that traditionally associated with the person's sex assigned at birth. Other terms that can have similar meanings are "transsexual" and "trans."

TRANSITION The process by which a person decides to live as the gender with which the person identifies, rather than the gender assigned at birth. In order to openly express their gender identity to other people, transgender people may take a variety of steps (e.g., using a nickname or legally changing their names and/or their sex designation on legal documents; choosing clothes and hairstyles that reflect their gender identity; and generally living, and presenting themselves to others consistently with their gender identity). Some, but not all, transgender

people take hormones or undergo surgical procedures to change their bodies to align with their gender identity. Although transitioning includes the public representation on one's gender expression, transitioning is a personal process and individuals transitioning have the right to privacy.

X MARKER Gender marker option for a person who does not identity with the binary categories of "M" for male or "F"

PROACTIVELY WORKING WITH TRANSGENDER AND GENDER NONCONFORMING STUDENTS

GENDER SUPPORT PLAN

The principal (or designee), in collaboration with the student and the student's family (if the family is supportive of the student), should develop a plan to ensure that the student has equal access and equal opportunity to participate in all programs and activities at school and is otherwise protected from gender-based discrimination at school. The principal, designee, or school-based mental health professional (e.g., school psychologist or school counselor) should use MCPS Form 560-80, *Intake Form: Supporting Students, Gender Identity,* to support this process and assist the student in participating in school. The completed form must be maintained in a secure location and may not be placed in the student's cumulative or confidential files. While the plan should be consistently implemented by all school staff, the form itself is not intended to be used or accessed by other school staff members.

- Each student's needs should be evaluated on a case-by-case basis, and all plans should be evaluated on an ongoing basis and revised as needed. As a part of the plan, schools should identify staff member(s) who will be the key contact(s) for the student. The plan should delineate how support will be provided and how and to whom information will be disseminated. In addition, each plan should address identified name; pronouns; athletics; extracurricular activities; locker rooms; bathrooms; safe spaces, safe zones, and other safety supports; and formal events such as graduation.

COMMUNICATION WITH FAMILIES

Prior to contacting a student's parent/guardian, the principal or identified staff member should speak with the student to ascertain the level of support the student either receives or anticipates receiving from home. In some cases, transgender and gender nonconforming students may not openly express their gender identity at home because of safety concerns or lack of acceptance. Matters of gender identity can be complex and may involve familial conflict. If this is the case, and support is required, the Office of School Support and Improvement or the Office of Student and Family Support and Engagement (OSFSE) should be contacted. In such cases, staff will support the development of a student-led plan that works toward inclusion of the family, if possible, taking safety concerns into consideration, as well as student privacy, and recognizing that providing support for a student is critical, even when the family is nonsupportive.

PRIVACY AND DISCLOSURE OF INFORMATION

- All students have a right to privacy. This includes the right to keep private one's transgender status or gender nonconforming presentation at school.
- Information about a student's transgender status, legal name, or sex assigned at birth may constitute confidential medical information. Disclosing this information to other students, their parents/guardians, or third parties may violate privacy laws, such as the federal *Family Educational Rights and Privacy Act* (FERPA).
- Schools will ensure that all medical information, including that relating to transgender students, is kept confidential in accordance with applicable state, local, and federal privacy laws.
- Please note that medical diagnosis, treatment, and/or other documentation are not required for a school to accommodate requests regarding gender presentation, identity, and diversity.
- Transgender and gender nonconforming students have the right to discuss and demonstrate their gender identity and expression openly and decide when, with whom, and how much to share private information. The fact that students choose to disclose their status to staff members or other students does not authorize school staff members to disclose a student's status to others, including parents/guardians and other school staff members, unless legally required to do so or unless students have authorized such

disclosure. It is inappropriate to ask transgender or gender nonconforming students more questions than are necessary to support them at school.

NAMES/PRONOUNS

- All students have the right to be referred to by their identified name and/or pronoun. School staff members should address students by the name and pronoun corresponding to the gender identity that is consistently asserted at school. Students are not required to obtain a court-ordered name and/or sex designation change or to change their student records as a prerequisite to being addressed by the name and pronoun that corresponds to their identified name. To the extent possible, and consistent with guidelines, school personnel will make efforts to maintain the confidentiality of the student's transgender status.

STAFF COMMUNICATION

Whenever schools are not legally required to use a student's legal name or sex assigned at birth on school records and other documents, the school should use the name and gender identified by the student on documents such as classroom rosters, identification badges, announcements, certificates, newspapers, newsletters, and yearbooks. To avoid harmful misgendering or misnaming, schools should be especially mindful that all information shared with substitute teachers should be in alignment with the student's identified name and gender.

- Schools should seek to minimize the use of permission slips and other school-specific forms that require disclosure of a student's gender or use gendered terminology such as boys/ girls (instead of students) or mother/father (instead of parent/guardian).
- Unless the student or parent/guardian has specified otherwise, when contacting the parent/guardian of a transgender student, MCPS school staff members should use the student's legal name and pronoun that correspond to the student's sex assigned at birth.
- Asking about a person's pronouns makes spaces more inclusive and welcoming of transgender, gender nonconforming, and non-binary people.

OFFICIAL SCHOOL RECORDS

Schools are required to maintain a permanent student record for each student, which includes the legal name and gender of the student. In situations where schools are required to use the legal name and gender from a student's permanent record, such as for standardized tests or reports to the Maryland State Department of Education (MSDE), school staff members and administrators shall adopt practices to avoid the inadvertent disclosure of the student's legal name and gender when it differs from the student's identified name and gender.

- In accordance with guidance from the Maryland State Department of Education, a student's records may identify the student as male, female, or gender X.
- A student's permanent record will be changed to reflect a change in the student's legal name or gender upon receipt of documentation that such legal name and/or gender have been changed. Any of the following documents is evidence of a legal name and/or gender change:
    - Court order;
    - New birth certificate;
    - State- or federal-issue identification; or
    - Documentation from a licensed healthcare practitioner.
- If a student and/or the student's parent/guardian requests a change to the student's permanent record, absent such documentation, the school should contact OSFSE.
- The school must protect the student's previous identity once a change to a student's legal name and/or gender has occurred. Please refer to the Student Record Keeper Manual, Office of Shared Accountability (OSA), or OSFSE for additional information.
- When a name and/or gender change has been made to official school records, the school must notify OSA so that appropriate notice to MSDE can be made.
- When a name and/or gender change has been made to official school records, school administrators should advise families that they must provide updated copies of any records provided to the school that were generated by external sources (e.g., immunization records, doctor's orders, or other records from medical providers).
- Similarly, a former student's permanent record should be changed to

reflect a change in the former student's legal name or gender, upon receipt of documentation that such legal name and/or gender have been changed pursuant to a court order, new birth certificate, state- or federal-issue identification, or with documentation from a licensed healthcare practitioner. These changes are processed by Central Records.

DRESS CODE

- Transgender and gender nonconforming students have the right to dress in a manner consistent with their gender identity or gender expression, so long as it complies with the MCPS dress code. School staff members shall not enforce a school's dress code more strictly for transgender or gender nonconforming students than for other students.
- Schools should consider gender-neutral dress codes for class or yearbook photos, honor society ceremonies, graduation ceremonies, or dances. In addition, in circumstances where gendered clothing is worn (e.g., in shows and performances), students should be allowed to wear the garments associated with their gender identity.

GENDER-BASED ACTIVITIES

- Schools should evaluate all gender-based policies, rules, and practices, and maintain only those that have a clear and sound pedagogical purpose. For example, if music and performance groups arrange students into sections, they should seek to group them by voice type/qualities, rather than by gender.
- Whenever students are separated by gender in school activities or are subject to an otherwise lawful gender-specific rule, policy, or practice, students must be permitted to participate consistent with their gender identity.

GENDER-SEPARATED AREAS

- Where facilities are designated by gender, students **must** be provided access to gender-specific facilities (e.g., bathrooms, locker rooms, and changing rooms) in alignment with their consistently asserted gender identity.
- Any student who is uncomfortable using a shared facility

because of safety, privacy, or any other reason, should, upon request, be provided with a safe and nonstigmatizing alternative arrangement such as a single bathroom or, with respect to locker rooms, a privacy partition or curtain in changing areas, use of a nearby private restroom or office, or a separate changing schedule. The student should be provided access in a manner that safeguards confidentiality.

- Students who are entitled to use a facility consistent with their gender identity cannot be required to use an alternative arrangement. Alternative arrangements should be used only at the request of a student and in a manner that keeps the student's transgender status confidential.
- Some students may feel uncomfortable with a transgender student using the same sex-specific facility. This discomfort is not a reason to deny access to the transgender student. School administrators and counseling staff members should work with students to address their discomfort to foster understanding of gender identity and to create a school culture that respects and values all students.

NEW CONSTRUCTION/RENOVATION

- If existing facilities do not meet the requirements of school administration to provide a gender-neutral facility for students, schools should work with the Department of Facilities Management to develop facility plans that could include renovation of existing facilities.
- Bearing in mind student safety considerations, the Department of Facilities Management should work to design gender-neutral bathroom facilities that are for student/public use.
- To the extent feasible, MCPS should build at least one gender-neutral restroom on each floor and in high-traffic areas.
- To the extent feasible, MCPS should incorporate at least one gender-neutral changing facility into the design of new schools and school renovations, allowing for safety and confidentiality considerations in the design and location of the gender-neutral facility.

PHYSICAL EDUCATION CLASSES AND INTRAMURAL SPORTS

- Whenever the school provides gender-segregated physical education classes and intermural sports, students must be allowed to participate in a manner consistent with their gender identity.

INTERSCHOLASTIC ATHLETICS

- Transgender and gender nonconforming student participation in interscholastic athletics is determined in accordancewith Maryland Public Secondary Schools Athletic Association (MPSSAA) policies and guidelines (available online at *www.mpssaa.org/assets /1/6/MPSSAA_Transgender_Guidance_ revised_8.16.pdf*).
- Per MPSSAA guidance and to ensure competitive fairness, the integrity of women's sports, and equal opportunities to participate without discrimination, transgender and gender nonconforming students in MCPS shall be permitted to participate on the interscholastic athletics team of:
  - the student's sex assigned at birth; or
  - the gender to which the student has transitioned; or
  - the student's asserted gender identity.
- Schools should refer any appeals regarding eligibility to participate in interscholastic athletics to the MCPS Athletics Unit.
- Competition at other schools: Accommodations provided at the home school should be made available at other facilities with the consent of the student and as part of the student's plan. The coach or home school should notify the school to be visited about any necessary accommodations, keeping the identity of the student confidential.

CLUBS

- Many MCPS middle and high schools have student-led clubs that connect and support the interests of LGBTQ+ and gender nonconforming students, such as Gender and Sexuality Alliance (GSA) clubs. These clubs should run like any other club with clearly defined purposes.

OUTDOOR EDUCATION/OVERNIGHT FIELD TRIPS

- Students must be allowed to participate consistent with their asserted gender identity.
- Sleeping arrangements should be discussed with the student and family (if the family is supportive of the student). Upon request, the student should be provided with a safe and non-stigmatizing alternative arrangement, such as a private sleeping area, if practicable.
- Schools should try to accommodate any student who may desire greater privacy, if practicable, without isolating other students.
- A student's transgender status is confidential information and school staff members may not disclose or require disclosure of a student's transgender status to other students or their parents/guardians, as it relates to a field trip, without the consent of the student and/or the student's parent/guardian.

BULLYING, HARASSMENT, OR INTIMIDATION AND THREAT ASSESSMENT

- LGBTQ+ students have a higher incidence of being bullied and harassed, as well as a higher rate of suicide contemplation, and are more than five times as likely as non-LGBTQ+ students to attempt suicide.
- Board Policy JHF, *Bullying, harassment, or Intimidation*, sets forth the Board's commitment to an environment that is free of bullying, harassment, or intimidation so that schools are a safe place in which to learn; and MCPS Regulation JHF-RA, *Student Bullying, Harassment, or Intimidation*, provides procedures that address the prohibition of bullying in schools. These are available on the MCPS website at *https://www.montgomeryschoolsmd.org/departments/policy/pdf/jhf.pdf* and *https://www.montgomeryschoolsmd.org/departments/policy/pdf/jhfra.pdf.*
- Board Policy COA, *Student Well-being and School Safety*, establishes and maintains a behavior threat assessment process, based on an appraisal of behaviors, and provides appropriate preventive or

corrective measures to maintain safe and secure school environments and workplaces. All children deserve a safe and nurturing school environment that supports their physical, social, and psychological well- being. In alignment with Board Policy ACA, *Nondiscrimination, Equity, and Cultural Proficiency*, school safety measures should not reinforce biases against, or rely on the profiling of, students based on their actual or perceived personal characteristics. MCPS Regulation COA-RA, *Behavior Threat Assessment*, requires that staff responsible for implementing behavior threat assessment procedures at the school level are trained to understand implicit bias, promote diversity awareness, and consider the risk of self-harm or the presence of suicidal ideation. Board of Education Policy COA, *Student Well-being and School Safety*, and MCPS Regulation COA-RA, *Behavior Threat Assessment*, are available on the MCPS web at *www.montgomeryschoolsmd.org/departments/policy /pdf/coa.pdf* and *www.montgomeryschoolsmd.org/departments/policy/ pdf/coara.pdf*

- Bullying and harassment include conduct that is directed at a student based on a student's actual or perceived gender identity or expression, and includes conduct that targets a student because of a characteristic of a friend, family member, or other person or group with whom a student associates.
- Complaints alleging discrimination or harassment directed at a student based on a student's actual or perceived gender identity or expression should be handled in the same manner as other discrimination or harassment complaints. Schools should be vigilant about bullying and harassment and address it promptly.
- School staff members should take all reasonable steps to ensure safety and access for transgender and gender nonconforming students at their school and support students' rights to assert their gender identity and expression.
- Students shall not be disciplined based on their actual or perceived gender identity or expression.
- Schools are encouraged to have age-appropriate student organizations develop and lead programs to address issues of bullying prevention for all students, with emphasis on LGBTQ+ students.

SAFE SPACES

- **Hallway or "Flash" Pass:** If needed, schools will allow a transgender or gender nonconforming student to go to a safe space (e.g., main office, counselor's office) at any time the student encounters a situation that feels unsafe or uncomfortable.
- **Safe Zones:** Schools will designate certain teachers' classrooms, specific offices, or a location in a school that is deemed a safe zone where any student, for whatever reason, may go to be free from judgment and to feel comfortable and safe. Schools also should ensure that staff members who have safe zone stickers on their doors have received appropriate training regarding providing inclusive, affirming environments.

STAFF SUPPORT

- Board of Education Policy ACA, *Nondiscrimination, Equity, and Cultural Proficiency* protects all MCPS employees from any form of discrimination, including actions that are motivated by an invidious intent to target individuals based on their actual or perceived personal characteristics as well as acts of hate, violence, insensitivity, disrespect, or retaliation—such as verbal abuse, harassment, bullying, slurs, threats, physical violence, vandalism, or destruction of property—that impede or affect the learning or work environment, and encompassing racism, sexism, issues of gender identity, and other forms of institutional prejudice in all their manifestations. Staff seeking guidance and supports involving issues of gender identity are encouraged to contact the coordinator in the Office of Employee Engagement and Labor Relations (OEELR) at 240-740-2888.

CONTACTS

- For more information please contact the MCPS OSFSE at 240- 314-4824, or the MCPS Office of the Chief of Staff, Student Welfare and Compliance, at 240-740-3215.

MCPS NONDISCRIMINRATION STATEMENT

Montgomery County Public Schools (MCPS) prohibits illegal discrimination based on race, ethnicity, color, ancestry, national origin, religion, immigration status, sex, gender, gender

identity, gender expression, sexual orientation, family/parental status, marital status, age, physical or mental disability, poverty and socioeconomic status, language, or other legally or constitutionally protected attributes or affiliations. Discrimination undermines our community's long-standing efforts to create, foster, and promote equity, inclusion, and acceptance for all. Some examples of discrimination include acts of hate, violence, insensitivity, harassment, bullying, disrespect, or retaliation. For more information, please review Montgomery County Board of Education Policy ACA, *Nondiscrimination, Equity, and Cultural Proficiency*. This Policy affirms the Board's belief that each and every student matters, and in particular, that educational outcomes should never be predictable by any individual's actual or perceived personal characteristics. The Policy also recognizes that equity requires proactive steps to identify and redress implicit biases, practices that have an unjustified disparate impact, and structural and institutional barriers that impede equality of educational or employment opportunities.

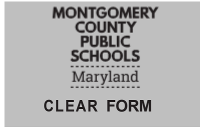
For inquiries or complaints about discrimination against MCPS staff *	**For inquiries or complaints about discrimination against MCPS students ***
Office of Employee Engagement and Labor Relations Department of Compliance and Investigations 850 Hungerford Drive, Room 55, Rockville, MD 20850 240-740-2888 OEELR-EmployeeEngagement@mcpsmd.org	Office of the Chief of Staff Student Welfare and Compliance 850 Hungerford Drive, Room 162, Rockville, MD 20850 240-740-3215 COS-StudentWelfare@mcpsmd.org
For inquiries or complaints about sex discrimination under Title IX, including sexual harassment, against students or staff*	
Title IX Coordinator Office of the Chief of Staff Student Welfare and Compliance 850 Hungerford Drive, Room 162, Rockville, MD 20850 240-740-3215 COS-TitleIX@mcpsmd.org	

**Inquiries, complaints, or requests for accommodations for students with disabilities also may be directed to the supervisor of the Office of Special Education, Resolution and Compliance Unit, at 240-740-3230. Inquiries regarding accommodations or modifications for staff may be directed to the Office of Employee Engagement and Labor Relations, Department of Compliance and Investigations, at 240-740-2888. In addition, discrimination complaints may be filed with other agencies, such as: the U.S. Equal Employment Opportunity Commission, Baltimore Field Office, City Crescent Bldg., 10 S. Howard Street, Third Floor, Baltimore, MD 21201, 1-800-669-4000, 1-800-669-6820 (TTY); or U.S. Department of Education, Office for Civil Rights, Lyndon Baines Johnson Dept. of Education Bldg., 400 Maryland Avenue, SW, Washington, DC 20202-1100, 1-800-421- 3481, 1-800-877-8339 (TDD), OCR@ed.gov, or www2.ed.gov/about/offices/list/ocr/complaintintro.html.*

This document is available, upon request, in languages other than English and in an alternate format under the *Americans with Disabilities Act*, by contacting the MCPS Office of Communications at 240-740-2837, 1-800-735-2258 (Maryland Relay), or PIO@mcpsmd.org. Individuals who need sign language interpretation or cued speech transliteration may contact the MCPS Office of Interpreting Services at 240-740-1800, 301-637-2958 (VP) or MCPSInterpretingServices@mcpsmd.org. MCPS also provides equal access to the Boy/Girl Scouts and other designated youth groups.

Intake Form: Supporting Student Gender Identity

Office of Student and Family Support and Engagement
MONTGOMERY COUNTY PUBLIC SCHOOLS
Rockville, Maryland 20850
See MCPS *Guidelines for Student Gender Identity*



Instructions: The school administrator, counselor, or psychologist should complete this form with the student. Parents/guardians may be involved if the student states that they are aware of and supportive of the student's gender identity. This form should be kept in a secure, confidential location. See distribution information on Page 2. **This form is not to be kept in the student's cumulative or confidential folders.** All plans should be evaluated on an ongoing basis and revised as needed.

STUDENT INFORMATION

Student Name in MCPS Student Information System (Last, First, MI):

School -- Choose One --

Grade

What is your identified name?*

MCPS ID #

What is your identified gender?** 0 Male 0 Female 0 X

---

* Consistent with MCPS Guidelines for Student Gender Identity, the school administrator/counselor/psychologist can request that the school record keeper add the identified name in the MCPS Student Information System.

** Student's indication of identified gender on this form is for confidential notification to the school ONLY. If the student requests that their gender

(unspecified/non-binary) 0 Other

____

____

What pronouns do you use to identify yourself in school?

____

____

SUPPORT/SAFETY FOR STUDENT

Is parent/guardian aware of your gender identity? 0 Yes 0 No

Support Level: (None) 0 1 0 2 0 3 0 4 0 5 0 6 0 7 0 8 0 9 0 10 (High)

If support level is low, what considerations must be accounted for in implementing this plan?

PRIVACY, CONFIDENTIALITY, AND DISCLOSURE

Plan for bathroom/locker use:

Plan for sports/extracurricular activities:

Other issues to be considered/addressed:

Who will be the student's "go to adult" on campus?

---

be changed on MCPS official records, the school must follow the procedures outlined in the MCPS Student Record Keeper Manual.

PRIVACY, CONFIDENTIALITY, AND DISCLOSURE (continued)

If this person is not available what should student do?

What, if any, will be the process for periodically checking in what the student and/or family?

What are expectations in the event the student is feeling unsafe and how will the student signal their need for help?

OTHER SCHOOL ACTIVITIES

Are there lessons, units, content or other school activities during the school year to consider (health curriculum, swim unit, social justice units, name projects, dance instruction, Pride events, school dances, promotion/graduation ceremonies, etc.)?

COMMUNICATION PLAN

Identify staff to whom this information may be disclosed:

How public or private will information about this student's gender be?

SUPPORT PLAN REVIEW AND REVISION

How will this plan be monitored over time?

Form completed by (print name) ______________________________

Date _____/ _____ / _____

Distribution: Copy 1/School Confidential folder (in principal's office)
Copy 2/Student Welfare and Compliance Unit, via scan to COS-StudentWelfare@mcpsmd.org, or via pony to CESC, Room 162, in a envelope marked confidential