No.

IN THE

Supreme Court of the United States

JONATHAN LEE, ERIN LEE, NICOLAS JURICH, AND LINNAEA JURICH,

Petitioners,

v.

POUDRE SCHOOL DISTRICT R-1,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a school district may discard the presumption that fit parents act in the best interests of their children and arrogate to itself the right to direct the care, custody, and control of their children.

PARTIES TO THE PROCEEDING

Petitioners Jonathan Lee, Erin Lee, Nicolas Jurich, and Linnaea Jurich, the plaintiffs-appellants below, are parents to students in Poudre School District R-1.

Respondent Poudre School District R-1, the defendant-appellee below, is a public school district in Colorado.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to the cases within the meaning of Rule 14.1(b)(iii):

- *Jonathan Lee, Erin Lee, C.L., a minor, by and through parents Jonathan and Erin Lee as next friends, M.L., a minor, by and through parents Jonathan and Erin Lee as next friends, Nicolas Jurich, Linnaea Jurich, and H.J., a minor, by and through parents Nicolas and Linnaea Jurich as next friends v. Poudre School District R-1 and Poudre School District R-1 Board of Education*, No. 1:23-cv-01117 (D. Col.), judgment entered May 16, 2024 in the United States District Court for the District of Colorado;

- *Jonathan Lee, Erin Lee, Nicolas Jurich, and Linnaea Jurich v. Poudre School District R-1*, No. 24-1254 (10th Cir.), judgment entered April 22, 2025 in the United States Court of Appeals for the Tenth Circuit.

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PETITION FOR WRIT OF CERTIORARI

The Constitution does not countenance the bureaucratic arrogance of school officials who presume to know better than parents how to raise children and who covertly commandeer parental rights. Indeed, the Due Process Clause of the Fourteenth Amendment does the opposite. For, it secures the rights of parents—yes, parents—to make decisions concerning the upbringing, education, and care of their children. This doctrine is as old as the Republic.

This country was founded on the idea of citizen self-government based on individual liberty and a reluctance to relinquish that liberty to the government. Thomas Jefferson wrote in the Declaration of Independence that the People created the Government to secure the inalienable rights of all men to "Life, Liberty, and the pursuit of Happiness," and that governments derive their "just powers . . . from the consent of the governed." *Declaration of Independence*, para 2 (U.S. 1776). Madison, referencing how the government's role is to protect, not replace individual liberties, contended: "The protection of these faculties is the first object of government." *The Federalist No. 10* (Madison). And Alexander Hamilton, arguing against the need to include the Bill of Rights, believed that "the Constitution . . . itself, in every rational sense, and to every useful purpose, [is] A BILL OF RIGHTS[,]" *The Federalist No. 84* (Hamilton), that already protected individual liberty from government infringement. At times, these men promoted varied approaches to organizing the republic, but if they were unanimous about anything, it was in their focus on restraining government from interfering in personal affairs so that the People could enjoy liberty.

The fundamental rights of parents, though not enumerated in the Constitution, are among the liberties Hamilton believed to be protected by the Constitution itself. This Court recognized as much in *Troxel v. Granville*, explaining that parental rights are "perhaps the oldest of the fundamental liberty interests[.]" 530 U.S. 57, 65 (2000). Accordingly, when the government acts to "supersede parental authority[,]" it takes action that is "repugnant to American tradition." *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

America's long history of protecting parents' legal authority in raising their children is being deliberately dismantled by school districts across the country that have enacted policies to replace parental authority with governmental authority. These policies actively deprive parents of the very information they need to exercise their legal rights and moral obligations to act in their children's best interests.

This interference by school districts is exacerbated by courts that either refuse to consider the merits of parental rights claims or that apply parental rights doctrine in so narrow a manner as to facilitate these usurpations by school districts. The result is that school districts nationwide, including Respondent, are adopting policies that not only elevate the judgment and involvement of school officials over those of parents, but also often exclude parents from the conversation entirely. To suggest that a public school district may, by mere policy fiat, presume that all parents are unfit to be informed of matters as intimate and consequential as their child's gender identity—while simultaneously vesting that discretion in unelected school administrators and telling children that their parents

may be untrustworthy—is not only constitutionally suspect, it is an affront to the very underpinnings of our constitutional system that recognizes the primacy of parental rights.

This honorable Court has long and repeatedly recognized the centrality of parental rights under the Fourteenth Amendment. It has identified a presumption that fit parents act in the best interests of their children.[1] The United States Constitution imbues its subjects with procedural due process rights that must be honored before substantive due process rights can be revoked. In place of this Court's well-established presumptions regarding parental fitness, lower courts, including both courts below in the present litigation, have accepted and effectively endorsed Respondent's subordination of the presumption that fit parents act in the best interest of their children to its own authority and discretion. This acceptance has enabled a system to perpetuate across this nation where school officials—not parents—determine not only how, but whether parents may still determine the care, control, and upbringing of their children.

In the instant case, the trial court dismissed Petitioners' case and denied leave to amend the complaint on futility grounds, finding that they could not establish municipal liability. The Tenth Circuit affirmed. Petitioners' constitutional rights were questioned by all but one judge on the Tenth Circuit panel. These rulings invite Respondent to continue surreptitiously wresting decision-making authority from fit parents unawares and instead vesting that authority in school officials.

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1. *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

In addition to excluding parents from decision-making, these policies explicitly call for concealment of students' gender identities from parents unless and until the student and the school decide to involve them. Thus, under such policies, "parents' fear that the school district might make decisions for their children without their knowledge and consent is not speculative." *Parents Protecting Our Children, UA v. Eau Claire Area School District*, 604 U.S. ___, 145 S. Ct. 14, 14 (Mem.) (Alito, J., dissenting) (citation omitted).

Despite this reality, courts enable this blatant interference with parental liberty to continue. This Court's intervention is therefore necessary to afford Petitioners their day in court on the merits through overturning the denial of leave to amend and to re-establish the existence and the breadth of parental rights with respect to the care, control, and upbringing of their children.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 135 F. 4th 924 and reproduced at Appendix A. The district court's order denying Petitioner's Motion for Leave to Amend Complaint is reported at 2024 WL 2212261 and reproduced at Appendix D.

JURISDICTION

The Tenth Circuit issued its opinion on April 22, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, § 1 provides, in relevant part, "No state shall . . . deprive any person of life, liberty, or property without due process of law . . . "

STATEMENT OF THE CASE

Jonathan and Erin Lee (the "Lees") and Nicolas and Linnaea Jurich (the "Juriches," together with the Lees, the "Parents" or "Petitioners") are the parents of minor children, C.L. and H.J. (together, the "Daughters"), who were formerly enrolled at Wellington Middle School ("WMS") in Poudre School District R-1 in Wellington, Colorado ("Respondent"). Petitioners challenged the legality of certain policies implemented by Respondent, *see* App. at 8a-13a, that infringe on their fundamental right to direct the upbringing of their children and its companion presumption that fit parents act in the best interests of their children.

This case was not considered on the merits and was instead dismissed on procedural grounds—first for lack of standing and then for failure to establish municipal liability. However, Petitioners can clear both procedural hurdles and the substantive issue is narrow. This Court's intervention is necessary to reaffirm the fundamental constitutional right of parents to determine the care, custody, and control of their children as well as to instruct lower courts on the proper application of those rights when analyzing school policies such as those in the present case.

A. The District's Policy Discouraging Disclosure to Parents.

Petitioners seek this Court's intervention to clarify whether public schools may implement policies that effectively cancel the right of parents to determine the care, custody, and control of their children, which includes the presumption that fit parents act in the best interests of their children, and replace that right with a unilateral system of authority that withholds even the knowledge of circumstances involving their children.

Petitioners allege that policies that exclude parents from the conversation of their child's gender identity by, *inter alia*, actively discouraging disclosure of such information by school officials, infringe on their right to direct the upbringing of their children. Here, as in many schools in America today, Respondent has implemented a series of policies that usurp parental authority in favor of schools' authority, effectively denying parents the right to the care, custody, and control of their children.

Respondent's policies, (hereinafter the "District Secrecy Policies") work together in support of Respondent's unconstitutional assumptions that parents are unworthy participants in decisions about their children's gender identities and should therefore be denied information upon which they might base decisions about their educational control. In addition to purposefully excluding parents, the District Secrecy Policies interfere with parental authority and the family unit by sowing doubt in the minds of students regarding the trustworthiness of their parents. For example, the Policies state:

- District employees "*should not disclose* information that may reveal a student's transgender or non-binary status to others, including . . . parents" App. at 174a; 231a; (emphasis added);

- School counselors are instructed to use their discretion to "work with the student in coming out to their family and others, as appropriate[.]" App. at 175a; 232a;

- District employees are instructed to actively deceive parents by "us[ing] the name and pronouns that the student's parent or guardian use, unless the student requests otherwise;" App. at 232a;

- District employees are instructed not to respond to direct questions from parents regarding a student's gender identity and instead direct the parents to a school counselor, who is instructed to "use their professional judgment to determine" whether to disclose the child's gender identity to the parents; App. at 232a.

Respondent acknowledged in the proceedings below that disclosure of gender identity information to parents "is generally discouraged." App. at 200a. This general discouragement was implemented in several ways:

- Respondent instructed children not to discuss the topics of GSA Meetings with their parents because their parents may not be "trustworthy"; App. at 155a; 159a; 183a; 142a-93a;

- Respondent trained school staff by discouraging disclosure; App. at 183a ¶207;

- Respondent actively deceived parents by instructing employees to use the child's preferred name and pronouns with the child and the child's birth name and pronouns with the parents; App. at 183a ¶208;

- Employees shared related information using informal means to reduce the chances of inadvertent parental notification, i.e. telling parents the truth; App. at 184a-85a ¶¶ 212, 214;

- Employees sought internal guidance amongst colleagues on how to best avoid parental disclosure App. at 184a ¶ 210.

This secrecy and concealment toward parents whose children discuss topics related to gender identity at school creates division within the parent-child relationship and undermines the trust essential to a family's foundation. Further destruction of the parent-child relationship inheres in Respondent's suggestion to students that parents might not be safe to talk to on this subject. This strategy has the triple effect of furthering Respondent's mission to purloin a right reserved to parents, forwarding a theory about children that Respondent agrees with, and insulating Respondent from having its subversive activities discovered.

B. The District's Policies Caused the Parents' Injuries

The Tenth Circuit panel doubted whether the District Secrecy Policies injured Petitioners. App. at 18a. First,

the very existence of the Policies in and of themselves directly infringes on the fundamental rights of all parents with children in Respondent school district by discarding parental rights in favor of parental exclusion. The District Secrecy Policies amount to a regime of parental exclusion, allowing school officials to override parental authority based on their own discretion. But for the existence of the Policies, Petitioners would have known the true nature of the school activities the Daughters were participating in and would have been included in discussions regarding the Daughters' gender identities and sexuality. The doubt and distrust pushed by school officials between the parents and children would not have been present.

That said, Petitioners were directly injured by the District Secrecy Policies after the Daughters attended meetings of the Gender and Sexualities Alliance ("GSA") held at WMS. App. at 4a-8a. These meetings were run by WMS teacher Jenna Riep. *Id.* Ms. Riep invited the students at these meetings to discuss their thoughts and feelings on gender identity and provided prizes to children who "came out" as transgender during a GSA Meeting. *Id*. Other topics such as suicide among transgender children were also discussed. *Id.*

Respondent has euphemistically called the GSA Meetings a "safe space," App. at 43a, for children to discuss difficult issues when in actuality they served as a medium for the imposition of Respondent's Policies to interfere with parental rights and the parent-child relationship. It was at these meetings that the seeds of distrust were planted, leading to the deterioration of the Daughters' relationships with the Parents. It was at these meetings that the Daughters were simultaneously

encouraged to trust school employees and told that their parents were not deserving of that same trust.

That the actions underlying this case were undertaken in furtherance of the Policies is evident by the encounter between the Lees and the WMS principal. Despite being told by school officials that her mother may not be someone she could trust with conversations on gender, C.L. told her parents about the GSA Meetings and announced that she would be transitioning to a boy. App. at 70a, 158a. Upon learning that C.L. had been told to distrust and keep secrets from her parents, Petitioner Erin Lee complained to the WMS principal, Mr. Benedict. Adding insult to the injury of the discord sowed between the Lees and their daughter, Mrs. Lee found an unapologetic school official who not only did not deny that the school was following a policy of nondisclosure to parents but defended the actions of Ms. Riep and the GSA club. App. at 6a.

In fact, the District Secrecy Policies continued to be implemented at GSA Meetings after Mrs. Lee's complaint. Following Mrs. Lee's complaint, H.J. attended two GSA Meetings, where she was told that her parents may not be trustworthy and that school officials were the ones to be trusted with gender conversations. App. at 7a. That launched H.J. into a serious mental health decline in which she questioned her gender and had suicidal thoughts, all of which she withheld from her parents for months until they culminated in a suicide attempt. *Id.*

Principal Benedict actively misled both sets of parents in furtherance of the District Secrecy Policies on different occasions. When asked directly by Petitioner Nicolas Jurich whether any lessons on sexuality were included

in the GSA Meetings, Principal Benedict responded that "GSA did not have sexuality lessons last fall or spring," App. at 13a, a patently false statement as sexuality and similar themes were not only openly discussed when C.L. and H.J. attended meetings but the children attending the meetings were also encouraged to ask questions about sexuality. App. at 155a.

On another occasion, Petitioner Erin Lee asked Principal Benedict about the nature of C.L.'s relationship with Ms. Riep, the teacher leading the GSA Meetings. App. at 13a. Again, acting in conformance with and furtherance of the District Secrecy Policies, when asked by Mrs. Lee whether C.L. had a close relationship with Ms. Riep, Principal Benedict denied any such relationship existed. In fact, Ms. Riep had provided C.L. with her personal cell phone number, had been having one-on-one conversations over lunch hours with C.L. about gender, and first persuaded C.L. to attend the GSA Meeting by misleading her as to the nature of the gathering, calling it GSA Art Club. (C.L. had no idea what GSA meant and believed she was in fact going to an art club). App. at 5a, 37a. Importantly, Ms. Riep warned C.L., despite her protestations that her mother was trustworthy, to keep their conversations secret because her mother may not be safe to talk to. *Id.*

These actions were taken in conformance with and furtherance of the District Secrecy Policies. Despite the acknowledgement that gender identity is a matter that has serious physical and mental health implications, App. at 5a, 70a, 155a, the Policies purposely exclude parents from involvement in those conversations.

C. Procedural Background

Petitioners, along with their minor children, filed a Complaint for Damages and Injunctive Relief (the "Original Complaint") against Poudre School District R-1 (the "District") and the Poudre School District R-1 Board of Education (the "Board") on May 3, 2023. App. 13a. The Original Complaint contained two claims: (1) a substantive due process claim under the Fourteenth Amendment by all Plaintiffs against all Defendants, and (2) an equal protection claim under the Fourteenth Amendment asserted by the Lees and their minor child, M.L. App. at 13a, 39a. The Original Complaint sought (1) a permanent injunction requiring opt-out and related rights for gender-related topics taught in the District, like those sought by the petitioners in *Mahmoud v. Taylor*, 606 U.S. ___, 2025 WL 1773627, at *10-*11, (June 27, 2025), (2) compensatory damages including but not limited to private school tuition and counseling fees, and (3) punitive damages. App. at 13a, 39a.

Defendants moved for dismissal of the Original Complaint on July 7, 2023, (the "Motion to Dismiss") which the district court granted, determining that the minor children lacked standing to bring claims related to their parents' fundamental rights and that the Parents lacked standing to seek prospective injunctive relief because their children no longer attended District schools. App. at 40a. The district court also held that the Parents had not sufficiently alleged a violation of their constitutional rights. *Id*. at 50a-62a.

The Parents moved for leave to file an amended complaint (the "Motion to Amend") on January 18, 2024,

which included a copy of the proposed First Amended Complaint (the "FAC"). App. at 123a. The FAC removed the minor children as plaintiffs, removed the Board as a defendant, and eliminated the equal protection claim. *Id.* at 142a. The sole remaining allegation of the FAC is the Parents' Fourteenth Amendment substantive due process claim against Respondent. App. at 190a-192a.

The district court denied the Motion to Amend on futility grounds. *Id.* at 33a. Unlike the order granting the Motion to Dismiss, which focused on standing and the constitutional violations alleged in the Original Complaint, the district court shifted its focus for denying the Motion to Amend to the requirements for establishing municipal liability. *Id.* at 47a-49a. Because the court dismissed on procedural grounds it did not consider the alleged constitutional violation, although it questioned whether such a right was adequately pled. App. at 49a-55a.

Petitioners appealed the denial to the Tenth Circuit. Following briefing and oral argument, the district court's denial of leave was affirmed in a decision and order dated April 22, 2025. App. at 30a-31a. The Tenth Circuit also questioned whether Petitioners had sufficiently alleged a substantive due process right but ultimately ruled based on the question of municipal liability. *Id.* at 3a. Judge McHugh concurred in the judgment but wrote separately to express that the parents had in fact asserted a violation of a valid substantive due process right. *Id.* at 24a-29a. Petitioners then timely filed the present Petition for Writ of Certiorari on July 21, 2025.

REASONS TO GRANT THE PETITION

I. This Court Must Affirm The Fundamental Rights of Parents.

This Court has repeatedly and consistently recognized the liberty interest of parents to make decisions concerning the care, custody, and control of their children, which is fundamental to the fabric of American society and predates the founding. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Troxel v. Granville*, 530 U.S. 57 (2000), *Mahmoud v. Taylor*, 606 U.S. ___, 2025 WL 1773627 (June 27, 2025). Indeed, this Court's precedent affirms both the essential role parents play in the upbringing and education of their children as well as the importance to American society of preserving the family unit.

Despite this long and well-established history, rogue courts continue to narrow parental rights where schools assert their authority as superior. In the present case, the Tenth Circuit questioned whether Petitioners had asserted a fundamental right at all. This Court's intervention is necessary to remind school officials that the fundamental rights of parents, like those of students and teachers in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), do not stop at the schoolhouse gate.

A. Parental Rights are Foundational to American Government and Society.

Concepts of natural law are deeply embedded in the American tradition and are foundational to the rights enshrined by the Founders. As one writer described,

"the American Founders' policies regarding the family derive from their natural rights principles and match their goal of establishing a self-governing republic." Scott Yenor, The True Origin of Society: The Founders on the Family, First Principles No. 48 The Heritage Foundation at 2 (Oct. 16, 2013).[2]

Natural law concepts provide that human beings have certain intrinsic, or as the Founders might say, inalienable, rights at birth, that cannot be interfered with or infringed by the government. The right of parents to direct the upbringing of their children is one such intrinsic natural right.

Parental rights are based on "the perceived family relations in a state of nature, that is before any organized form of government beyond the clan could influence the behavior involved in family formation and the raising of children." Richard Epstein, *A Natural Law Approach to Parental Rights*, The Journal of Contemporary Legal Issues, 11, 15 (Feb. 28, 2025).[3] While true that individuals surrendered control over some aspects of their lives to a governing body in return for certain protections, that "basic social contract" did not "require[] parents to surrender the basic rights to control their children." *Id.* at 18. Thus, while the state may set certain requirements,

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2. https://static.heritage.org/2013/pdf/fp48.pdf?_gl=1*zcy88u*_gcl_au*MTc5OTIxMDI3MC4xNzQ5MjM4MTE1*_ga*MTAxOTc4MjkwMi4xNzQ5MjM4MTE1*_ga_W14BT6YQ87*czE3NDkyMzgxMTUkbzEkZzEkdDE3NDkyMzgyMTYkajM0JGwwJGgw

3. https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1066&context=jcli.

such as compulsory school attendance, *Meyer*, 262 U.S. at 402, parental authority remains paramount.

Natural law also provides that parental rights are reciprocal to parental responsibilities. As Sir William Blackstone wrote, "[t]he *duty* of parents to provide for the maintenance of their children is a principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world." 1 Sir William Blackstone, *Commentaries on the Laws of England* 434 (emphasis added). This duty necessarily "requires making decisions on their behalf, because children are not capable of making reasonable decisions for themselves. Thus, parental child-rearing authority is the flipside of parents' natural obligation to love and raise their children, which flows . . . from the very nature of the . . . parent-child relationship." Melissa Moschella, *Natural Law, Parental Rights and the Defense of "Liberal" Limits on Government: An Analysis of the Mortara Case and Its Contemporary Parallels*, Notre Dame Law Review, Vol. 98:4 1559, 1574.[4]

John Locke, another natural law thinker who influenced the Founders[5], discussed education as "the Duty

4. https://ndlawreview.org/wp-content/uploads/2023/06/NDL405_Moschella_cropped.pdf.

5. Thomas Jefferson wrote a letter to neighbor Henry Lee describing the influence natural law thinkers had on the Declaration of Independence: "All authority rests . . . on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, &c." Thomas Jefferson, letter to Henry Lee, May 8, 1825, available at: https://www.loc.gov/resource/mtj1.055_0219_0220/?st=gallery.

and Concern of Parents," and explained that "the Welfare and prosperity of the Nation so much depends on it[.]" John Locke, *Some Thoughts Concerning Education*, lxiii (1693) (Cambridge Univ. Press ed. 1880)[6]. The natural law view relied on by the Founders in mapping out this great nation reflects that it is fundamental to human liberty and societal stability for parents to educate, discipline, and instill moral values in their children. Proper application of these principles requires acknowledgement that any gender identity communication policy that replaces parental authority with school authority is a direct infringement on parental interests.

In contrast with the preeminence of parental rights, which is deeply rooted in U.S. history and tradition, is the notion of schools unilaterally inverting the authority of parents and schools, which finds no support in our history and tradition. Justice Thomas, concurring in *Mahmoud v. Taylor*, 606 U.S. ___, WL 1773627 (June 27, 2025), recognized that empowering schools over parents "would upend the 'enduring American tradition' of parents occupying the 'primary role . . . in the upbringing of their children.'" *Id.* at *27 (Thomas, J., concurring) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232-233 (1972)). Both *Mahmoud* and *Yoder* are extensions of this Court's ruling in *Pierce v. Society of Sisters*, where "th[is] Court rejected the premise that the child was merely a 'creature of the State[.]'" *Id.* (quoting *Pierce* 286 U.S. at 535). Instead, "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*

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6. https://archive.org/details/somethoughtsconc00lockuoft/page/n11/mode/2up

B. This Court's Precedents Honor Parental Rights.

The primacy of parental authority with respect to their children means that government cannot interfere with parental authority absent neglect or abuse. *Troxel v. Granville*, 530 U.S. 57 (2000) (plurality op.). As this Court also explained,

> [i]t 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. *Pierce v. Society of Sisters*, [268 U.S. 510 (1925)]. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

Parental rights are bolstered by the "traditional presumption that a fit parent will act in the best interest of his or her child." *Troxel* 530 U.S. at 70 (citing *Parham v. J. R*, 442 U.S. 584, 602 (1979)). This presumption requires special weight to the decisions of parents that cannot be overridden by the state simply because the state believes a different decision would be better for the child. *Id*. Respondent expresses a contrary belief and asserts that its guidelines are simply consistent with, and give effect to, children's wishes. But that view does not find constitutional support. "Simply because the decision of a parent is not agreeable to a child or because it involves risk does not automatically transfer power to make the decision from parents to some agency or officer of state."

Id. at 603. Yet Petitioners, and parents across the nation, face school policies on gender identity and communication that do just that: interfere with the rightful decision-making authority of parents based on the belief that school officials or children know better when it comes to gender identity. Respondent provides no persuasive legal support for its position, although a world of countervailing law stands between it and its objectives of usurping and appropriating parental authority.

Promoting the idea to children that teachers know better than parents and that their parents may not be trustworthy is a direct and shameful attack not only on a foundational legal principle but also on the parent-child relationship. It seeks to do the same thing to relationships between parents and their children that it seeks to accomplish in our legal system, and it is no less pernicious in families than it is in our legal system. As the dissenting judge in a recent Fourth Circuit case pointed out, "[t]he 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." *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 636 (4th Cir. 2023), *cert. denied sub nom. Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 144 S. Ct. 2560 (2024) (Niemeyer, J., dissenting).

Interference by public schools in these matters violates the principle that "parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). This is true even when parent-child "relationships are strained[.]" *Id.* Moreover, this "fundamental liberty interest . . . does

not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Id.* It follows that the interest also does not "evaporate" when a child faces questions of gender identity at school.

As Judge McHugh explained in the concurrence below, "[w]hile the district may disagree with how some parents may react when they learn about their children's gender identities, the district *may not seize control of a child's upbringing* based on a 'simple disagreement' about what is in the child's best interests." App. at 27a (quoting *Troxel*, 530 U.S. at 72) (emphasis added). Permitting schools to usurp "parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Parham*, 442 U.S. at 603 (emphasis omitted). Accordingly, policies that discourage school employees from disclosing to parents important facts about their children or which facilitate or encourage students to conceal their gender identity from parents based on the assumption that parents may not react the way the school believes they "should" are also repugnant as they improperly elevate the school's judgment over that of parents.

Yet the court below questioned the existence of a fundamental right in this case. App. at 16a-19a. The Tenth Circuit's attempt to "define the right at issue with microscopic granularity," *Foote v. Ludlow Sch. Comm.*, 128 F. 4th 336, 348 (1st Cir. 2025), is contrary to this Court's analysis of parental rights. As the First Circuit recently noted, proper analysis requires "the Court [to] consider[] whether the conduct at issue fell within the broader, well-established parental right to direct the

upbringing of one's child." *Id.* (citing *Meyer*, 262 U.S. at 399-403; *Pierce*, 268 U.S. at 534-35; *Troxel*, 530 U.S. at 65-67).

Notably, Judge McHugh's concurrence disagreed with the Tenth Circuit's holding that no fundamental right was implicated by the District Secrecy Policies: "As alleged, the district's employees, by policy, are required to help students conceal their gender identities from their parents. If such a policy exists, it runs counter to the constitutional 'presumption that fit parents act in the best interests of their children.'" App. at 27a (quoting *Troxel*, 530 U.S. at 68). She further explained that Respondent's "policy of helping students keep their parents in the dark about their gender identities turns this presumption on its head. The policy assumes that children of all ages possess sufficient wisdom and maturity to decide their gender identity-and even to transition genders-without parental involvement." *Id.*

Children's lack of the necessary skills and experience needed for certain decisions is not a new concept. Justice Thomas recently explained that "[t]here is no dispute . . . that the decision-making capacity of adolescents is developing, but not yet complete. This Court has recognized as much in other contexts, explaining that children's 'lack of maturity' and 'underdeveloped sense of responsibility' often lead to 'impetuous and ill-considered actions and decisions.'" *United States v. Skrmetti*, 605 U.S. ___, 145 S. Ct. 1816, 1846 (2025) (Thomas, J., concurring) (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). By their nature and purpose, policies that presume children can make such decisions with the input of school officials while simultaneously excluding parental input violate

this principle and should not be permitted to stand. The District Secrecy Policies fit squarely in this category and are thus unconstitutional.

The same was recognized by this Court in *Mahmoud v. Taylor*. Justice Alito explained that it is parents who direct the religious and moral upbringing of children, and that positive reinforcement of opposing views by schools undermines that ability. 2025 WL 1773627 at *16. When schools present information on such "hotly contested" issues, "they exert upon children a psychological 'pressure to conform' to their specific viewpoints." *Id.* at *16-*17 (quoting *Yoder*, 406 U.S. at 211). The danger to parental rights in these situations "is only exacerbated by the fact that [information] will be presented to young children by authority figures. . . .". *Id.* Importantly, this Court "ha[s] recognized the potentially coercive nature of classroom instruction of this kind" in areas outside of religious freedom. *Id.* "Young children . . . are often impressionable and implicitly trus[t] their teachers." *Id.* (internal quotation marks omitted).

In this case, the Daughters were told by an authority figure—a teacher—that they may not be able to trust their parents with the topics of conversation at the GSA meeting. Much like the books in *Mahmoud*, the Secrecy Policies at issue here "implicate direct, coercive interactions between the State and its young residents." *Id.* at *19. The interactions at issue in the present case similarly conflict with this Court's precedents upholding parental rights and must not be permitted.

Mahmoud is also instructive regarding access to public education. Although its focus is free exercise, the

Court recognized that the mandatory nature of public education put parents in the position of either accepting burdensome school policies or spending money out of pocket to send their children to private schools. *Id.* at *20-*21. As the Court explained, "[i]t is both insulting and legally unsound to tell parents that they must abstain from public education in order to raise their children in their religious faiths, when alternatives can be prohibitively expensive and they already contribute to public schools." *Id.* at *21. The same logic applies to the present case. Petitioners should not be forced to choose between accessing public education and maintaining their parental rights.

II. This Court Should Grant Certiorari Because This Case Presents a Question of Significant National Importance.

A. Policies Discouraging Disclosure of Student Information to Parents Are Widespread.

This case is one of many seeking to affirm the "fundamental constitutional right to make decisions concerning the rearing of" children, *Troxel*, 530 U.S. at 70, with respect to school policies that, "without parental knowledge or consent . . . encourage[] a student to transition to a new gender or assist[] in that process." *Parents Protecting Our Children, UA v. Eau Claire Area School District, Wisconsin, et al.*, 604 U.S. ___, 145 S. Ct. 14, 14 (Mem.) (2024) (Alito, J., dissenting). As such, it reflects a "question of great and growing national importance," *id.*, that requires this Court's attention.

Respondent is hardly the only school district with a gender identity policy that interferes with parental rights. In fact, it has become a common theme for schools across the nation to implement secretive or exclusionary gender identity communication policies that purposefully interfere with parental authority. *See*, *e.g.*, *List of School District Transgender-Gender Nonconforming Student Policies*, Defending Education (Apr. 21, 2025)[7] (indicating that 1215 districts involving 21,314 schools have secrecy policies that affect 12,360,787 students); Josh Christenson, *Nearly 6,000 Public Schools Hide Child's Gender Status from Parents*, New York Post (Mar. 8, 2023, 6:25 pm)[8]; *Summary Report on "Gender Identity" Indoctrination in the Schools*, WDI USA (last visited July 21, 2025).[9] These policies reflect the growing trend among schools to exclude parents from accessing the information necessary to make important decisions regarding their children and thereby to directly interfere with the fundamental parental rights repeatedly acknowledged and upheld by this Court. To date, these school districts have undertaken their unconstitutional actions with impunity in a brazen campaign to commandeer parental authority for themselves.

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7. https://defendinged.org/investigations/list-of-school-district-transgender-gender-nonconforming-student-policies/?gad_source=1&gclid=CjwKCAjwouexBhAuEiwAtW_Zx2FaQavHLO72kn9htjFcBUINvCzAg4dFGuZaXwsdP04uUv58QfRMNRoC7VQQAvD_BwE (last updated April 21, 2025)

8. https://nypost.com/2023/03/08/us-public-schools-conceal-childs-gender-status-from-parents/

9. https://womensdeclarationusa.com/gender-identity-indoctrination-in-our-schools/summary-report-on-gender-identity-indoctrination-in-the-schools/

Unfortunately, the path for parents to protect their rights (and their children) is littered with hurdles. Many cases have been dismissed for lack of standing. For example, the District Court in the present litigation initially denied the Parents standing because they withdrew the Daughters from WMS after they discovered Respondent was secretly informing and encouraging their transitions. App. at 85a. In other words, to have standing, Petitioners would have had to allow themselves and their Daughters to continue to be subjected to the District Secrecy Policies and suffer continued harm in order to establish a cognizable injury.

However, even if the Parents were willing to subject themselves and the Daughters to this continued harm, that situation requires parental awareness, which is not a guarantee considering the secret nature of this type of policy. For example, in *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, the Fourth Circuit explained that a similar policy permitted "public schools to hide the very information about the children that would establish the injury." 78 F.4th 622, 631 (4th Cir. 2023), *cert. denied sub nom. Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 144 S. Ct. 2560 (2024). In the Fourth Circuit's view, the following would need to occur to establish a cognizable injury under the challenged policy in that case:

> (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.

Id. at 631. The court further recognized that "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." *Id.* Parents in such cases are left with no recourse to a policy that facially infringes on their rights unless and until this attenuated chain of events takes place, at which time they still may lack standing. This Court denied review of the parents' fundamental rights claims in that case. 144 S. Ct. 2560 (2024).

The Seventh Circuit came to a similar result in *Parents Protecting Our Children, UA v. Eau Claire Area Sch. Dist., Wisconsin*, 95 F.4th 501 (7th Cir.), *cert. denied*, 145 S. Ct. 14 (Mem.) (2024). In that case, an association of concerned parents challenged administrative guidance for gender identity support promulgated by the school district. Again, that court recognized it was "clear that their members harbor genuine concerns about possible applications of the School District's policy." *Id.* at 503. It went on to explain, however, that "[u]nless that policy operates to impose an injury or to create an imminent risk of injury—a worry that may never come to pass—the association's concerns do not establish standing to sue." *Id.* The parents petition for relief in that case was also denied by this Court. 145 S. Ct. 14 (2024). These courts, much like the court below, dismissed based on supposed procedural issues and thereby avoided dealing with the constitutional questions presented.

In the present litigation, although the Parents found out about the policy and were found to have established standing, they were denied recourse because the Tenth Circuit determined that the District Secrecy Policies were not the "moving force" of the Parents' alleged injuries. App. at 22a. This view conveniently ignores that had the Policies not existed, there would be no question of Respondent's interfering with fundamental parental rights, indicating that they were indeed the impetus to the injury.

These cases evince the difficulties facing parents in challenging gender identity communication policies. This Court's intervention is needed to right the ship and re-affirm that parental rights are in fact infringed by policies that subordinate the presumption that fit parents act in the best interest of their children to government authority and discretion. This subjective determination is made by school officials without consideration of any of the traditional objective factors set out in statutes and case law.

A recent case in Kansas brought by a teacher asserting First Amendment protections highlights the nature of parental rights and explains the constitutional problems with gender identity policies that exclude parents:

> Presumably, the District may be concerned that some parents are unsupportive of their child's desire to be referred to by a name other than their legal name. Or the District may be concerned that some parents will be unsupportive, if not contest, the use of

> pronouns for their child that the parent views as discordant with a child's biological sex. But this merely proves the point that the District's claimed interest is an impermissible one because it is intended to interfere with the parents' exercise of a constitutional right to raise their children as they see fit. And whether the District likes it or not, that constitutional right includes the right of a parent to have an opinion and to have a say in what a minor child is called and by what pronouns they are referred.
>
> The Court can envision that a school would have a compelling interest in refusing to disclose information about preferred names or pronouns where there is a particularized and substantiated concern that disclosure to a parent could lead to child abuse, neglect, or some other *illegal* conduct. Indeed, at least in Kansas, were such a case to arise, a school would likely have to report the matter to the Department for Children and Families. *See generally* K.S.A. § 38-2223. But the District has not articulated such an interest here—either abstractly or in the case of the specific students in Plaintiff's class.

Ricard v. USD 475 Geary Cnty., KS Sch. Bd., 2022 WL 1471372, at *8 (D. Kan. May 9, 2022). While school districts have a legitimate interest in protecting students, the mechanism for providing such protection is through official channels such as child protective services or the state's court system, and not through implementing blanket

policies to deprive all parents of their constitutional rights. Schools are not triers of fact. Policies such as the District Secrecy Policies infringe upon those rights. This Court's intervention is necessary to confirm that parents are not powerless in the face of school policies that denigrate parental rights across the country.

CONCLUSION

Following this Court's holdings in *Mahmoud*, *Pierce*, *Meyer, Parham*, and *Troxel*, it is beyond question that parents have fundamental constitutional rights with respect to the religious upbringing of their children. While our Petitioners do have deeply held religious beliefs, they assert that parental rights are broader than the religious context. The 14th Amendment and this Court's precedents protect the right of parents such as Petitioners to determine the care and upbringing of their children against school policies that secretly confiscate and exercise that authority. They should have their day in court on substantive grounds to prove it. Therefore, denial of leave to amend the Complaint should be overturned.

This Court should grant the Petition.

Respectfully submitted,

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Dated: July 21, 2025

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED APRIL 22, 2025

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 24-1254

JONATHAN LEE; ERIN LEE; NICOLAS JURICH; LINNAEA JURICH,

Plaintiffs-Appellants,

and

C.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS; M.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS; H.J., A MINOR, BY AND THROUGH PARENTS NICOLAS AND LINNAEA JURICH AS NEXT FRIENDS,

Plaintiffs,

v.

POUDRE SCHOOL DISTRICT R-1,

Defendant-Appellee,

and

POUDRE SCHOOL DISTRICT R-1 BOARD OF EDUCATION,

Defendant.

Appendix A

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:23-CV-01117-NYW-STV)

Before **MATHESON**, **PHILLIPS**, and **McHUGH**, Circuit Judges.

PHILLIPS, Circuit Judge.

Like many twelve-year-old children who attend a new school, C.L. struggled. Her homeroom teacher, Jenna Riep, noticed and began talking one-on-one with C.L. These talks included discussions about C.L.'s gender identity and her freedom to use masculine pronouns if she preferred. Despite these conversations, C.L. never questioned her gender identity. Eventually, Riep, who was also the school's art teacher, invited C.L. to an after-school art-club meeting. When C.L. arrived at the meeting, she saw that it was really a Gender and Sexualities Alliance (GSA) meeting.

The meeting featured a guest speaker, Kimberly Chambers, a substitute teacher in the district. Chambers lectured the assembled students on gender-identity issues for about ninety minutes. She said that students uncomfortable with their bodies were likely transgender and as such were more prone to suicide. She gave LGBTQ-themed prizes to students who came out as transgender during the meeting. She warned the students that it might not be safe to tell their parents about the meeting, and she invited the students to communicate with her confidentially after providing them her personal contact information.

Though C.L. had not previously questioned her gender identity, she announced herself as transgender at the meeting. As C.L. was leaving, Riep again told her that she didn't have to tell her parents about the meeting. But when she got home, C.L. tearfully told her parents that she was transgender and recounted what had happened at the meeting. The next day, her parents disenrolled her from the school district. As spelled out more below, H.J., one of C.L.'s classmates, had similar experiences with Riep and Chambers at the next two after-school GSA meetings.

C.L.'s and H.J.'s parents (the Lees and the Juriches) sued the Poudre School District and its Board of Education under the Fourteenth Amendment, alleging a violation of their parental substantive-due-process rights. After the district court granted the district's motion to dismiss the complaint without prejudice, the parents moved to amend their complaint. This time they asserted a single claim against the school district for violating their parental substantive-due-process rights. They dropped their request for injunctive relief and instead sought only money damages for the cost of private schooling, medical expenses, counseling fees, damage to the parents' reputation, transportation expenses, and emotional anguish.

The district court denied the motion to amend the complaint after concluding that the parents had failed to plausibly allege municipal liability. We agree and hold that the parents have not plausibly alleged that the district's official policy was the moving force behind their alleged injuries. So exercising our appellate jurisdiction under 28 U.S.C. § 1291, we affirm.

Appendix A

BACKGROUND

I. Factual Background[1]

A. C.L. (Lee)

In fall 2020, the Lees moved to Wellington, Colorado. Their twelve-year-old daughter, C.L., enrolled at Wellington Middle-High School (WMS) as a sixth grader. C.L. struggled to make friends. Her homeroom teacher, Jenna Riep, took an interest in her, and had several one-on-one conversations with C.L. about C.L.'s gender identity. Among other things, Riep stressed to C.L. that C.L. could reject her feminine pronouns. Despite those conversations, C.L. never questioned her gender identity.

On May 4, 2021, Riep, who was also the school's art teacher, invited C.L. to an after-school meeting, describing it as being for the "GSA Art Club." App. vol. II, at 275 ¶¶ 47-49. C.L. didn't know that GSA was shorthand for Gender and Sexualities Alliance, and she agreed to attend the meeting because she liked art. Soon after arriving, C.L. saw that the meeting wasn't about art. Instead, for ninety minutes, Kimberly Chambers, a substitute teacher in the school district, lectured the assembled students about gender identity and sexual orientation. Among other things, Chambers told the students that if they were not completely comfortable in their bodies, they were

1. Because we are reviewing the denial of a motion to amend on futility grounds, we rely on well-pleaded factual allegations in the proposed amended complaint as construed most favorably to the parents. *See Chilcoat v. San Juan Cnty.*, 41 F.4th 1196, 1217-18 (10th Cir. 2022).

likely transgender. Her message led several students to announce during the meeting that they were transgender. For those students, Chambers awarded themed prizes, including LGBTQ-pride flags.

Though C.L. had not questioned her gender identity or experienced symptoms of gender dysphoria before this, she came out at the meeting as transgender. She did so after Chambers advised the students that transgender youth are more likely to attempt and complete suicide than their cisgender peers. Before the meeting ended, Chambers warned the students that it might not be safe to tell their parents they are transgender or about the meeting. Instead, she said that she could be trusted and gave the students her personal cell-phone number and Discord information so they could talk with her at any time.[2]

As C.L. was leaving the meeting, Riep pulled her aside and reemphasized that she shouldn't feel pressured to tell her parents about the meeting. Even so, C.L. told Riep that she planned to tell her mother that she was transgender because she believed that her mother would be accepting of this. In response, Riep reiterated that she didn't have to tell her mother.

When C.L. got home, she told her parents that she was transgender. That evening, the family had several

2. Discord is an application that allows users to send voice, video, and text messages to other users. *What is Discord*?, Discord (May 12, 2022), https://discord.com/safety/360044149331-what-is-discord (last visited April 18, 2025).

stressful conversations about C.L.'s gender identity, and C.L. tearfully recounted that Riep and Chambers had warned her that it might be unsafe to come out to them. Astonished at what they had heard, the Lees disenrolled C.L. from the district the next day and enrolled her in a private school. Over the next few months, C.L. experienced suicidal thoughts and received counseling for the gender and sexuality confusion she was experiencing.

After the Lees disenrolled C.L. from attending school in the district, WMS staff internally discussed involving child-protective services to conduct a wellness check on C.L. When the Lees contacted Kelby Benedict, the WMS principal, to discuss what happened at the GSA meeting, he insisted on going to the Lee home so that, unbeknownst to the Lees, he could check on C.L. The Lees were again astonished when Benedict defended Riep and Chambers and told the Lees that students who attended GSA meetings were expected to keep the meetings confidential to ensure a safe space for open discussion.

The Lees had not known that Riep would be discussing gender-identity issues with C.L. or that Riep would solicit C.L. to attend a GSA meeting. After learning this, Ms. Lee expressed her concern to the WMS staff not only about the subject matter discussed at these meetings but also about the district's policies designed to keep parents from knowing what was happening.

B. H.J. (Jurich)

After C.L. attended the GSA meeting, Riep invited another sixth grader, H.J., to a GSA meeting set for the

next Tuesday. H.J. attended that meeting and another the following Tuesday. H.J.'s experience was like C.L.'s—H.J. was told that if she didn't like her body, she was likely transgender; that doctors or parents can misassign gender at birth; and that transgender people are more likely to commit suicide. Riep also warned H.J. that it may not be safe to talk to her parents about her gender identity and emphasized that she didn't have to tell anyone what they discussed at the GSA meetings.

After those two meetings in the spring semester of sixth grade, H.J. began suffering from suicidal ideation. Because H.J. had been told that transgender people were more likely to commit suicide, H.J. believed that her suicidal thoughts further affirmed that she must be transgender. That in turn increased the intensity of her suicidal thoughts. This cycle continued for about six months and harmed H.J.'s mental health. During this time, H.J.'s friendships with classmates deteriorated, and she became nervous about attending classes taught by Riep, who kept asking her to return to the GSA meetings. Things got so bad that H.J. asked her parents to homeschool her so she wouldn't have to go to WMS. Soon after that, H.J. attempted suicide. After receiving psychiatric treatment, H.J. re-enrolled in WMS to start eighth grade. But soon after the school year began, her parents disenrolled her from the district after she told them she felt unsafe being in the same building as Riep.

H.J. pinpoints the GSA meetings as the beginning of her emotional decline. Before going to the GSA meetings, H.J. never questioned her gender identity or contemplated suicide. No one from the district told her parents that she

was attending GSA meetings or that Riep was asking her to attend meetings.

C. The Policies

1. The District's Written Policies

The parents spotlight several written policies of the district, grouping them together as a single core district "Policy." They attached just one policy (the Guidelines) to their proposed amended complaint, so we must rely on the parents' allegations about what the other policies say. The parents refer to the policies by nicknames, which sometimes makes it difficult to tell which policy they are referencing. We've included the names that the parents have assigned each policy, but we mostly refer to the policies by their titles.

IHAM Policy ("Illusory Notice Policy"). Under this policy, the district required notice to the parents before their child would be instructed on health education. This enabled parents to excuse their child from attending that curriculum. Though the parents allege that the district intended the GSA meetings with C.L. and H.J. to "advance[] the health education curriculum," App. vol. II, at 298 ¶ 198, the parents do not challenge the school's curriculum or argue that the GSA meetings were subject to this policy, Op. Br. at 32; Reply Br. at 20-21. Instead, the parents allege that this policy "deliberately mollifies parental anxiety and caution regarding the teaching of highly sexualized themes." App. vol. II, at 290 ¶ 151.

KD Public Information and Communications Policy ("Deceptive Reassurance Policy"). Under this policy, the district required its staff to "[k]eep the public informed about the policies, administrative operations, objectives, and educational programs of the schools." *Id.* at 291 ¶ 159 (emphasis omitted). The policy placed "great importance on the role of the teacher as communicator and interpreter of the school program to parents[.]" *Id.* at 291-92 ¶ 160 (emphasis omitted).

Guidelines for Supporting Transgender and Non-Binary Students ("Guidelines"). Under the Guidelines, the district directed its staff in their interactions about students' gender identity.[3] The parents focus on these provisions:

- "School personnel should not disclose information that may reveal a student's transgender or non-binary status to others, including students, parents, or community members, unless legally required to do so or unless the student has authorized such disclosure." *Id.* at 311; *see id.* at 292 ¶ 163.

3. The proposed amended complaint relies on a revised version of the Guidelines that went into effect two years after the parents' children attended the GSA meetings. We surmise that an earlier version was in effect when C.L. and H.J. attended GSA meetings. App. vol. II, at 275 ¶ 49; *id.* at 284 ¶ 108, 309. The district notes this but provides no additional information. We will consider the version of the Guidelines attached to the proposed amended complaint, because they are central to the parents' claim and no one disputes their authenticity. *E.W. v. Health Net Life Ins. Co.*, 86 F.4th 1265, 1286 n.3 (10th Cir. 2023).

- "The school counselor will work with the student in coming out to their family and others, as appropriate, *and collaborate with families to promote consistent gender support*."[4] *Id.* at 311 (emphasis added); *see id.* at 293 ¶ 166.

- "When contacting or communicating with a parent/guardian of a transgender or non-binary student, school staff should use the name and pronouns that the student's parent/guardian use, unless the student requests otherwise." *Id.* at 311; *id.* at 293 ¶ 167.

- "If a parent/guardian asks a staff member about whether their student uses another name/pronoun at school or has other gender-related questions, the staff member should refer them to the school counselor, who can address questions and concerns that the parent/guardian may have. If a school counselor receives questions from a parent/guardian, they should use their professional judgment to determine how best to follow up with the student and then the parent/guardian." *Id.* at 311; *id.* at 293 ¶¶ 167, 169-70.

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4. The proposed amended complaint omits the italicized language. *Compare* App. vol. II, at 293 ¶ 166, *with id.* at 311. The Guidelines' full language controls. *See Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1105 (10th Cir. 2017).

Gender Support FAQ ("FAQ"). The district provided official responses to frequently asked questions about its handling of gender-identity issues. In one response, the district advised that it would not inform a parent of any private discussions between staff and students about sex, sexual orientation, or gender identity. In another, the district said that to "the extent possible, a school counselor will not out the student to their parent(s)/guardian(s) before the student is ready to come out themselves." *Id.* at 294 ¶ 175 (alteration accepted). And in another, the district expressed that school counselors needed to "balance the inherent right of parents and guardians to their student's information and the potential impact this sharing [of a child's transgender or non-binary status at school] could have on the student and the student's trust in sharing future concerns with the school counselor." *Id.* at 294-95 ¶ 176 (emphasis omitted).

A Toolkit for Supporting Transgender and Gender Expansive Nonconforming Students ("Toolkit"). The Toolkit stated that "'[p]rior to notification of any parent/guardian . . . regarding the transition process, school staff should work closely with the student to assess the degree, if any, the parent/guardian will be involved in the process' of the child's gender transition." *Id.* at 296 ¶ 181 (emphasis omitted). It also stated that "[w]hen a student elects to transition during the school year, the school should schedule a meeting with the student and parents/guardians (provided they are involved in the process)[.]" *Id.* ¶ 182 (emphasis omitted).

Individual Gender Support Form ("District Gender Support Plans"). As part of its operations, the district

provided "[a]n Individual Gender Support Form [as] an official document included in a child's education records, which directs school engagement with the child. The Individual Gender Support Form dictates how [] school employees are expected to address a particular child." *Id.* ¶ 185. A student could complete the forms without parental consent and school staff could choose not to notify the parents about their child's completing the form until the parent asked. *Id.* at 296-97 ¶¶ 186-88.

2. The district's de facto policies.

The parents alleged that the district also had several de facto policies, including these:

GSA Meetings. The district had a "*de facto* policy of refusing to notify parents of the child's participation" and of telling the students that the meeting was confidential. *Id.* at 298 ¶¶ 198-99.

Personnel Training. The district encouraged staff to attend training sessions on LGBTQ issues at which staff were trained not to reveal a student's non-conforming gender-identity to the student's parents.

Circumventing Parental Notice. The district stored on its record-keeping software students' personal-identifying information, and any changes needed to be made by a parent or by means that would notify a parent. Even so, district staff sometimes circulated lists of students' preferred names and pronouns without updating the record-keeping software so parents would be unaware

of the district's use of a preferred name or pronoun. And the district's medical staff sought guidance from the district on maintaining and using medical records with a student's preferred name without those records becoming legally accessible to parents under federal-disclosure law.

Misleading Responses to Parental Inquiries. After Riep repeatedly met privately with C.L. to discuss gender-identity issues, and after C.L. attended the GSA meeting, the Lees met with Principal Benedict in 2022 and asked whether Riep had an "appropriate relationship" with C.L. Benedict said yes.

After the Juriches learned that H.J. had attended two GSA meetings, they met with Benedict and asked if the district had taught any lessons on sexuality at GSA meetings during that academic year. Benedict said it had not.

Both parents allege that Benedict's answers were false and show a de facto policy of misrepresenting information about children's gender-identity to their parents.

II. Procedural Background

The Lees and Juriches sued the Poudre School District and the district's Board of Education, on behalf of themselves and their children. They alleged the district had violated their Fourteenth Amendment substantive-due-process rights by interfering with their parental decision-making, for which they sought injunctive relief and monetary damages to reimburse the cost of

private education, medical expenses, counseling fees, compensation for damages to the parents' reputation, transportation expenses, and compensation for emotional anguish. The district moved to dismiss the complaint, and the district court granted its motion.[5] *Lee v. Poudre Sch. Dist. R-1*, No. 1:23-CV-01117-NYW-STV, 2023 U.S. Dist. LEXIS 226003, 2023 WL 8780860, at *1 (D. Colo. Dec. 19, 2023).

After that, the parents moved to amend their complaint, attaching a proposed amended complaint that substantially narrowed their suit. The proposed amended complaint dropped the minor children as plaintiffs, removed the Board of Education as a defendant, and no longer sought injunctive relief. The proposed amended complaint contained one count against one defendant—the district—and sought money damages for a violation of their Fourteenth Amendment rights.

The district opposed the motion to amend the complaint, contending that the proposed amendment would be futile. The court agreed with the school district after concluding that the plaintiffs had failed to plausibly

5. The district court dismissed the complaint on some grounds not relevant to this appeal. For example, the district court concluded the parents lacked standing to seek prospective injunctive relief because none of their children were still enrolled in the district and that the children lacked standing to assert a parental-rights claim. *See Lee v. Poudre Sch. Dist. R-1*, No. 1:23-CV-01117-NYW-STV, 2023 U.S. Dist. LEXIS 226003, 2023 WL 8780860, at *5, *7, *19 (D. Colo. Dec. 19, 2023).

allege municipal liability against the district. *Lee v. Poudre Sch. Dist. R-1*, No. 1:23-CV-01117-NYW-STV, 2024 U.S. Dist. LEXIS 88705, 2024 WL 2212261, at *11 & n.10 (D. Colo. May 16, 2024). The parents timely appealed the judgment.

STANDARD OF REVIEW

"We review the district court's denial of leave to amend for an abuse of discretion." *Quintana v. Santa Fe Cnty. Bd. of Comm'rs*, 973 F.3d 1022, 1033 (10th Cir. 2020). Though courts should freely grant leave to amend a complaint, they may deny leave to amend if doing so would be futile. *Chilcoat v. San Juan Cnty.*, 41 F.4th 1196, 1217-18 (10th Cir. 2022); *see* Fed. R. Civ. P. 15(a)(2). "A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." *Chilcoat*, 41 F.4th at 1218 (internal quotation marks omitted). Here, the district court deemed the proposed amended complaint futile after concluding that it failed to state a plausible municipal-liability claim. *Lee*, 2024 WL 2212261, at *11 & n.10; *see* Fed. R. Civ. P. 12(b)(6). "When a district court denies amendment based on futility, our review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Chilcoat*, 41 F.4th at 1218 (internal quotation marks omitted). So we review de novo whether the proposed amended complaint states a plausible municipal-liability claim. *See id.*

Appendix A

DISCUSSION

I. The Parents' Substantive-Due-Process Claim

The parents bring a Fourteenth Amendment substantive-due-process claim against the district, arguing that by "discourag[ing] disclosure" of a child's transgender status, the district's policies violated their parental rights as guaranteed by the Fourteenth Amendment's Due Process Clause.[6] Op. Br. at 4. Substantive-due-process claims are rooted in the Fourteenth Amendment Due Process Clause's "substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (internal quotation marks omitted). The asserted fundamental liberty interest must be precise and only cautiously expanded to prevent courts from transforming "the liberty protected by the Due Process

6. By "discouraged disclosure" as alleged in this case, the parents refer to (1) Riep's and Chambers's discouraging the GSA attendees from telling their parents what was discussed at those meetings, and (2) Riep's private conversations with C.L. during which Riep told C.L. she could reject feminine pronouns. Not implicated in this appeal are other categories of what might fall into a category of "discouraged disclosure," including the district's use of a student's affirming name and pronouns at school but use of the student's legal name with parents, along with all other efforts to conceal that from the parents. *See* App. vol. I, at 48. Because the parents allege that the only discouraged disclosure in this case occurred at the GSA meetings and in Riep's private conversations with C.L., we have no need to decide whether other instances of discouraged disclosure would violate a fundamental right.

Clause" into their policy preferences. *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997); *accord Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 239-40, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022).

The Supreme Court has recognized that parents have a fundamental right to determine "the care, custody, and control of their children." *Troxel*, 530 U.S. at 66. That right includes the ability "to direct the upbringing and education of children under [the parents'] control." *Id.* at 65 (quoting *Pierce v. Soc'y of the Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510, 530, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)). Embedded in a parent's fundamental right is a "traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* at 69. That parental right includes the right to "control the education" of their child, *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), which encompasses the right to remove their child from public school, *Pierce*, 268 U.S. at 530, 534-35.

But the scope of that right has limits. For example, parents have no right to "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 *Wisconsin v. Yoder*, 406 U.S. 205, 239, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (White, J., concurring)). And our court has ruled that a parent doesn't have "a constitutional right to control each and every aspect of their children's education

and oust the state's authority over that subject." *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998).

After briefing and oral argument, we remain uncertain about what the parents assert qualifies to meet their asserted fundamental right. They simply restate the broad descriptions of parental rights described above. At oral argument, counsel simply pointed us to *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), for the principle that parents are presumed to act in the best interest of their child, with "full deference [being] due to the parents." Oral Argument at 10:22-10:34. From that they argue that the district violated that fundamental right because its policies ignored the presumption in favor of the parents and instead "gave the deference to school administrators."[7] *Id.* So as we understand it, the parents assert a general substantive-due-process right barring school districts from discouraging disclosure of information to parents.[8] *Id.* at 09:40-09:47. At oral

7. In *Troxel*, the Supreme Court held unconstitutional a state statute that permitted visitation rights with a child if the visitation served the best interest of the child. 530 U.S. at 60, 63. The Court struck down the statute, because the statute allowed judges to decide what was in the best interest of a child without any deference to the objection of a fit custodial parent. *Id.* at 67, 72. The Court noted that the parental right contains a "traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* at 69.

8. At oral argument, the parents conceded that their parental rights do not *require* the school to disclose information. Oral Argument at 09:40-09:54. In other words, the parents do not allege they had a right to be told their child was being asked to attend, or was attending, GSA meetings.

argument, the parents argued that the asserted right against "discouraged disclosure" (that is, the teachers' cautioning the GSA attendees against telling their parents about the meetings) applies only "on the transgender issue." *Id.* at 13:00-13:15. But the parents cite no authority for what "the transgender issue" includes, and fail to argue why the right would apply only to that information.

Ultimately, we need not decide whether the parents have sufficiently identified a fundamental right that would afford them relief, *see Glucksberg*, 521 U.S. at 720-21, because we conclude that they've failed to plausibly allege municipal liability.

II. The parents fail to plausibly allege municipal liability against the district.

A. Legal Framework

To state a plausible municipal-liability claim, a plaintiff must allege (1) that the municipality had a policy or custom, which can take multiple forms, including a formal regulation or policy statement, or a widespread practice that was "so entrenched . . . as to constitute an official policy";[9] (2) that the municipality was deliberately

9. We recognize three other forms of municipal policy or custom: "[1] the decisions of employees with final policymaking authority; [2] the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or [3] the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused." *Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1283 (10th

indifferent to the obvious consequences of the policy; and (3) that the policy caused the plaintiff's constitutional injury. *See Finch v. Rapp*, 38 F.4th 1234, 1244 (10th Cir. 2022); *see also Waller v. City & Cnty. of Denver*, 932 F.3d 1277, 1283 (10th Cir. 2019); *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

To demonstrate deliberate indifference, the parents "may show that the municipality had actual or constructive notice that its action or failure to act was substantially certain to result in a constitutional violation and consciously or deliberately chose to disregard the risk of harm." *Finch*, 38 F.4th at 1244 (cleaned up). "Notice can be established through a pattern of tortious conduct or if a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction." *Id.* (internal quotation marks omitted).

To establish causation, the parents must allege more than that an employee violated their constitutional rights. *Monell*, 436 U.S. at 691. In addition, they must plausibly allege that the district "through its *deliberate* conduct . . . was the 'moving force' behind the injury alleged." *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). In other words, the parents must show "a direct causal link between the municipal action and the deprivation of federal rights." *Id.* We apply

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Cir. 2019) (internal quotation marks omitted). The parents have not raised these other forms of municipal policy or custom as being at issue in this case. *See* Reply Br. at 10.

such "rigorous standards of culpability and causation . . . to ensure that the municipality is not held liable solely for the actions of its employee." *Id.* at 405.

B. Analysis

The parents assert that the district violated their parental rights through a formal regulation and through an associated informal custom. But the parents don't identify a formal regulation of the district requiring the GSA meetings or Riep's and Chambers's statements at them. Instead, in a single sentence in their briefing, they argue that the policies "promote[d]" the idea that the district knew better than the parents and that approval of this idea authorized the GSA meetings and the teachers' statements and activities at the meetings. Reply Br. at 10-11; *see id.* (arguing that the district's policies are formal regulations because they "individually and collectively promote the idea that parents are not trustworthy, that disclosure is to be discouraged, and that the school employee's judgment is superior to the parents' when it comes to issues of gender identity and expression"); App. vol. II, at 303 ¶ 223 ("Taken together, [the district's] official and *de facto* policies evidence a custom and unwritten policy of secrecy towards parents on matters regarding transgenderism, sexual orientation, and gender identity."); App. vol. II, at 305 ¶ 233 ("This avoidance of parental disclosure and encouraged student secrecy was undertaken as part of the custom and standard operating procedures of [the district].").

But the parents have not plausibly alleged that policy was the moving force behind their alleged constitutional injury.[10] The parents don't explain how policies that presume the district knows better than parents, or that discourage disclosure, directly caused district staff to do any of the following:

- recruit students to attend GSA meetings (including by misleading one student to coax her attendance),
- present dubious information to students about being transgender and about suicide,
- award prizes to students if they identify as transgender at the meeting,
- offer the staffs' personal contact information to students so they could talk any time, and
- tell students that they didn't have to tell their parents about what happened at the meeting, and that it might be unsafe to talk with their parents about gender-identity issues.

Though a formal regulation or widespread practice that discourages disclosure may be "in harmony" with what

10. We will assume without deciding that the district's policies meet our definition of a formal regulation or policy statement. We will also assume that the policies promote the ideas the parents allege.

happened here, under our rigorous causation standard, the parents haven't plausibly alleged it was the moving force of their alleged injury. Op. Br. at 1.[11]

CONCLUSION

We affirm.

11. We also note that the parents have not plausibly alleged deliberate indifference—that is, the parents have not alleged that the district was on "actual or constructive notice" that its policies or customs were substantially certain to cause constitutional violations but still deliberately chose to disregard that risk. *See Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 771 (10th Cir. 2013) (internal quotation marks omitted).

McHUGH, Circuit Judge, concurring:

I concur in the result, but I write separately because in my view, the parents have alleged that the district's policies implicate a cognizable substantive due process right. As alleged, the district's employees, by policy, are required to help students conceal their gender identities from their parents. If such a policy exists, it runs counter to the constitutional "presumption that fit parents act in the best interests of their children." *Troxel v. Granville*, 530 U.S. 57, 68, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). But the present parents have not alleged that this policy injured them; the only injury they point to is an impaired parent-child relationship after several district employees encouraged C.L. and H.J. not to discuss their gender identities with their parents. Yet the *district's policies* do not instruct employees to discourage students from discussing their gender identities with their parents, and thus did not cause these injuries. Accordingly, I concur in the judgment.

The parties focus their arguments on the written Guidelines, which holistically set forth the district's policies for supporting transgender students. At multiple points, the Guidelines instruct employees to help students conceal their gender identities from their parents, if the student so chooses. Most pointedly, the Guidelines state: "When contacting or communicating with a parent/guardian of a transgender or non-binary student, school staff should use the name and pronouns that the student's parent/guardian use, unless the student requests otherwise." App. Vol. II at 311. The Guidelines also instruct district

employees not to disclose information about a student's gender identity to the student's parents "unless legally required to do so or unless the student has authorized such disclosure." *Id.* And if a parent asks "whether their student uses another name/pronoun at school or has other gender-related questions, the staff member should refer them to the school counselor, who can address questions and concerns that the parent[] may have," using the counselor's "professional judgment." *Id.* at 311. School counselors, for their part, are instructed to "work with [a transgender] student in coming out to their family and others, *as appropriate*." *Id.* (emphasis added).

Additionally, if a student does not want her parents to be involved in preparing a District Gender Support Plan, the Guidelines instruct district employees to "work with the student to support them in their coming out process," noting some students may not want to notify their parents for "personal reason[s]." *Id.* at 319. At the same time, the Guidelines recognize that Support Plans are educational records parents can access under the Family Educational Rights and Privacy Act ("FERPA"). *Id.* But the parents allege the district's employees have created internal lists of students' preferred names and pronouns, thus eliminating any need for students to submit Support Plans or otherwise update the district's online system with their preferred names and pronouns—all to ensure that parents are not told about their children's gender identities. *Id.* at 300-01.

The parents also point to several expressions of the district's policy outside the Guidelines. They allege that

in an answer to frequently asked questions, the district stated its employees will "not out [a transgender] student to their parent(s)[] before the student is ready to come out themselves." *Id.* at 294. They claim the district has a "Toolkit" resource instructing its employees that before alerting parents about a child's "transition process, school staff should work closely with the student to assess the degree, *if any*, the parent/guardian will be involved in the process." *Id.* at 295-96. The parents also assert that the district's employees attended trainings at which they were directed not to "reveal a student's in-school transgender or gender non-conforming identity to that student's parents." *Id.* at 299-300.

In sum, the parents have plausibly alleged that the district, by policy, requires its employees to help students conceal their gender identities from their parents. This policy implicates a substantive due process right the Supreme Court has frequently enforced: "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66. This right "is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court. *Id.* at 65. And integral to this right is the "presumption that fit parents act in the best interests of their children." *Id.* at 68. By so presuming, we recognize that "[t]he child is not the mere creature of the state," *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), and "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," *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944). This

presumption applies unless there is a showing of parental unfitness, such as "inciden[ts] of child neglect and abuse." *Parham v. J.R.*, 442 U.S. 584, 602, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979). Indeed, "[t]he statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Id.* at 603.

The district's policy of helping students keep their parents in the dark about their gender identities turns this presumption on its head. The policy assumes that children of all ages possess sufficient wisdom and maturity to decide their gender identity—and even to transition genders—without parental involvement. But under the Supreme Court's jurisprudence, parents, not children, are presumed to possess the "maturity, experience, and capacity for judgment required for making life's difficult decision." *Parham*, 442 U.S. at 602. While the district may disagree with how some parents may react when they learn about their children's gender identities, the district may not seize control of a child's upbringing based on a "simple disagreement" about what is in the child's best interests. *Troxel*, 530 U.S. at 72. To the contrary, "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68-69.

Quite simply, although the Constitution presumes that parents will act in their children's best interests, the district's alleged policy presumes otherwise by helping

students hide important information from their parents. This policy impedes parents' longstanding, fundamental right "to speak and act on their [children's] behalf."[1] *See Hodgson v. Minnesota*, 497 U.S. 417, 483, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990) (Kennedy, J., concurring in part and dissenting in part).

But as the majority aptly explains, the parents have not alleged that the district infringed this or any other fundamental right. Nothing in the first amended complaint indicates that the district refused to give the parents information about C.L. and H.J.'s gender identities. After she attended her first GSA meeting, C.L. returned home and immediately told her parents that she was transgender. The Lees, therefore, knew from the beginning about C.L.'s newly assumed gender identity. For her part, H.J. never told any district employees that she was transgender, and the Juriches do not allege they were ever denied information about H.J.'s gender identity.

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1. Of course, courts must tread carefully when entering "the 'treacherous field' of substantive due process," *Troxel v. Granville*, 530 U.S. 57, 76, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (Stevens, J., concurring), and we must attempt "to rein in the subjective elements that are necessarily present in due-process judicial review," *Washington v. Glucksberg*, 521 U.S. 702, 722, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). Thus, if the parents had alleged that the district's policy did, in fact, cause a cognizable injury, we would need to closely compare their alleged liberty interest with interests recognized by existing precedent. In my view, the district's alleged policy of helping students hide sensitive information from their parents implicates the Supreme Court's prior descriptions of parents' fundamental right to control their children's upbringing. But I do not address whether the district's policy, as applied to different parents in a different case, would violate substantive due process.

The parents instead allege they were injured because their relationships with their daughters were "very strained" after Ms. Riep and Ms. Chambers encouraged the daughters not to discuss their gender with their parents. Oral Argument at 23:20. But nothing in the Guidelines or the other alleged policies instructs district employees to *discourage* students from discussing issues of gender with their parents. Instead, the policies simply require employees to assist students in withholding that information—if the student makes the decision not to tell. The policies instruct that if the student chooses not to tell her parents, the district employees are to assist with the student's "coming out."

Further, if the district's policy of helping students who choose not to tell their parents about their in-school gender identities infringes a fundamental right, the parents here have not explained how that policy injured them. Recall that despite Ms. Riep's encouragement not to reveal her transgender status, C.L. immediately told her parents she was transgender. And because H.J. never told anyone at the district that she was transgender, there was no information to withhold. Therefore, the parents have not pleaded a core element of municipal liability—that the district's allegedly unconstitutional policy was a moving force that "directly caused" their injuries. *See Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 415, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

Accordingly, I concur that the district court correctly dismissed the case for failure to state a municipal-liability claim.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED APRIL 22, 2025

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 24-1254
(D.C. No. 1:23-CV-01117-NYW-STV)
(D. Colo.)

JONATHAN LEE; ERIN LEE; NICOLAS JURICH; LINNAEA JURICH,

Plaintiffs-Appellants,

and

C.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS; M.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS; H.J., A MINOR, BY AND THROUGH PARENTS NICOLAS AND LINNAEA JURICH AS NEXT FRIENDS,

Plaintiffs,

v.

POUDRE SCHOOL DISTRICT R-1,

Defendant-Appellee,

and

POUDRE SCHOOL DISTRICT R-1 BOARD OF EDUCATION,

Defendant.

Appendix B

JUDGMENT

Before **MATHESON**, **PHILLIPS**, and **McHUGH**, Circuit Judges.

This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED MAY 17, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-01117-NYW-STV

JONATHAN LEE, ERIN LEE, C.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS, M.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS, NICOLAS JURICH, LINNAEA JURICH, AND H.J., A MINOR, BY AND THROUGH PARENTS NICOLAS AND LINNAEA JURICH AS NEXT FRIENDS,

Plaintiffs,

v.

POUDRE SCHOOL DISTRICT R-1, AND POUDRE SCHOOL DISTRICT R-1 BOARD OF EDUCATION,

Defendants.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Memorandum Opinion and Order entered by United States District Judge Nina Y. Wang on December 19, 2023 [Doc. 58], it is

ORDERED that Defendants' Motion to Dismiss Plaintiffs' Complaint [Doc. 29] is GRANTED. It is

FURTHER ORDERED that Count I is DISMISSED without prejudice for lack of subject matter jurisdiction under Rule 12(b)(1) to the extent it is asserted by H.J., C.L., or M.L. It is

FURTHER ORDERED that Count I is DISMISSED without prejudice for failure to state a claim under Rule 12(b)(6) to the extent it is asserted by Jonathan Lee, Erin Lee, Nicolas Jurich, and Linnaea Jurich. It is

FURTHER ORDERED that Count II is DISMISSED without prejudice for failure to state a claim under Rule 12(b)(6).

Pursuant to the Memorandum Opinion and Order entered by United States District Judge Nina Y. Wang on May 16, 2024 [Doc. 69], it is

ORDERED that Plaintiffs' Amended Motion for Leave to Amend Complaint (Oral Argument Requested) [Doc. 64] is DENIED. It is

FURTHER ORDERED that final judgment is hereby entered in favor of Defendants Poudre School District R-1 Board of Education and Poudre School District R-1 and against Plaintiffs Jonathan Lee, Erin Lee, C.L., M.L., Nicolas Jurich, Linnaea Jurich, and H.J. It is

FURTHER ORDERED that Defendants shall have their costs by the filing of a Bill of Costs with the Clerk of

this Court within fourteen days of the entry of judgment, pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1. It is

FURTHER ORDERED that this case is closed.

Dated at Denver, Colorado this 17th day of May, 2024.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/Emily Buchanan
Emily Buchanan, Deputy Clerk

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED MAY 16, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Nina Y. Wang

Civil Action No. 23-cv-01117-NYW-STV

JONATHAN LEE, ERIN LEE, C.L., A MINOR, BY AND THROUGH PARENTS JONTHAN AND ERIN LEE AS NEXT FRIENDS, M.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS, NICOLAS JURICH, LINNAEA JURICH, AND H.J., A MINOR, BY AND THROUGH PARENTS NICOLAS AND LINNAEA JURICH AS NEXT FRIENDS,

Plaintiffs,

v.

POUDRE SCHOOL DISTRICT R-1, AND POUDRE SCHOOL DISTRICT R-1 BOARD OF EDUCATION,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Plaintiffs' Amended Motion for Leave to Amend Complaint (Oral Argument Requested) (the "Motion to Amend") [Doc. 64, filed

January 18, 2024].[1] The Court has reviewed the Motion, the Parties' briefing [Doc. 67; Doc. 68], and the applicable case law, and concludes that oral argument would not materially assist in the resolution of the Motion. For the reasons set forth in this Order, the Motion to Amend is respectfully **DENIED**.

BACKGROUND

The Court has discussed the background of this action previously, *see* [Doc. 58], and will limit its discussion here accordingly.

Original Complaint. On May 3, 2023, Plaintiffs Jonathan Lee ("Mr. Lee"); Erin Lee ("Ms. Lee"); C.L., a minor, by and through parents Jonthan and Erin Lee as next friends; M.L., a minor, by and through parents Jonathan and Erin Lee as next friends; Nicolas Jurich ("Mr. Jurich"); Linnaea Jurich ("Ms. Jurich," and collectively with Mr. Lee, Ms. Lee, and Mr. Jurich, the "Plaintiff Parents"); and H.J., a minor, by and through parents Nicolas and Linnaea Jurich as next friends, initiated this action by filing a Complaint for Damages and Injunctive Relief (the "Original Complaint") against Defendant Poudre School District R-1 (the "District") and the Poudre School District Board of Education (the "Board"). [Doc. 1]. The District is a K-12 public school district in Larimer County, Colorado, and its schools

1. This Court uses the convention of [Doc.] and the page number assigned by the Court Management/Electronic Court Files ("CM/ECF") system for this District to refer to materials filed in this action.

include Rice Elementary School ("RES") and Wellington Middle School ("WMS"), which is now consolidated into Wellington Middle-High School. [*Id.* at ¶¶ 12, 15-16, 22].

In their Original Complaint, Plaintiffs alleged that the District ran an after-school organization called the Genders and Sexualities Alliance ("GSA") at a number its schools, which was not disclosed as part of the District curriculum. [*Id.* at ¶¶ 28-30]. Plaintiffs alleged that GSA meetings "regularly address sex, sexualities, mental health, suicide, sexual orientation, gender identities, and other topics in discussions, lectures, and distributed materials." [*Id.* at ¶ 123]. Plaintiffs alleged that a GSA meeting was held at WMS on May 4, 2021, and following the meeting, C.L., then a twelve-year-old sixth grader at WMS, announced to her mother, Ms. Lee, that "she would be transitioning," although she had never expressed such sentiments to her parents before. [*Id.* at ¶¶ 66-67]. Plaintiffs alleged that "C.L.'s experience at the GSA club led to a months-long emotional decline of gender and sexuality confusion that required counseling and included suicidal thoughts." [*Id.* at ¶ 75].

Additionally, M.L., the seven-year-old son of Mr. and Ms. Lee (the "Lees"), was a first grader at RES in May 2021. [*Id.* at ¶¶ 16, 78]. The Lees alleged that they learned that the District offers gender support plans that "prohibit harassment based on gender identities or gender expressions" and that "oblige [District] personnel to use the elected pronouns and names identified" in a plan when speaking with or about the child who is the subject of the plan. [*Id.* at ¶¶ 79, 81]. The Lees completed gender support

forms for M.L. on three separate occasions, requesting that District personnel refer to M.L. by his biological sex and birth name, but the District denied their request because, they alleged, "gender support plans exist only to benefit and protect the gender identities of transgender children, whereas the Lees sought a gender support plan binding the [District] to benefit and protect the gender identity of their son, including his name and masculine pronouns." [*Id.* at ¶¶ 85, 86, 178].

Plaintiffs further alleged that H.J., then a twelve-year-old sixth grader at WMS, attended GSA meetings on May 11 and May 18, 2021. [*Id.* at ¶¶ 90, 97]. After attending the GSA meetings, H.J. "began to have her first suicidal thoughts." [*Id.* at ¶ 113]. Throughout the summer of 2021, H.J. began leaving notes for her parents, Mr. Jurich and Ms. Jurich (the "Juriches"), about "transgenderism" and being aromantic or asexual. [*Id.* at ¶ 114]. In the fall of 2021, H.J. began to question her gender identity. [*Id.* at ¶ 115]. H.J. then "underwent a significant emotional decline," and in December 2021, requested to be homeschooled. [*Id.* at ¶ 117]. Shortly thereafter, H.J. attempted suicide. [*Id.* at ¶ 118]. H.J., C.L., and M.L. no longer attend District schools. [*Id.* at ¶¶ 15-16, 20].[2]

Plaintiffs alleged that the District and the Board engaged in a pattern and practice of keeping the GSA

2. C.L. was not a student at WMS as of May 14, 2021. [Doc. 64-2 at ¶¶ 94-95]. H.J. was homeschooled in or about December 2021 for the remainder of the 2021-2022 school year, and left permanently "[s]hortly after the start of the 2022-2023 school year." [*Id.* at ¶¶ 130-132].

activities secret from District parents in that they failed to disclose GSA activities to parents and encouraged students to not discuss GSA activities with their parents. [*Id.* at ¶¶ 31-33]; *see also, e.g.*, [*id.* at ¶¶ 58, 104]. Plaintiffs alleged that, in the District, school-sponsored clubs are "considered part of the school program and/or relate[] to a school's curriculum," [*id.* at ¶ 184], and that the District has a policy that requires written notice to parents or guardians of any curriculum that is "part of the District's comprehensive health education program," which includes notice that the parents or guardians may excuse their children from some or all of the comprehensive health education program, [*id.* at ¶ 134]. The Lees and the Juriches contended that they were not given notice of the GSA's activities, agenda, or materials; otherwise, "they would have elected to opt their child out based on [their] deeply held religious beliefs." [*Id.* at ¶¶ 76, 109, 124-26].

Plaintiffs asserted two claims against Defendants pursuant to 42 U.S.C. § 1983: (1) a Fourteenth Amendment substantive due process claim alleging a "[d]enial of [the] right of the Plaintiff Parents to direct the education and upbringing of the Plaintiff Children," asserted by all Plaintiffs against all Defendants, [*id.* at ¶¶ 205-22]; and (2) a Fourteenth Amendment equal protection claim based on the District's denial of a gender support plan for M.L., asserted against both Defendants by Mr. Lee, Ms. Lee, and M.L., [*id.* at ¶¶ 223-31]. They requested the following relief: (1) a permanent injunction requiring (a) that the District provide notice and opt-out rights if gender dysphoria, gender transitioning, or related topics are taught in the District, (b) that these topics

only be taught by qualified and trained professionals, and (c) that all materials used in any such instruction be given to parents fourteen days in advance of any instruction; (2) compensatory damages, including the costs of private-school tuition, medical expenses, counseling fees, compensation for damage to Plaintiffs' reputation, transportation, and emotional anguish; and (3) punitive damages. [*Id.* at 30-31].

On July 7, 2023, Defendants moved for dismissal of the Original Complaint. [Doc. 29]. After full briefing on the merits, this Court granted Defendants' Motion to Dismiss. [Doc. 58]. The Court concluded that the minors, H.J., C.L., and M.L., lacked standing to bring a Fourteenth Amendment substantive due process claim rooted in the right of parents to make decisions concerning the care, custody, and control of their children. [*Id.* at 12-13]. The Court further found that the Plaintiff Parents lacked standing to seek any prospective injunctive relief, because none of their children continued to attend District schools. [*Id.* at 17]. Finally, the Court concluded that the Plaintiff Parents had not adequately stated a violation of the Fourteenth Amendment. [*Id.* at 28]. In addition, the Court concluded that M.L., and the Lees as his next friends, had failed to state a claim under the Equal Protection Clause. [*Id.* at 45]. The Court granted Plaintiffs leave to file a motion to amend. [*Id.* at 46].

Motion to Amend. The Plaintiff Parents filed the instant Motion to Amend on January 18, 2024. [Doc. 64]. In the proposed First Amended Complaint, the Plaintiff Parents assert a sole Fourteenth Amendment

substantive due process claim against the District, again invoking § 1983. [*Id.* at 2; Doc. 64-1; Doc. 64-2]. Although many of the factual allegations remain the same, *see* [Doc. 64-1], the Plaintiff Parents describe "[t]he most important change . . . is [the proposed First Amended Complaint's] focus on the broad policy of the District to unconstitutionally interfere with the parent/child relationship." [Doc. 64 at 2]. The Plaintiff Parents identify this broad policy as "the District Secrecy Policy."[3] [*Id.*; Doc. 64-2 at ¶ 32]. In addition, the Plaintiff Parents have abandoned their requests for injunctive relief and punitive damages. [Doc. 64-2 at 39]. Instead, the Plaintiff Parents seek compensatory damages (including private school tuition, medical expenses, counseling fees, compensation for damage to the Plaintiffs' reputation, transportation, and emotional anguish); reasonable attorneys' fees and costs; and "[a]ny and all other relief that the Court deems appropriate." [*Id.* at 40].

In the proposed First Amended Complaint, the Plaintiff Parents allege that the District has engaged in a custom and practice of secrecy which manifests itself through verbal statements by the District's agents as well as its written policies. [*Id.* at ¶¶ 32-33]. They allege that the District engaged in a pattern and practice of keeping GSA activities secret from parents by not disclosing the GSA as part of the District's curriculum and that "agents of the Defendant District who led the GSA meetings actively

3. Consistent with its obligations at this juncture of the case, this Court construes the proposed First Amended Complaint in the light most favorable to the Plaintiff Parents and uses their terminology without passing on the substantive merits.

encouraged the children to treat the discussions as secret." [*Id.* at ¶¶ 34, 37, 39]. Though the proposed First Amended Complaint is not entirely clear as to the definition of the "District Secrecy Policy," the Plaintiff Parents point to several elements, including: (1) "Policy IHAM," which they describe as "illusory" because it "deliberately mollifies parental anxiety and caution" by providing that written notice will be provided before the commencement of any unit or lesson that is part of the District's comprehensive health education program at a child's school to allow parents to excuse their student, [*id.* at ¶ 152]; (2) "Policy KD Public Information and Communications" that "obliges [the District] and the schools therein to '[k]eep the public informed about the **policies**, administrative operations, objectives, and **educational programs** of the schools," [*id.* at ¶ 159]; (3) the Guidelines for Supporting Transgender and Non-Binary Students ("Guidelines"), [*id.* at ¶ 162];[4] (4) the Gender Support FAQ,[5] which "announces that school staff will not inform a parent or guardian of conversations

4. The Guidelines are attached to Plaintiff Parents' proposed First Amended Complaint. [Doc. 64-2 at 43-56]. The Court previous noted that these Guidelines were dated January 13, 2023. [Doc. 58 at 2 n.1]. But in its Response to the Motion to Amend, the District does not dispute their authenticity, seemingly adopts the Guidelines as in effect in 2021, and argues that the Court may consider them in the context of a motion to dismiss. *See* [Doc. 67 at 5].

5. The Plaintiff Parents cite to https://www.psdschools.org/programs-services/PSD-Gender-Support-FAQs, accessed on May 2, 2023. [Doc. 64-2 at ¶ 174 & n.2]. This Court accessed the website on May 16, 2024. It is not clear that these FAQs were in place, or what they said, in 2021 when the incidents giving rise to this action occurred.

that school staff privately have with their child regarding sex, sexual orientation, or gender identity," [*id.* at ¶ 174]; (5) a toolkit for Supporting Transgender and Gender Expansive Nonconforming Students which states that "'[p]rior to notification of any parent/guardian or guardian [sic] regarding the transition process, school staff should work closely with the student to assess the degree, **if any**, the parent/guardian will be involved in the process' of the child's gender transition," [*id.* at ¶ 181]; (6) the gender support forms, which may be completed wholly by a child without parental notice or consent, [*id.* at ¶ 186]; and (7) the District's de facto policies, including WMS's GSA, [*id.* at ¶ 191].

With respect to these de facto policies, the Plaintiff Parents aver that Jenna Riep, a WMS teacher, personally invited C.L. to attend the GSA club meeting, describing it as an after-school club called the "GSA Art Club." [*Id.* at ¶ 49]. They allege that the principal of WMS, Kelby Benedict ("Mr. Benedict"), confirmed to Mr. Lee that "in order to create a 'safe space,' the GSA clubs created an expectation of confidentiality, and students were strongly encouraged to keep the discussions at GSA meetings private." [*Id.* at ¶ 96]. Further, the Plaintiff Parents allege that the District[6] never provided the Lees notice of the GSA's activities, agenda, or materials; that an employee of the District would solicit C.L.'s attendance without notice and consent from her parents; and that the District had

6. The Plaintiff Parents use the terminology "No Defendant" to frame this allegation. [Doc. 64-2 at ¶ 98]. However, as noted above, the District is the only remaining defendant in the proposed First Amended Complaint. *See* [*id.* at 1].

a policy of keeping these topics secret from parents and encouraging children to do the same. [*Id.* at ¶ 98].

Finally, the Plaintiff Parents allege that District personnel are "regularly encouraged" to attend professional training sessions during which they are trained to "not reveal a student's in-school transgender or gender non-conforming identity to that student's parents." [*Id.* at ¶ 207]. They also allege that there is a "common practice" amongst District personnel to discuss the best means of circumventing parental notice when students seek to use alternative names and pronouns in school. [*Id.* at ¶ 210]. To that end, they aver that District officials consistently directed personnel to avoid revealing the divergent name and pronoun use to parents. [*Id.* at ¶ 214]. The Plaintiff Parents point to examples of unnamed District officials providing guidance to District personnel, including deferring to the student's use of their preferred name and pronouns in school, while using their given name and pronouns in communications with parents. [*Id.* at ¶ 217].

LEGAL STANDARDS

I. Motion to Amend

Rule 15(a) provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Because the Plaintiff Parents filed the Motion to Amend before any deadline for amending pleadings, this Court considers only whether they have satisfied the Rule 15(a) standard. *See Fernandez v. Bridgestone/Firestone, Inc.*,

105 F. Supp. 2d 1194, 1195 (D. Colo. 2000); *cf. Gorsuch, Ltd., B.C. v. Wells Fargo Nat'l Bank Assoc.*, 771 F.3d 1230, 1242 (10th Cir. 2014) (adopting two-prong analysis and considering whether both Rule 16(b)(4) and Rule 15(a) are satisfied when a motion to amend is submitted after deadline included in scheduling order). Refusing leave to amend "is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir.1993). A general presumption exists in favor of allowing a party to amend its pleadings, *see Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962), and the non-moving party bears the burden of showing that the proposed amendment is sought in bad faith, that it is futile, or that it would cause substantial prejudice, undue delay or injustice, *Jefferson Cnty. Sch. Dist. No. R-1 v. Moody's Inv. Servs., Inc.*, 175 F.3d 848, 859 (10th Cir. 1999).

II. Substantive Due Process

Fourteenth Amendment. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L.

Ed. 2d 772 (1997)). "[T]he Supreme Court recognizes two types of substantive due process claims: (1) claims that the government has infringed a 'fundamental' right, . . . and (2) claims that government action deprived a person of life, liberty, or property in a manner so arbitrary it shocks the judicial conscience." *Doe v. Woodard*, 912 F.3d 1278, 1300 (10th Cir. 2019) (citing *Glucksberg*, 521 U.S. at 721-22, and *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)).

Different standards apply to the respective approaches. Under the fundamental rights approach, the Fourteenth Amendment Due Process Clause "forbids the government to infringe fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)). If the plaintiff fails to establish that the challenged action implicates a "fundamental right," then there only a "reasonable relation to a legitimate state interest" is required for constitutional purposes. *Id.* at 722. The standard is higher for the shocks-the-conscience approach. *See e.g., Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs.*, 680 F. Supp. 3d 1250, 1278 (D. Wyo. 2023). In determining whether a plaintiff has asserted a violation of substantive due process under the shocks-the-conscience approach is "whether the challenged government action shocks the conscience of federal judges." *Moore v. Guthrie*, 438 F.3d 1036, 1040 (10th Cir. 2006) (citing *Ruiz v. McDonnell*, 299 F.3d 1173, 1183 (10th Cir. 2002)).

Appendix D

Monell Liability. Under the law of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"), liability for constitutional violations pursuant to § 1983 may exist against governmental entities, like school districts, without liability against a particular individual. *See Lucas v. Turn Key Health Clinics, LLC*, 58 F.4th 1127, 1144 (10th Cir. 2023). But liability against the District cannot be based on a respondeat superior theory, i.e., solely because the governmental entity employs a person or people who violated a plaintiff's constitutional rights. *See Dorsey v. Pueblo Sch. Dist. 60*, 140 F. Supp. 3d 1102, 1119 (D. Colo. 2015) (citing *Lawrence v. Sch. Dist. No. 1*, 560 F. App'x 791, 794 (10th Cir. 2014)); *see also Seamons v. Snow*, 206 F.3d 1021, 1029 (10th Cir. 2000) (applying *Monell* to school district). Instead, a school district may only be held liable if the constitutional violation arises from an official policy or custom or was carried out by an official with final policy making authority with respect to the challenged action. *See Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694-95, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). An official policy or custom under *Monell* may take several forms, including:

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final

> policymakers of the decisions — and the basis for them — of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Bryson v. City of Okla. City, 627 F.3d 784, 788 (10th Cir. 2010) (cleaned up).

It is also not enough for a plaintiff to simply identify a policy or custom—the plaintiff must also "demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bd. Of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). The challenged policy or practice must be closely related to the violation of the plaintiff's federally protected right—often described as "the moving force." *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 770 (10th Cir. 2013).

Finally, the plaintiff must demonstrate that the challenged policy was enacted with deliberate indifference. A plaintiff may show deliberate indifference by alleging that the municipality had actual or constructive notice that its action (or its failure to act) was substantially certain to result in a constitutional violation and that the municipality consciously and deliberately chose to disregard that risk. *Finch v. Rapp*, 38 F.4th 1234, 1244 (10th Cir. 2022). A municipality may be on notice through a pattern of tortious conduct or "if a violation of federal rights is a

'highly predictable' or 'plainly obvious' consequence of a municipality's action or inaction." *Id.* (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998)).

ANALYSIS

The sole claim in the proposed First Amended Complaint is a substantive due process claim that alleges a violation of the fundamental right of parents to direct the education and upbringing of their children based on the "District Secrecy Policy." *See generally* [Doc. 64; Doc. 64-2]. The District opposes Plaintiffs' request to amend on futility grounds. *See* [Doc. 67]. It argues that the proposed First Amended Complaint still fails to plead a Fourteenth Amendment violation because it "is still based on a narrow right to control [the Plaintiff Parents'] children's education," [*id.* at 2-11], and alternatively contends that Plaintiffs fail to meet the pleading requirements for municipal liability under *Monell*, [Doc. 67 at 13-15].

A proposed amendment is futile if the complaint, as amended, would be subject to dismissal. *Moody's Inv. Servs.*, 175 F.3d at 859. "If a party opposes a motion to amend or to supplement on the grounds of futility, the court applies the same standard to its determination of the motion that governs a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Conkleton v. Zavaras*, No. 08-cv-02612-WYD-MEH, 2010 U.S. Dist. LEXIS 142260, 2010 WL 6089079, at *3 (D. Colo. Oct. 6, 2010). Therefore, the Court must determine if the proposed pleading contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662,

678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The plaintiff may not rely on conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Whether to allow amendment or to dismiss pursuant to a futility analysis is within the trial court's discretion. *Burks v. Okla. Publ'g Co.*, 81 F.3d 975, 978-79 (10th Cir. 1996); *see also Frank*, 3 F.3d at 1365. Thus, the Court, taking all factual averments as true and drawing them in favor of the Plaintiff Parents, now turns to considering whether amendment is futile.

I. The Plaintiff Parents' Arguments

As previously acknowledged, the right of parents "to make decisions concerning the care, custody, and control of their children" has been recognized as a fundamental right. *Troxel*, 530 U.S. at 66. This protection includes a parent's right to direct a child's education. *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998). This right can be traced back to *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). In *Meyer*, the Supreme Court held that a law requiring that school lessons be in English was unconstitutional because it infringed on parents' due process rights to direct the education of their children. 262 U.S. at 399-401. And in *Pierce*, the Supreme Court held that a law which required public-school attendance for children ages eight to sixteen also "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of

children under their control." 268 U.S. at 534-35. *Meyer* and *Pierce* "evince the principle that the state cannot prevent parents from choosing a specific educational program—whether it be religious instruction at a private school or instruction in a foreign language," and cannot otherwise "completely foreclos[e] the opportunity of individuals and groups to choose a different path of education." *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995), *abrogated in part on other grounds by DePoutot v. Raffaelly*, 424 F.3d 112, 118 n.4 (1st Cir. 2005).

But the Supreme Court has stressed the "limited scope" of this authority. *Norwood v. Harrison*, 413 U.S. 455, 461, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973); *see also, e.g., Pierce*, 268 U.S. at 534 ("No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."); *Meyer*, 262 U.S. at 402 (recognizing the state's right to "compel attendance at some school," "make reasonable regulations for all schools," and "prescribe a curriculum for institutions which it supports"). Indeed, the Tenth Circuit (like other circuits) recognizes that this right only extends so far. *See, e.g., Swanson*, 135 F.3d at 699 (explaining that the right is "limited in scope" and that "parents simply do not have a constitutional right to control each and every aspect of their children's education

and oust the state's authority over that subject"); *see also Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) ("*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."); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005) (holding that the parental right to direct the care, custody, and control of children "does not extend beyond the threshold of the school door"). The Sixth Circuit has described the limits of the right as follows:

> 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 . . . 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) (quoting *Goss v. Lopez*, 419 U.S. 565, 578, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975)). "These decisions make clear that a parent has the right to control where their child goes to school. But that is where their control ends." *Doe v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 3:22-cv-00337-MJN-PBS, 2023 U.S. Dist. LEXIS 137555,

2023 WL 5018511, at *13 (S.D. Ohio Aug. 7, 2023), *appeal docketed*, No. 23-3740 (6th Cir. Sept. 8, 2023).

In their proposed First Amended Complaint, the Plaintiff Parents assert that their Fourteenth Amendment parental rights were violated by a "District Secrecy Policy," under which District personnel fail to provide parents full and correct information regarding curriculum and actions taken by District personnel involving gender identification issues. *See generally* [Doc. 64-2]. The Plaintiff Parents insist that they are not challenging the District's substantive curriculum or policies regarding transgender and gender identification issues, but argue that the District Secrecy Policy violated their fundamental right to choose *whether* to maintain their children's enrollment in District schools. [Doc. 68 at 3]. Specifically, the Lees and the Juriches argue that Ms. Riep's and Mr. Benedict's conduct under the District Secrecy Policy interfered with their fundamental right to decide *whether* to send their kids to WMS. [Doc. 64 at 11]. The Plaintiff Parents allege that had they been provided notice of the topics planned for discussion at the GSA meetings, they would have elected to opt their children out of District schools and sought alternative education based on their deeply held religious beliefs. [Doc. 64-2 at ¶ 143]. They further aver that the District "knew or should have known that the failure to provide notice, coupled with affirmative steps to discuss the topics secretly, would necessarily undermine parental authority and informed parental decision-making on whether to seek alternative education for their children." [*Id.* at ¶ 147]. In other words, the Plaintiff Parents attempt to re-frame

their alleged constitutional injury as a violation of their fundamental right to choose whether their child attends District schools, *see* [Doc. 64 at 3], which is consistent with how the district court framed the Fourteenth Amendment issue in *Willey v. Sweetwater County School District No. 1 Board of Trustees*, 680 F. Supp. 3d 1250 (D. Wyo. 2023), though that case is not cited in any of the Plaintiff Parents' briefing.

While the Court is not bound to the framework of the Plaintiff Parents' or another district court's constitutional analysis, *see United States v. Rhodes*, 834 F. App'x 457, 462 (10th Cir. 2020) ("[D]istrict courts in this circuit are bound by [Tenth Circuit] decisions and those of the United States Supreme Court—they are not bound by decisions of other district courts"), it need not decide that issue.[7]

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7. The Court notes that, despite the Plaintiff Parents' attempt to re-frame their claim, the core of their claim remains the assumption that they have a right to receive notice and information about topics discussed within an after-school, voluntary extracurricular club and the manner in which school employees address students. *See, e.g., generally* [Doc. 64-2 at ¶¶ 142-43, 146-48]. Significantly, the Plaintiff Parents direct the Court to no Supreme Court or Tenth Circuit authority demonstrating that the Fourteenth Amendment confers a constitutional right to receive "full and correct information" about topics discussed in the District's curriculum, and particularly, at after-school, voluntary extracurricular clubs that they may find objectionable, so that they may exercise their right to withdraw their children from the District. *See generally* [Doc. 64].

There is also no clear weight of authority from district courts to suggest the Fourteenth Amendment confers a substantive due process right to receive information. *See Bethel Loc. Sch. Dist. Bd. of Educ.*, 2023 U.S. Dist. LEXIS 137555, 2023 WL 5018511, at *13-

Appendix D

Because this Court finds that the Plaintiff Parents have inadequately alleged *Monell* liability, it focuses its analysis accordingly.

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14 (holding that the district's alleged refusal to answer parents' questions about bathroom policies "[did] not implicate a parent's fundamental right to control their children's upbringing," reasoning that "the Fourteenth Amendment does not confer parents with an unfettered right to access information about what their children are learning," to "interject in how a State school teaches children," or to receive an "answer [to] every demand made of them from frustrated parents (no matter how reasonable that frustration may be)."); *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 622 F. Supp. 3d 118, 136 (D. Md. 2022) (concluding that parents did not have a fundamental right to be promptly informed of their child's gender identity when it differs from the identity of the child at birth, regardless of the child's wishes or any concerns regarding the potential detrimental impact upon the child), *vacated and remanded on other grounds*, 78 F.4th 622 (4th Cir. 2023). Even the *Willey* court did not find one. *See Willey*, 680 F. Supp. 3d at 1280 (in the context of a preliminary injunction, declining to find an affirmative obligation on the District under the Constitution to actively disclose information regarding a student in the absence of a parent's inquiry or request).

The Supreme Court has long warned that, "[a]s a general matter, [it] has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). To that end, "[courts] must . . . exercise the utmost care whenever [they] are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [courts]." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 240, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022) (quoting *Glucksberg*, 521 U.S. at 720).

II. *Monell* Liability

The Tenth Circuit has directed lower courts to apply requirements of *Monell* rigorously to avoid collapsing municipal liability into respondeat superior liability. *Schneider*, 717 F.3d at 772. The District may only be held liable for the constitutional violations of its employees if they were taken pursuant to a District policy or custom; thus, the Court turns to whether the Plaintiff Parents have adequately alleged facts to allow a factfinder to conclude that such a policy or custom existed. The Plaintiff Parents allege that the District Secrecy Policy "prevents parents from being informed about unilateral decisions the District takes regarding the best interests of their children, and prevents parents from being fully informed about the nature of the District's curriculum." [Doc. 64-2 at ¶ 32]. They argue that the District Secrecy Policy is comprised of both the Guidelines and informal customs resulting in a widespread practice of preventing them from receiving "[f]ull and correct information" regarding their children. [Doc. 64 at 7-9, 11]. The District argues in response that Plaintiffs fail to allege the existence of a widespread practice or custom, as required for *Monell* liability, because their allegations "relate to a sole District employee (Ms. Riep) in relation to one GSA club at a single District school over a narrow span of time." [Doc. 67 at 14]. Plaintiffs respond that their Motion to Amend "articulate[s] numerous instances in which C.L. and H.J. were impressed upon to distrust their parents," and that they "clearly articulated numerous instances in which District employees complied with or sought to comply with the District's Secrecy Policy." [Doc. 68 at 9].

Appendix D

A. The Guidelines

The Plaintiff Parents have attached the Guidelines to their proposed First Amended Complaint, [Doc. 64-2 at 43-56], and neither side disputes the Court's ability to consider them. To the extent that there is a conflict between the allegations by the Plaintiff Parents about the Guidelines or any other source documentation, to the extent that the written document has been provided, it controls. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1105 (10th Cir. 2017). The Guidelines do not prohibit disclosure to parents or guardians of information regarding a student's gender status or any curriculum regarding gender identity and gender expression issues, including but not limited to extracurricular GSA meetings. The Guidelines provide that "[s]tudents have a general right to keep their transgender or non-binary status private from other students, parents, or third parties." [Doc. 64-2 at 45]. They further state:

> When contacting or communicating with a parent/guardian of a transgender or non-binary student, school staff should use the name and pronouns that the student's parent/guardian use, unless the student requests otherwise. If a parent/guardian asks a staff member about whether their student uses another name/pronoun at school or has other gender-related questions, the staff member should refer them to the school counselor, who can address questions and concerns that the parent/guardian may have. If a school counselor receives questions

> from a parent/guardian, they should use their professional judgment to determine how best to follow up with the student and then the parent/guardian.

[*Id.*]. The Guidelines provide that parents and guardians have the right under the federal Family Educational Rights and Privacy Act ("FERPA") to view all of their student's educational records, including a student's gender support form. [*Id.*]. And parent or guardian signatures are specifically required for transgender and non-binary students to request their name and/or gender be updated in Synergy, the District's internal record-keeping system, or if such signature is not available, District staff will notify the parents/guardians prior to making an update to Synergy. [*Id.* at 46]. There is no direction in the Guidelines that requires or even suggests that instructors of gender-inclusive clubs should encourage students who are attending to confide in teachers rather than their parents, or to hide their attendance or the topics of discussion from their parents. [*Id.* at 52].

As for Plaintiffs' allegation that the Guidelines "evidence a broader custom and unwritten policy at [the District] to exclude parents from making well-informed decisions regarding the education of their children as it pertains to transgenderism, sexual orientation, and diverging gender identity," [Doc. 64-2 at ¶ 149], the plain language of the Guidelines renders this allegation implausible. *Brokers' Choice of Am.*, 861 F.3d at 1105; *Iqbal*, 556 U.S. at 678. Thus, this Court finds that the Guidelines alone are inadequate to satisfy the Plaintiff

Parents' obligation to plead sufficient facts of the existence of a District Secrecy Policy that precludes parents from accessing full and accurate information "regarding the best interests of their children, and . . . the nature of the District's curriculum." *Cf. John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 622 F. Supp. 3d 118, 136 (D. Md. 2022).

B. Widespread Practice

Next, the Court considers the Plaintiff Parents' allegations that the District maintains "de facto" policies that "evidence a custom and unwritten policy of secrecy towards parents on matters regarding transgenderism, sexual orientation, and gender identity." *See, e.g.*, [Doc. 64-2 at ¶ 223]. In order to adequately plead a cognizable custom or practice, the Plaintiff Parents must plead facts that demonstrate that the District employed a policy that was "so permanent and well settled as to constitute a custom or usage with the force of law." *Bryson*, 627 F.3d at 788. Even taking the factual allegations as true and drawing all inferences in favor of the Plaintiff Parents, this Court concludes that the allegations are insufficient to meet that threshold.

The Plaintiff Parents' allegations generally contemplate a broad, generalized informal policy "of concealing information relating to transgenderism from parents." *See, e.g.*, [Doc. 64-2 at ¶ 148]. However, "at the pleading stage, the existence of a *Monell* policy is a 'conclusion' to be built up to, rather than a 'fact' to be baldly asserted." *Sanchez v. City of Littleton*, 491 F.

Supp. 3d 904, 923 (D. Colo. 2020) (quotation omitted). "In attempting to prove the existence of such a 'continuing, persistent and widespread custom,' plaintiffs most commonly offer [allegations] suggesting that similarly situated individuals were mistreated by the municipality in a similar way." *Carney v. City & Cnty. of Denver*, 534 F.3d 1269, 1274 (10th Cir. 2008); *Duran v. Colbert*, No. 2:16-cv-805 CW, 2023 U.S. Dist. LEXIS 56668, 2023 WL 2742738, at *5 (D. Utah Mar. 31, 2023). While the Plaintiff Parents generally allege that "the Defendant engaged in a pattern and practice of keeping the GSA activities secret from parents," [Doc. 64-2 at ¶ 38], or "actively encouraged [students] to treat the [GSA] discussions as secret," [*id.* at ¶ 39], they identify actions with respect to the GSA at WMS only during a limited timeframe, and they do not have any factual allegations about similar conduct outside of WMS or outside of that timeframe.[8] *See, e.g.*, [*id.* at ¶¶ 61, 108]. There are also no allegations of the implementation of GSA clubs at the other nine schools in the District, *see* [*id.* at ¶ 36 ("[The District] runs ten GSA clubs at its schools.")], or examples from other schools where information about "transgenderism" was hidden from parents, *see generally* [*id.*]. Nor are there any allegations of similar conduct directed to other specific WMS students or parents; instead, the proposed First Amended Complaint contains only allegations of specific instances of WMS personnel allegedly enforcing the District Secrecy Policy with the

8. The Plaintiff Parents allege that in 2022, Mr. Benedict provided false information to the Lees by characterizing the relationship between C.L. and Ms. Riep as "not inappropriate." [Doc. 64-2 at ¶ 220]. To the extent that the Lees allege that this violated their constitutional rights, this Court notes that by 2022, C.L. was no longer a District student. [*Id.* at ¶ 90].

Plaintiff Parents. *See generally* [*id.* at ¶¶ 98, 122, 219]. The Juriches' allegations regarding H.J.'s experiences during the 2022-2023 school year at WMS do not pertain to any withholding of information through the GSA, Ms. Riep, or Mr. Benedict; the Plaintiff Parents simply allege that H.J. "expressed to her parents that she did not feel safe in a building with Jenna Riep, at which point Nick and Linnaea Jurich enrolled H.J. in a non-PSD charter school." [*Id.* at ¶ 136]. In other words, the Plaintiff Parents' allegations of an informal custom of secrecy are extrapolated from their *own* experiences with WMS staff. *See Dechant v. Grayson*, No. 2:20-cv-02183-HLT, 2021 U.S. Dist. LEXIS 2600, 2021 WL 63280, at *2 (D. Kan. Jan. 7, 2021) (concluding that the plaintiff failed to plausibly allege an informal custom where his "broad allegations . . . stem[med] solely from [his] own encounter" with municipality employees); *see also Lavigne v. Great Salt Bay Cmty. Sch. Bd.*, No. 2:23-cv-00158-JDL, 2024 U.S. Dist. LEXIS 80828, 2024 WL 1975596, at *7 (D. Me. May 3, 2024) (the plaintiff failed to allege a widespread policy "of withholding and concealing information respecting 'gender-affirming' treatment of minor children from their parents" where the plaintiff alleged only "one occasion" that a school employee withheld information from a parent).

Insofar as the Plaintiff Parents contend that the District Secrecy Policy extends to gender support plans, *see* [Doc. 64-2 at ¶¶ 184-190], there are no factual allegations to support the conclusion that information regarding the forms are kept secret from parents. The section of the Guidelines to which the Plaintiff Parents refer, *see* [*id.* at ¶ 189], cannot be fairly read to "contemplate the exclusion of parents in the submission

of an Individual Gender Support Form," as the language expressly encourages the participation of parents and guardians, [*id.* at 52 ("There is no one best way to manage communication with classmates, parents/guardians, and staff. Therefore, it is helpful as the school counselor meets with the student and parents/guardians, if involved, to discuss if others are aware of the student's gender identity, if they plan to share this information, and whether they require communication or confidentiality from the involved staff member(s).")]. The Guidelines go on to explain:

> If a student initiates a conversation about needing support at school related to the student's gender identity or gender expression, the school counselor will encourage and discuss with the student how to inform and/or include the parent(s)/guardian(s) in this process. While it is not unusual for a student's identity to be first communicated at school, [the District] recognizes the importance of involving the student's parent(s)/guardian(s) to promote congruent and affirming environments through the student's daily experiences. If a student requests not to inform or include their parent(s)/guardian(s) at the time of creating or reviewing an Individual Gender Support Form, staff will work with the student to support them in their coming out process, and *there are exceptions for student safety.*

[*Id.* at 53 (emphasis added)]. Thus, read in context, the expectation is parent disclosure, with an exception for student safety. Indeed, there are no allegations contained

in the proposed First Amended Complaint that would allow a factfinder to conclude that these Plaintiff Parents, or any other District parents, were provided incomplete or incorrect information regarding their child's gender support form.

Finally, as for the Plaintiff Parents' factual allegations regarding District employees trying to prevent disclosure of the District students' in-school pronoun usage to parents, *see, e.g.*, [*id.* at ¶¶ 210-15], these allegations do not plausibly establish the existence of a widespread, informal "secrecy" policy. Plaintiffs' allegations lack factual details about who these employees were, which District schools these employees worked at, when these employees took the alleged actions, or how often this alleged conduct occurred. *Cf. Hernandez v. City & Cnty. of Denver*, No. 21-cv-01538-PAB-MEH, 2022 U.S. Dist. LEXIS 151302, 2022 WL 3597452, at *5-6 (D. Colo. Aug. 23, 2022) (explaining that both the nature of the alleged similar incidents and the time frame in which those incidents occurred are relevant to the determination of whether the plaintiff's allegations are sufficient to allege a widespread practice) (collecting cases). Conclusory allegations that unnamed District employees tried to circumvent the Synergy system "[o]n numerous occasions" or that one unnamed "medical staff" employee tried to circumvent FERPA requirements do not suffice to establish a widespread, informal custom that is "so permanent and well settled as to constitute a custom or usage with the force of law." *Bryson*, 627 F.3d at 788; *cf Murphy v. City of Tulsa*, 950 F.3d 641, 649 (10th Cir. 2019) ("A single unconstitutional incident is ordinarily insufficient for municipal liability" unless that incident is "caused by an existing policy that can

be attributed to a municipal policymaker." (cleaned up)); *Sodaro v. City & Cnty. of Denver*, 629 F. Supp. 3d 1064, 1082 (D. Colo. 2022) ("[T]wo incidents [of similar conduct] are insufficient to plausibly allege a widespread practice of constitutional violations similar to that alleged in the case, much less a practice so permanent and well settled as to constitute a custom or usage with the force of law." (quotation omitted)). Furthermore, the allegations, as pleaded—particularly in the context of the Guidelines, discussed above—are distinguishable from the alleged constitutional violation in this case so as to not permit a plausible inference of a widespread informal practice "of concealing information relating to transgenderism from parents." *See Hernandez*, 2022 U.S. Dist. LEXIS 151302, 2022 WL 3597452, at *5 (factually dissimilar allegations do not lend plausible support to informal custom theory).

Thus, this Court concludes that the Plaintiff Parents have failed to allege sufficient facts—as opposed to conclusory allegations—to establish that the Guidelines, along with other informal actions, amount to "a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law."[9] *Bryson*, 627 F.3d at 788.[10] For this reason, the Court

9. There are no allegations that Ms. Riep or Mr. Benedict are final policymakers, or that the District ratified their actions, *see generally* [Doc. 64-2], nor do the Plaintiff Parents attempt to proceed on these theories, *see* [Doc. 64; Doc. 68].

10. Having found that the Plaintiff Parents fail to allege sufficient facts to state a cognizable custom or policy to support Monell liability against the District, this Court need not decide

concludes that amendment would be futile. *Moody's Inv. Servs.*, 175 F.3d at 859. Accordingly, the Motion to Amend is respectfully **DENIED**.

CONCLUSION

For the reasons set forth herein, **IT IS ORDERED** that:

(1) Plaintiffs' Amended Motion for Leave to Amend Complaint (Oral Argument Requested) [Doc. 64] is **DENIED**;

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whether they have alleged sufficient facts to plausibly allege that the District was deliberately indifferent to constitutional violations that were "the obvious consequence of its policy." *See Finch*, 38 F.4th at 1244; *see also Crowson v. Washington Cnty.*, 983 F.3d 1166, 1188 (10th Cir. 2020) (collecting cases)). Indeed, this element was not raised by the District in opposition to the Motion to Amend. However, the Court simply notes that the Plaintiff Parents only cursorily allege that the District "knew or should have known that the failure to provide notice, coupled with affirmative steps to discuss the topics secretly, would necessarily undermine parental authority and informed parental decision-making on whether to seek alternative education for their children." [Doc. 64-2 at ¶ 147]. Without more specific factual details regarding what the District knew when it implemented the Guidelines that were effective as of May 2021, or what the District knew about employees' conduct vis-à-vis parents surrounding transgender or gender identification issues prior to May 2021, the Plaintiff Parents' allegations appear insufficient to satisfy the third element of a *Monell* claim. *See Iqbal*, 556 U.S. at 678 (in the context of a motion to dismiss, holding that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice").

(2) Defendants are entitled to their costs pursuant to Federal Rule of Civil Procedure 54(d) and Local Rule 54.1; and

(3) The Clerk of Court is **DIRECTED to CLOSE** this case.

DATED: May 16, 2024

BY THE COURT:

/s/ Nina Y. Wang
Nina Y. Wang
United States District Judge

APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED DECEMBER 19, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Nina Y. Wang

Civil Action No. 23-cv-01117-NYW-STV

JONATHAN LEE, ERIN LEE, C.L., A MINOR, BY AND THROUGH PARENTS JONTHAN AND ERIN LEE AS NEXT FRIENDS, M.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS, NICOLAS JURICH, LINNAEA JURICH, AND H.J., A MINOR, BY AND THROUGH PARENTS NICOLAS AND LINNAEA JURICH AS NEXT FRIENDS,

Plaintiffs,

v.

POUDRE SCHOOL DISTRICT R-1, and POUDRE SCHOOL DISTRICT R-1 BOARD OF EDUCATION,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendants' Motion to Dismiss Plaintiffs' Complaint (the "Motion" or "Motion

to Dismiss") [Doc. 29]. The Court has reviewed the Motion, the Parties' briefing, and the applicable case law, and concludes that oral argument would not materially assist in the resolution of the Motion. For the reasons set forth in this Order, the Motion to Dismiss is respectfully **GRANTED**.

BACKGROUND

The Court draws the following facts from Plaintiffs' Complaint for Damages and Injunctive Relief (the "Complaint"), [Doc. 1], and presumes they are true for purposes of this Order.[1] Defendant Poudre School District R-1 (the "District") is a K-12 public school district in Larimer County, Colorado. [*Id.* at ¶ 22]. Its schools

1. Attached to Plaintiffs' Complaint is a document titled "Guidelines for Supporting Transgender and Non-Binary Students" (the "Guidelines"). [Doc. 1-1]. In ruling on a motion to dismiss under Rule 12(b)(6), a court "may . . . consider documents attached to or referenced in the complaint if they 'are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.'" *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1103 (10th Cir. 2017) (quoting *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002)). Defendants do not dispute the Guidelines' authenticity, and rely upon their language to support arguments that dismissal is proper. [Doc. 29 at 6-7]. But Defendants also note that the Guidelines state that they were "Revised 1-13-2023," *see*, *e.g.*, [Doc. 1-1 at 2], and "were not in existence" when the circumstances giving rise to this case occurred, [Doc. 29 at 15]. Plaintiffs do not respond to this assertion. *See* [Doc. 37]. To the extent that there is a conflict between the allegations by Plaintiff about the Guidelines and the contents of the Guidelines, the exhibit controls. *See Brokers' Choice*, 861 F.3d at 1105.

include Rice Elementary School ("RES") and Wellington Middle School ("WMS"), which is now consolidated into Wellington Middle-High School. [*Id.* at ¶¶ 15-16, 22].

The District runs an after-school organization called the Genders and Sexualities Alliance ("GSA") at a number its schools. [*Id.* at ¶¶ 28-29]. The GSA is not "disclosed" as part of District curriculum. [*Id.* at ¶ 30]. Plaintiffs allege that GSA meetings "regularly address sex, sexualities, mental health, suicide, sexual orientation, gender identities, and other topics in discussions, lectures, and distributed materials." [*Id.* at ¶ 123].

A GSA meeting was held at WMS on May 4, 2021. [*Id.* at ¶¶ 41-42]. Plaintiff C.L., then a 12-year-old sixth grader at WMS, attended the meeting after being personally invited by her homeroom and art teacher. [*Id.* at ¶¶ 36, 40, 42]. According to Plaintiffs, topics discussed at the May 4 meeting included polyamory, suicide, puberty blockers, gender identity, sexualities, changing names or pronouns, and "[k]eeping the discussions at GSA secret from parents." [*Id.* at ¶ 60]. Plaintiffs allege that a part-time District teacher, who had been invited to be a "guest speaker" at the meeting, "told the children that if they are not completely comfortable in their bodies, that means that they are transgender." [*Id.* at ¶¶ 49-50, 54]. The part-time teacher also "awarded prizes in the [sic] LGBTQ paraphernalia such as toys, flags, and other swag" to students who came out as transgender. [*Id.* at ¶ 56]. Plaintiffs allege that several students in attendance announced that they are transgender, and, "feeling pressure to do the same and wanting to receive

[the teacher's] prizes," C.L. also announced that she is transgender. [*Id.* at ¶ 57]. After the GSA meeting, C.L. announced to her mother, Plaintiff Erin Lee ("Ms. Lee"), that "she would be transitioning," although she had never expressed such sentiments to her parents before. [*Id.* at ¶¶ 66-67].[2] The day after the meeting, Ms. Lee and C.L.'s father, Jonathan Lee ("Mr. Lee," and collectively with Ms. Lee, the "Lees"), disenrolled C.L. from WMS and enrolled her in a private school for the next academic year. [*Id.* at ¶ 69]. Plaintiffs allege that "C.L.'s experience at the GSA club led to a months-long emotional decline of gender and sexuality confusion that required counseling and included suicidal thoughts." [*Id.* at ¶ 75].

Plaintiff H.J., then a 12-year-old sixth grader at WMS, attended GSA meetings on May 11 and May 18, 2021. [*Id.* at ¶¶ 90, 97]. At these meetings, Plaintiffs allege, it was suggested to the student attendees that "if they did not like their bodies, they were most likely not the gender they were 'assigned' at birth." [*Id.* at ¶ 102]. H.J. was also taught about gender fluidity and "the heightened connections between transgenderism and suicide." [*Id.* at ¶¶ 100-01]. After attending the GSA meetings, H.J. "began to have her first suicidal thoughts." [*Id.* at ¶ 113]. Throughout the summer of 2021, H.J. began leaving notes for her parents, Plaintiffs Nicolas Jurich ("Mr. Jurich") and Linnaea Jurich ("Ms. Jurich," and collectively with Mr. Jurich, the "Juriches"), about "transgenderism" and being aromantic or asexual. [*Id.* at ¶ 114]. In the fall of 2021,

2. Plaintiffs allege that C.L. "has since abandoned" this announcement. [Doc. 1 at ¶ 70].

H.J. began to question her gender identity. [*Id.* at ¶ 115]. H.J. then "underwent a significant emotional decline," and in December 2021, requested to be homeschooled. [*Id.* at ¶ 117]. Shortly thereafter, H.J. attempted suicide. [*Id.* at ¶ 118].

Plaintiffs allege that the District and the Poudre School District R-1 Board of Education (the "Board," and collectively with the District, "Defendants") engaged in a pattern and practice of keeping the GSA activities secret from District parents in that they failed to disclose GSA activities to parents and encouraged students to not discuss GSA activities with their parents. [*Id.* at ¶¶ 31-33]; *see also*, *e.g.*, [*id.* at ¶¶ 58, 104]. Plaintiffs allege that, in the District, school-sponsored clubs are "considered part of the school program and/or relate[] to a school's curriculum," [*id.* at ¶ 184], and that the District has a policy that requires written notice to parents or guardians of any curriculum that is "part of the District's comprehensive health education program," which includes notice that the parents or guardians may excuse their children from some or all of the comprehensive health education program, [*id.* at ¶ 134]. The Lees and the Juriches were not given notice of the GSA's activities, agenda, or materials. [*Id.* at ¶¶ 76, 109]. Plaintiffs allege that they "have strong and sincere religious convictions regarding the education of their children" about gender identity and sexual orientation and that, had they been provided notice of the topics discussed at GSA meetings, "they would have elected to opt their child out based on these deeply held religious beliefs." [*Id.* at ¶¶ 124-26].

Additionally, Mr. and Ms. Lee's son, M.L., was a seven-year-old first grader at RES in May 2021. [*Id.* at ¶¶ 16, 78]. The Lees learned that the District offers gender support plans[3] that "prohibit harassment based on gender identities or gender expressions" and that "oblige [District] personnel to use the elected pronouns and names identified" in a plan when speaking with or about the child who is the subject of the plan. [*Id.* at ¶¶ 79, 81]. The Lees completed gender support forms for M.L. on three separate occasions, requesting that District personnel refer to M.L. by his biological sex and birth name. [*Id.* at ¶¶ 85, 178]. The District "informed the Lees that gender support plans exist only to benefit and protect the gender identities of transgender children, whereas the Lees sought a gender support plan binding the [District] to benefit and protect the gender identity of their son, including his name and masculine pronouns." [*Id.* at ¶ 86]. Plaintiffs allege that "an Individual Gender Support Form is not available to a biological male student who identifies as male nor a biological female student who identifies as . . . female" due to "the conjunction of the biological sex and gender identity of the student." [*Id.* at ¶¶ 177, 180]. H.J., C.L., and M.L. no longer attend District schools. [*Id.* at ¶¶ 15-16, 20].

Plaintiffs initiated this lawsuit on May 3, 2023, asserting two claims against Defendants: (1) a Fourteenth Amendment substantive due process claim alleging a "[d]enial of [the] right of the Plaintiff Parents to direct

3. Plaintiffs also use the term "Individual Gender Support Forms" interchangeably with "gender support plans." *See* [Doc. 1 at ¶¶ 167-80].

the education and upbringing of the Plaintiff Children," asserted by all Plaintiffs against all Defendants ("Count I"), [*id.* at ¶¶ 205-22]; and (2) a Fourteenth Amendment equal protection claim based on the District's denial of a gender support plan for M.L., asserted against both Defendants by Mr. Lee, Ms. Lee, and M.L. ("Count II"), [*id.* at ¶¶ 223-31]. They request the following relief: (1) a permanent injunction requiring (a) that the District provide notice and opt-out rights if gender dysphoria, gender transitioning, or related topics are taught in the District, (b) that these topics only be taught by qualified and trained professionals, and (c) that all materials used in any such instruction be given to parents fourteen days in advance of any instruction; (2) compensatory damages, including the costs of private-school tuition, medical expenses, counseling fees, compensation for damage to Plaintiffs' reputation, transportation, and emotional anguish; and (3) punitive damages. [*Id.* at 30-31].

Defendants filed the instant Motion to Dismiss on July 7, 2023. [Doc. 29]. In the Motion, Defendants contend that Plaintiffs' claims should be dismissed in their entirety because (1) Plaintiffs do not have standing to assert their claims, such that the Court lacks jurisdiction over the claims under Rule 12(b)(1), [*id.* at 17-20]; and (2) Plaintiffs fail to state a claim upon which relief can be granted under Rule 12(b)(6), [*id.* at 4-13]. Defendants also contend that Plaintiffs fail to allege facts supporting a theory of municipal liability and assert that their request for punitive damages is non-viable. [*Id.* at 13-17]. And finally, they contend that the Board should be dismissed because Plaintiffs' claims against it are duplicative. [*Id.* at 13-14].

Plaintiffs responded in opposition to the Motion, *see* [Doc. 37], and Defendants have replied, *see* [Doc. 43]. The matter is thus ripe for disposition and the Court considers the Parties' arguments below.

LEGAL STANDARDS

I. Rule 12(b)(1)

Rule 12(b)(1) permits a court to dismiss an action for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "Dismissal under Rule 12(b)(1) is not a judgment on the merits of the plaintiff's claim. Instead, it is a determination that the court lacks authority to adjudicate the matter." *Creek Red Nation, LLC v. Jeffco Midget Football Ass'n, Inc.*, 175 F. Supp. 3d 1290, 1293 (D. Colo. 2016). "A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1016 (10th Cir. 2013) (quotation omitted). The burden of establishing jurisdiction rests with the party asserting jurisdiction. *Kline v. Biles*, 861 F.3d 1177, 1180 (10th Cir. 2017).

"The Supreme Court's standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, and prudential standing[,] which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Wilderness Soc'y v. Kane Cnty.*, 632 F.3d 1162, 1168 (10th Cir. 2011) (en banc) (citations, ellipses, and quotations omitted). Under Article III of the United States

Constitution, federal courts only have jurisdiction to hear certain "cases" and "controversies." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014). Article III standing is a jurisdictional prerequisite to suit and requires "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Id.* at 157-58 (alterations in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 594 U.S., 141 S. Ct. 2190, 2208, 10 L. Ed. 2d 568 (2021).

The elements of standing are not simply pleading requirements, but are instead "an indispensable part" of a plaintiff's case. *Lujan*, 504 U.S. at 561. For this reason, the elements "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.* Thus, at the pleading stage, factual allegations of injury resulting from the defendant's conduct "may suffice." *Id.*

II. Rule 12(b)(6)

Under Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a Rule 12(b)

(6) motion, the Court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (quotation omitted). The plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Rather, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quotation omitted); *see also Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (explaining that plausibility refers "to the scope of the allegations in a complaint," and that the allegations must be sufficient to nudge a plaintiff's claim(s) "across the line from conceivable to plausible" (quotation omitted)). The ultimate duty of the Court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

ANALYSIS

Defendants contend that Plaintiffs' claims should be dismissed under Rule 12(b)(1) for lack of standing and under Rule 12(b)(6) for failure to state a claim. *See* [Doc. 29 at 4-13, 17-20]. The Court addresses Defendants' arguments on a claim-by-claim basis, starting with Defendants' standing arguments before turning to the merits of each claim. *See United States v. Springer*, 875

F.3d 968, 973 (10th Cir. 2017) ("Jurisdiction is a threshold question that a federal court must address before reaching the merits." (quotation omitted)).

I. Substantive Due Process—Count I

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)). One of these protected rights is the right of parents "to make decisions concerning the care, custody, and control of their children." *Id.* at 66. This protection includes a parent's right to direct a child's education. *Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998). However, this due process right is "limited in scope" and does not permit a parent "to control each and every aspect of their children's education and oust the state's authority over that subject." *Id.*

A. Standing

Defendants first challenge Plaintiffs' standing to bring their substantive due process claim, which is brought by all Plaintiffs against Defendants. *See* [Doc. 1 at 27]. Defendants contend that Plaintiffs have failed to allege

facts establishing any of the three required standing elements: injury in fact, causation, and redressability. [Doc. 29 at 17-20]. The Court addresses each element in turn.

Injury in Fact. "Article III requires more than a desire to vindicate value interests." *Diamond v. Charles*, 476 U.S. 54, 66, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986). Article III's standing requirements help distinguish between "a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *Id.* at 66-67 (quoting *United States v. Students Challenging Regul. Agency Procs.*, 412 U.S. 669, 689 n.14, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973)). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (quoting *Lujan*, 504 U.S. at 560). An injury is particularized if it affects the plaintiff "in a personal and individual way," and it is concrete if it is a real, non-abstract injury. *Id.* at 339-40 (quoting *Lujan*, 504 U.S. at 560 n.1).

Defendants argue that Plaintiffs fail to allege facts showing any concrete harm or direct injury to Plaintiffs. [Doc. 29 at 17]. According to Defendants, Plaintiffs' allegations are nothing more than conclusory assertions that fail to establish any concrete harm or direct injury to the Lees, the Juriches, or their children. [*Id.* at 17-18]. Plaintiffs respond that they "allege substantive

due process injuries of 'private school tuition, medical expenses, counseling fees, compensation for damages to the Plaintiffs' reputation, transportation, and emotional anguish' as a result of the violation of their substantive due process rights." [Doc. 37 at 16 (quoting Doc. 1 at 30)].

The requests listed by Plaintiffs in their prayer for relief are not allegations demonstrating an "invasion of a legally protected interest," *Lujan*, 504 U.S. at 560, but are instead simply the categories of damages sought by Plaintiffs, *see* [Doc. 1 at 30 (Plaintiffs requesting "[c]ompensatory damages . . . including . . . private school tuition, medical expenses, counseling fees, compensation for damage to the Plaintiffs' reputation, transportation, and emotional anguish")]. However, the Court nevertheless finds that the parent Plaintiffs have adequately alleged an injury in fact for purposes of their substantive due process claim. The Lees and the Juriches allege that they have "strong and sincere religious convictions" about educating their children on the topics of gender identity and sexual orientation. [Doc. 1 at ¶¶ 124-25]. They allege that Defendants improperly taught "sexually themed matters" to their children without notice or the opportunity to opt out, [*id.* at ¶ 209], and that had they had notice of the topics discussed at GSA meetings, they would have "elected to opt their child out," [*id.* at ¶ 126]. Plaintiffs assert that Defendants' actions interfered with Plaintiffs' "ability to make decisions . . . directly related to their children's care and education," [*id.* at ¶ 219], and violated Plaintiffs' "fundamental right to make decisions regarding the upbringing, education, custody, care, and control of their children," [*id.* at ¶ 209]. The Court concludes that

these allegations are sufficient, at the pleading stage, to adequately allege an injury in fact experienced by the Lees and the Juriches. *See Doe v. Bethel Loc. Sch. Dist. Bd. of Educ.*, No. 3:22-cv-00337-MJN-PBS, 2023 WL 5018511, at *11 (S.D. Ohio Aug. 7, 2023) (finding similar allegations sufficient to establish parents' standing), *appeal docketed*, No. 23-3740 (6th Cir. Sept. 8, 2023).

However, the Court cannot say the same with respect to H.J., C.L., or M.L. Although this specific argument was not raised by Defendants, *see generally* [Doc. 29], Article III standing is a jurisdictional requirement and the Court must satisfy itself that a case or controversy exists with respect to each claim, even if it requires sua sponte action. *Rector v. City & Cnty. of Denver*, 348 F.3d 935, 942 (10th Cir. 2003).

Count I is a substantive due process claim based solely on an alleged violation of the Fourteenth Amendment *parental* right to direct the education and upbringing of one's children. *See* [Doc. 1 at 27 ("COUNT I—Violation of *Parental* Rights Under the Fourteenth Amendment"; "Denial of [the] right *of the Plaintiff Parents* to direct the education and upbringing of the Plaintiff Children" (emphasis added))]. It is axiomatic that the Fourteenth Amendment right to direct the care, custody, and control of one's children belongs to *parents*, not their children. *See Troxel*, 530 U.S. at 65 ("The liberty interest at issue in this case—*the interest of parents* in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." (emphasis added)); *see also id.* at 66 (explaining

that the Supreme Court has "recognized the fundamental right *of parents* to make decisions concerning the care, custody, and control of their children" (emphasis added) (collecting cases)). In Count I, H.J., C.L., and M.L. do not allege that they themselves have minor children and a resulting fundamental Fourteenth Amendment due process right, *see generally* [Doc. 1], nor do they appear to claim a Fourteenth Amendment right to direct their *own* upbringing, *see*, *e.g.*, [*id.* at ¶ 219 (alleging a violation of "Plaintiffs' fundamental *parental* rights" (emphasis added))]. A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), and the Court has located no authority that would permit a minor child to claim a parental due process right under the Fourteenth Amendment.

If there is no identified constitutional right, there can be no violation of that right or standing to assert a claim alleging a violation of that right. *See*, *e.g.*, *Black Lives Matter-Stockton Chapter v. San Joaquin Cnty. Sheriff's Off.*, 398 F. Supp. 3d 660, 674 (E.D. Cal. 2019) (plaintiffs lacked standing to assert a violation of a constitutional right they did not possess); *Batista v. City of Perth Amboy*, No. 2:15-cv-02833-KM-MAH, 2020 WL 1329980, at *9 n.8 (D.N.J. Mar. 23, 2020) (same); *cf. Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trs.*, No. 23-cv-00069-SWS, 680 F. Supp. 3d. 1250, 2023 WL 4297186, at *7 (D. Wyo. June 30, 2023) (finding it "unlikely" that stepparent had standing to assert a Fourteenth Amendment claim based on care, custody, and control of stepchild with whom he

had no legal relationship). Because H.J., C.L., and M.L. do not identify a viable constitutional right that they actually possess with respect to Count I, they cannot allege a personal, particularized "invasion of a legally protected interest" for purposes of establishing an injury in fact. *Spokeo*, 578 U.S. at 339 (quotation omitted). Accordingly, the Court concludes that H.J., C.L., and M.L. do not have standing with respect to Count I. Count I is **DISMISSED without prejudice** to the extent it is asserted by these Plaintiffs. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006) (dismissal for lack of standing must be without prejudice). The Court limits its remaining analysis on Count I to the Lees and the Juriches.

Causation. Next, Defendants contend that any injury suffered by the Lees and the Juriches cannot be traced to the conduct of the Defendants. "The requisite causal connection between the injury and the conduct complained of requires the injury be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Willey*, 2023 WL 4297186, at *7 (quoting *Lujan*, 504 U.S. at 560). Defendants argue that causation is lacking because some of the claimed injuries—namely, private school tuition and transportation costs for C.L.—are "self-inflicted due to [the Lees'] decision to disenroll C.L. from WMS and enroll her in a private school." [Doc. 29 at 18]. They also argue that the parent Plaintiffs cannot demonstrate that Defendants' conduct was the impetus for C.L.'s and H.J.'s emotional decline because "the Complaint shows that it was parental non-acceptance and enforcement of their own traditional gender beliefs

that caused C.L. and H.J.'s emotional decline." [*Id.* at 19 (footnote omitted)].

Accepting Defendants' arguments would require the Court to construe allegations in Defendants' favor, draw inferences in Defendants' favor, and find facts in Defendants' favor, all of which this Court cannot do. *Casanova*, 595 F.3d at 1124. In any event, as explained above, the injury underlying Count I is the alleged violation of the parent Plaintiffs' Fourteenth Amendment right to direct the care, custody, and control of their children—not the various types of damages claimed in the Complaint. And the parent Plaintiffs have adequately tied their alleged injury to the Defendants' conduct: they allege that Defendants taught "sexually themed matters" to their children in a way that contravenes the parent Plaintiffs' preferences, without notice to the parents and without permitting the parents to opt their children out of these discussions; that these actions interfered with their ability to make decisions related to their children's care and education; and that they would have made different choices had they been given notice and the option to opt-out. [Doc. 1 at ¶¶ 125-26, 191-95, 209, 219]. These allegations are sufficient at the pleading stage to establish the causation element of standing. *See Doe*, 2023 WL 5018511, at *11.

Redressability. Finally, Defendants challenge Plaintiffs' standing with respect to their request for injunctive relief, which relates only to Count I. *See* [Doc. 1 at 30 (Plaintiffs requesting a permanent injunction ordering the District to provide notice and opt-out rights if certain subjects will be taught in school, that these topics

only be taught by qualified individuals, and that parents receive materials in advance of instruction)]. Defendants argue that Plaintiffs' request for injunctive relief would not be redressable by a judicial decision because Plaintiffs "do not plausibly allege any injury in fact or any immediate danger of sustaining a direct injury much less any continuing injury to establish any entitlement to injunctive relief as a matter of law." [Doc. 29 at 20 n.14].[4] Plaintiffs respond that they "will continue to sustain injuries if they reenroll their students in the Defendants' public schools," adding that their "current educational plans for their children are much less convenient and much more costly" than attending District schools. [Doc. 37 at 18-19].

The purpose of injunctive relief is to prevent future violations of the law, *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953), and thus, a plaintiff cannot maintain a request for injunctive relief "unless he or she can demonstrate a good chance of being likewise injured in the future," *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir. 1991). In requesting equitable relief, the plaintiff must "demonstrate 'an adequate basis for equitable relief'—that is, '[a] likelihood of substantial and immediate irreparable injury, and the inadequacy

4. Defendants also argue that Plaintiffs cannot demonstrate redressability because "the [District's] Guidelines follow both state law and District policies, all of which would still be in effect regardless of any court decision pertaining to the GSA meetings or Guidelines." [Doc. 29 at 20]. However, all references to the District's Guidelines in the Complaint are in the context of Count II, not Count I. *See*, *e.g.*, [Doc. 1 at ¶¶ 148-56, 170-81, 223-31]. The Court thus addresses this argument in the context of Count II.

of remedies at law.'" *Jordan v. Sosa*, 654 F.3d 1012, 1024 (10th Cir. 2011) (alteration in original) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 499, 502, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)). The plaintiff's continued susceptibility to injury "must be reasonably certain," and speculation or conjecture are insufficient. *Id.*

Plaintiffs allege that H.J., C.L., and M.L. are "former student[s]" of District schools, [Doc. 1 at ¶¶ 15-16, 20], though they only affirmatively allege that C.L. was disenrolled from her former school, [*id.* at ¶ 69]. Importantly, the Complaint contains no allegations that the student Plaintiffs are currently enrolled in District schools, that the parent Plaintiffs intend to or desire to reenroll their children in District schools, or that they have other children attending District schools. *See generally* [*id.*]. Indeed, the Stipulated Facts in the Scheduling Order omit any assertion that H.J., C.L., or M.L. attend District schools as of the filing of this action. [Doc. 27 at 4-6]. Although the parent Plaintiffs assert in their Response that they will continue to suffer injuries if they reenroll their children in District schools and suggest that they may benefit economically from doing so, [Doc. 37 at 18-19], it is well-established that a plaintiff cannot amend a pleading by including new facts in a response brief, *see Abdulina v. Eberl's Temp. Servs., Inc.*, 79 F. Supp. 3d 1201, 1206 (D. Colo. 2015). Further, the parent Plaintiffs identify no present plans—in the Complaint or otherwise—to reenroll their respective children in District schools.

Because the Complaint alleges that H.J., C.L., and M.L. are no longer enrolled in District schools, and

because Plaintiffs allege no present plans to reenroll the students in District schools, Plaintiffs' continued susceptibility to injury is not "reasonably certain." *Jordan*, 654 F.3d at 1024. The Court thus concludes that Plaintiffs lack standing to seek the prospective injunctive relief requested in the Complaint. *See Cash v. Lees-McRae Coll., Inc.*, No. 1:18-cv-00052-MR-WCM, 2018 WL 7297876, at *11 (W.D.N.C. Aug. 13, 2018) (finding that injunctive relief would not redress former student's alleged injuries where she had withdrawn from the defendant college and did not allege a present intention to reenroll), *report and recommendation adopted*, 2019 WL 276842 (W.D.N.C. Jan. 22, 2019), *aff'd*, 811 F. App'x 190 (4th Cir. 2020); *Hole v. Tex. A&M Univ.*, No. 1:04-cv-00175, 2009 WL 8173385, at *6 (S.D. Tex. Feb. 10, 2009) ("Plaintiffs' graduation, coupled with the fact that they are not now enrolled, or have even sought to re-enroll at the University indicates no ongoing harm, and thus, prevents the Court from providing any *prospective* remedy as to them." (emphasis in original)), *aff'd*, 360 F. App'x 571 (5th Cir. 2010). Count I is therefore **DISMISSED without prejudice** to the extent it seeks prospective injunctive relief. Having decided that the parent Plaintiffs have standing to assert their Fourteenth Amendment claim to the extent they seek monetary damages, the Court turns to the Parties' substantive merits arguments.

B. The Sufficiency of Plaintiffs' Allegations

"[T]he touchstone of due process is protection of the individual against arbitrary action of government." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845, 118

S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (quotation omitted). In addition to guaranteeing fair procedures, the Due Process Clause of the Fourteenth Amendment "cover[s] a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009) (alteration in original) (quoting *Lewis*, 523 U.S. at 840). "[T]he Supreme Court recognizes two types of substantive due process claims: (1) claims that the government has infringed a 'fundamental' right, . . . and (2) claims that government action deprived a person of life, liberty, or property in a manner so arbitrary it shocks the judicial conscience." *Doe v. Woodard*, 912 F.3d 1278, 1300 (10th Cir. 2019) (citing *Glucksberg*, 521 U.S. at 721-22, and *Lewis*, 523 U.S. at 846).

In the Tenth Circuit, courts generally "apply the fundamental-rights approach when the plaintiff challenges legislative action, and the shocks-the-conscience approach when the plaintiff seeks relief for tortious executive action." *Halley v. Huckaby*, 902 F.3d 1136, 1153 (10th Cir. 2018) (emphasis omitted). However, courts will also employ the fundamental-rights approach if "the plaintiff challenges 'the concerted action of several [government] employees, undertaken pursuant to broad government policies,' which is 'akin to a challenge to legislative action.'" *Maehr v. U.S. Dep't of State*, 5 F.4th 1100, 1117 (10th Cir. 2021) (quoting *Abdi v. Wray*, 942 F.3d 1019, 1027 (10th Cir. 2019)). Here, both Parties appear to use the fundamental-rights test without analyzing whether it is the appropriate test for Plaintiffs' claim. *See* [Doc. 29 at 4-9; Doc. 37 at 4-10]. Because neither Party argues that the conscience-

shocking approach applies here, and because Plaintiffs appear to challenge broadly the conduct of several District employees, allegedly undertaken pursuant to official and unofficial District policies, as opposed to the specific conduct of one government actor, *see ETP Rio Rancho Park, LLC v. Grisham*, 522 F. Supp. 3d 966, 1029 (D.N.M. 2021) ("An 'executive action' in the substantive due process analysis context is typically a 'specific act of a governmental officer.'" (quoting *Lewis*, 523 U.S. at 846)), the Court will consider the Parties' arguments under the fundamental-rights approach, *cf. Hernandez v. Grisham*, 508 F. Supp. 3d 893, 982 (D.N.M. 2020) (applying the fundamental-rights test to challenge to a school district's official guidance), *aff'd in part, appeal dismissed in part*, No. 20-2176, 2022 WL 16941735 (10th Cir. Nov. 15, 2022).

The Court analyzes a substantive due process claim using three steps. First, the Court determines whether a fundamental right is at stake. *Abdi*, 942 F.3d at 1028. Second, the Court must decide whether the claimed right has been infringed "through either total prohibition or direct and substantial interference." *Id.* (quotation and alteration marks omitted). And third, if the right allegedly violated is fundamental, the Court must determine whether the challenged government action is narrowly tailored to achieve a compelling government purpose—or, if the right at issue is not a fundamental right, whether it is rationally related to a legitimate government end. *Id.*; *see also United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir. 2002) (explaining rational basis review). With this framework, this Court now turns to considering whether Plaintiffs have sufficiently alleged a viable cause of action.

Appendix E

Plaintiffs allege a violation of their fundamental right to make decisions about the care, custody, and control of their children. *See*, *e.g.*, [Doc. 1 at ¶¶ 122, 206, 209, 219]. Defendants argue that Plaintiffs fail to allege a violation of that right because while parents have a right to direct the care, custody, and control of their children, they have no constitutional right to control each and every aspect of their child's education. [Doc. 29 at 4-6]. They contend that the right does not extend to the curriculum or extracurricular activities offered by the school. [*Id.* at 6]. In response, Plaintiffs insist that Defendants' actions have violated their right "to direct the upbringing of their children" by "surreptitiously inserting themselves into the private realm of the family" and "[keeping] parents uninformed about sexually explicit topics taught at school-sponsored clubs and discourag[ing] children from discussing issues related to gender and sexuality with their parents." [Doc. 37 at 4-5].

The right of parents to direct the care, custody, and control of their children "is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court, *Troxel*, 530 U.S. at 65, and encompasses the constitutional right to direct their children's education, "up to a point," *Swanson*, 135 F.3d at 699. This right can be traced back to *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). In *Meyer*, the Supreme Court held that a law requiring that school lessons be in English was unconstitutional because it infringed on parents' due process rights to direct the education of their children. 262 U.S. at 399-

401. And in *Pierce*, the Supreme Court held that a law which required public-school attendance for children ages eight to sixteen also "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. *Meyer* and *Pierce* "evince the principle that the state cannot prevent parents from choosing a specific educational program—whether it be religious instruction at a private school or instruction in a foreign language," and cannot otherwise "completely foreclos[e] the opportunity of individuals and groups to choose a different path of education." *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995), *abrogated in part on other grounds by DePoutot v. Raffaelly*, 424 F.3d 112, 118 n.4 (1st Cir. 2005).

But the Supreme Court has stressed the "limited scope" of this authority. *Norwood v. Harrison*, 413 U.S. 455, 461, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973); *see also*, *e.g.*, *Pierce*, 268 U.S. at 534 ("No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."); *Meyer*, 262 U.S. at 402 (recognizing the state's right to "compel attendance at some school," "make reasonable regulations for all schools," and "prescribe a curriculum for institutions which it supports"). Indeed, the Tenth Circuit (like other circuits) recognizes that this

right only extends so far. *See*, *e.g.*, *Swanson*, 135 F.3d at 699 (explaining that the right is "limited in scope" and that "parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject"); *see also Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) ("*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."); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005) (holding that the parental right to direct the care, custody, and control of children "does not extend beyond the threshold of the school door"). The Sixth Circuit has described the limits of the right as follows:

> 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) (quoting *Goss v. Lopez*, 419 U.S. 565, 578, 95 S. Ct. 729, 42 L. Ed. 2d 725

(1975)). "These decisions make clear that a parent has the right to control where their child goes to school. But that is where their control ends." *Doe*, 2023 WL 5018511, at *13.

Plaintiffs assert that their Fourteenth Amendment parental rights were violated when District personnel allegedly taught H.J. and C.L. about sexual orientation and/or gender identity without providing the parents with notice or the opportunity to opt their children out of GSA meetings. [Doc. 1 at ¶ 209]. However, Plaintiffs direct the Court to no authority demonstrating that the Fourteenth Amendment confers a *constitutional right* to receive notice about topics discussed in the District's curriculum, and particularly, at after-school, voluntary extracurricular clubs that they may find objectionable, or the right to excuse their children from those discussions. *See generally* [Doc. 37]. In fact, the weight of authority demonstrates that the Fourteenth Amendment right does not extend so far. *See*, *e.g.*, *Leebaert*, 332 F.3d at 140-42 (parent had no fundamental right to demand that child be excluded from health education classes); *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008) (holding that there is no constitutional right that "permit[s] parents to demand an exemption for their children from exposure to certain books used in public schools"); *Fields*, 427 F.3d at 1206 (parents "have no constitutional right . . . to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so").

Recent district court decisions involving factual allegations similar to those asserted here hold similarly.

For example, in *Doe*, the plaintiff parents alleged that the defendant school district violated their constitutional rights by (1) permitting transgender students to use the bathroom that corresponds with their gender identity and (2) refusing to answer the parents' questions about the district's bathroom policies. *See* 2023 WL 5018511, at *6. The court concluded that the parents failed to allege a plausible Fourteenth Amendment violation on either basis. *Id.* at *13-14. Noting the limited nature of the parents' Fourteenth Amendment right, the court determined that implementing new bathroom policies was "for the school to decide" and did not "in any way" implicate the rights recognized in earlier Supreme Court cases—e.g., the right to send students to a particular private school, the right to instruct children in certain subjects or to homeschool them, or parents' right to decide where their children receive an education. *Id.* at *13 (citing *Meyer*, 262 U.S. at 401-03; *Runyon v. McCrary*, 427 U.S. 160, 177, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976); and *Wisconsin v. Yoder*, 406 U.S. 205, 231-33, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)). Furthermore, even more relevant here, the Court found that the parents' objections to the district's alleged refusal to answer their questions about the bathroom policies "[did] not implicate a parent's fundamental right to control their children's upbringing," reasoning that "the Fourteenth Amendment does not confer parents with an unfettered right to access information about what their children are learning," to "interject in how a State school teaches children," or to receive an "answer [to] every demand made of them from frustrated parents (no matter how reasonable that frustration may be)." *Id.* at *13-14.

In addition, this Court finds a recent Recommendation issued by a Magistrate Judge in this District persuasive and relevant to the analysis in this case. *See Jones v. Boulder Valley Sch. Dist. Re-2*, No. 20-cv-03399-RM-NRN, 2021 WL 5264188 (D. Colo. Oct. 4, 2021).[5] In that case, the parent plaintiffs alleged, inter alia, that their due process rights were violated when the school district planned a performance by a transgender choir with accompanying videos and classroom discussion on transgender issues. *Jones*, 2021 WL 5264188, at *2. While parents were given the option to opt their children out of the musical performance, they were not given this option for the videos or classroom lessons. *Id.* at *4. The plaintiff parents kept their children home from school on the day of the performance and discussion and subsequently requested that if any similar topics arose in the future in the classroom, that their children "immediately be removed from the classroom (even before a teacher responds to a child's question), sent to the office, and [that the parents be] notified immediately"; the school district declined to opt-out the students from certain topics prospectively. *Id.* at *5. The court concluded that the plaintiffs had failed to allege a plausible violation of their Fourteenth Amendment due process rights, stating:

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5. In *Jones*, the Honorable N. Reid Neureiter issued a Recommendation that the defendant school district's motion to dismiss be granted and the parent plaintiffs' motion to amend the complaint be denied. *See* 2021 WL 5264188, at *22. Before the *Jones* parties filed any objections to Judge Neureiter's Recommendation, and before the Honorable Raymond P. Moore could rule on the Recommendation, the *Jones* parties settled the case. *See Jones v. Boulder Valley Sch. Dist. RE-2*, No. 20-cv-03399-RM-NRN, ECF No. 79 (D. Colo. Nov. 15, 2021).

Appendix E

> The Parents' primary complaint is that the School, without notice, is attempting to "indoctrinate" their children about LGBTQ-affirming and transgender-affirming principles, in conflict with the Family's religious beliefs. Despite the use of the loaded term "indoctrinate," reading the Amended Complaint liberally, it is the mere exposure to ideas or principles that allegedly conflict with their beliefs to which they are objecting. *And the Parents cite no federal case under the Due Process Clause which has permitted public school parents to demand an exemption for their children from mere exposure to certain concepts or ideas.*

Id. at *15 (emphasis added). The court found that "[d]ecisions as to what curriculum a public school decides to offer or require are uniquely committed to the discretion of local school authorities," *Id.* at *16, relying on, inter alia, *Fields*, which similarly held that a parent has no constitutional right to "prevent a public school from providing its students with whatever information it wishes to provide, . . . when and as the school determines that it is appropriate to do so," *Fields*, 427 F.3d at 1206.

Plaintiffs do not discuss any of this case law and do not identify any authority demonstrating that parents' fundamental Fourteenth Amendment rights are violated if they are deprived of the opportunity to direct what their children learn in schools, receive notice of what students are learning in schools, or exempt their children from certain lessons or topics. *See* [Doc. 37 at 4-10]. Instead,

they direct the Court to the Supreme Court's decision in *Troxel*, as well as two recent district-court decisions from other courts in the Tenth Circuit: *Ricard v. USD 475 Geary Cty.*, No. 5:22-cv-04015-HLT-GEB, 2022 WL 1471372 (D. Kan. May 9, 2022), and *Willey. See* [Doc. 37 at 5-7].

Plaintiffs first contend that "[w]hen examined through the lens of *Troxel* the unlawful nature of Defendants' policy is clear." [*Id.* at 5]. Plaintiffs seem to read *Troxel* to hold that school districts must always defer to parents' preferences about what their children can and cannot be taught in schools, so long as there has been no determination that the parents are "unfit." *See* [*id.* at 5-6 ("[T]here has been no suggestion that any Lee or Jurich parent [is] unfit. Accordingly, the Defendants were compelled to presume that the Lees and Juriches possess the maturity and experience their children lack and that their natural bonds of affection will lead the parents to act in the best interests of their children." (quotation and alteration marks omitted))]. But *Troxel* does not stand for this broad proposition. *Troxel* concerned parental visitation rights; it did not discuss a right of parents to direct the policies of or lessons taught in public schools or a right to receive notice about topics planned for discussion. *See Troxel*, 530 U.S. at 67-73; *see also Parents for Priv. v. Barr*, 949 F.3d 1210, 1230 (9th Cir. 2020) (discussing the nature and scope of the *Troxel* opinion). "[T]here is *nothing* in Troxel that would lead [a court] to conclude . . . 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 him or

her." *Leebaert*, 332 F.3d at 142 (first emphasis added). In contrast, numerous circuit courts have held, even post-*Troxel*, that parents have no fundamental constitutional right to exercise such control over a school's curriculum or extracurricular activities. *See id.*; *Parker*, 514 F.3d at 102; *Fields*, 427 F.3d at 1206.

The district court cases cited by Plaintiffs are similarly unhelpful. *Ricard* involved a teacher's challenge to school district policies that required her to refer to students using their preferred first name and pronouns. *See* 2022 WL 1471372, at *1. *Ricard* is a First Amendment free exercise case, not a Fourteenth Amendment parental rights case, *see id.* at *4, and despite its brief discussion of parental constitutional rights, *see id.* at *8, it is not analogous to this case. Meanwhile, *Willey* involved a challenge to a school district policy that prohibited, or could be read to prohibit, school district personnel from answering parents' questions about their children's use of pronouns at school. *See* 2023 WL 4297186, at *3, *15. In ruling that the parent plaintiffs had established a likelihood of success on the merits for purposes of obtaining preliminary injunctive relief, the *Willey* court concluded that the policy might burden a parent's right to direct the upbringing of their child "if a parent was misinformed or the District or a teacher refused to respond to a parent's inquiry regarding their minor child's request to be called by a different name, absent a showing of some danger to the health or wellbeing of the student." *Id.* at *13-14. In so doing, it specifically highlighted the denial of information *after parental inquiry*:

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> To the extent the Student Privacy Policy prohibits a teacher or school employee, *upon inquiry* by a parent or legal guardian, from responding or providing accurate and complete information concerning their minor child (and absent a threat to the wellbeing of the student), it burdens a parent's fundament right to make decisions concerning the care, custody and education of their child.

Id. at *14 (emphasis in original). The *Willey* court reasoned that parents could not make an informed decision as to how to exercise their parental rights to choose the site of their child's education—private school, public school, or home schooling—if "they [we]re unaware of circumstances that have a significant bearing on that decision because of the school's withholding of information or active deception, despite their inquiry." *Id.*

Willey is factually distinguishable from this case. Although the Complaint contains allegations concerning a District policy governing the disclosure of students' transgender status or pronouns used at school to parents, *see* [Doc. 1 at ¶¶ 148-65], Count I is not based on this policy, *see* [*id.* at ¶¶ 205-22]. Indeed, the Complaint contains no allegations that the Lees or the Juriches asked District personnel for information concerning their children's transgender status or use of pronouns at school and were denied information. *See generally* [*id.*]. Nor does the Complaint raise any claim based on this policy, *see* [*id.* at ¶¶ 205-31], assert any injury based on this policy, or seek any relief with respect to this policy,

see [*id.* at 30-31]. The Court remains persuaded by the case law discussed above holding that parents have no constitutional right to exercise control over a school's curriculum or extracurricular activities or to demand information about the same.

Finally, Plaintiffs assert that "Defendants' concealment efforts also run afoul of Colorado law" because "Colorado parents have statutory rights to be notified of educational materials that contemplate sexually explicit content and require parents to be afforded a meaningful opt-out provision." [Doc. 37 at 8 (citing Colo. Rev. Stat. §§ 22-1-128(3)(b), 22-25-110(2)(a))]. But a state-law requirement that school districts provide certain information to parents does not create a *constitutional* right to receive that information. *See Parents for Priv.*, 949 F.3d at 1232 ("Although state and federal statutes may expand upon constitutional protections by creating new statutory rights, statutes do not alter the protections afforded by the Constitution itself."); *Jones*, 2021 WL 5264188, at *11 ("A failure by the District or the School's principal to strictly adhere to a Colorado's notice and opt out requirements does not necessarily a federal constitutional claim make."). The Complaint, which asserts only federal claims, contains no allegations that Defendants' conduct violates state law, *see generally* [Doc. 1], nor do Plaintiffs assert that Defendants have deprived them of a protected property interest conferred by statute, *see generally* [*id.* at ¶¶ 205-22]; *see also Carnes v. Parker*, 922 F.2d 1506, 1509 (10th Cir. 1991) (explaining that property rights protected by the Due Process Clause are "created by independent sources such as a state or federal statute, a municipal charter or ordinance, or an implied or express contract").

In sum, while the parent Plaintiffs generally have a Fourteenth Amendment fundamental right to direct the upbringing of their children, they have not adequately alleged a violation of that fundamental right. As a result, the Court need not, and does not, analyze whether Defendants' conduct passes any particular level of scrutiny. *See Abdi*, 942 F.3d at 1028.[6] The Motion to

6. It is not entirely clear to the Court whether it must conduct a rational basis review even though it has concluded that the parent Plaintiffs have not alleged a violation of their fundamental right to direct the upbringing of their children. *Compare Abdi*, 942 F.3d at 1028, *with Dias*, 567 F.3d at 1182 ("Even if the Ordinance does not implicate a fundamental right, it must nonetheless bear a rational relationship to a legitimate government interest."). Even if the Court did proceed to a rational basis review, the end result would not change. Government action satisfies the rational basis standard if "if there is any reasonably conceivable state of facts that could provide a rational basis for the [infringement]." *Maehr*, 5 F.4th at 1122 (alteration in original) (quoting *FCC v. Beach Communications*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)). "This requires 'no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose.'" *Id.* (alteration in original) (quoting *Reno v. Flores*, 507 U.S. 292, 305, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)). In their Motion, Defendants argue that the District "has a legitimate interest in providing a safe and supportive environment for all its students, including those who are transgender or gender nonconforming." [Doc. 29 at 7]. They contend that their policies further that interest by "seek[ing] to reduce the stigmatization of, and improv[ing] the educational experiences and outcomes of, transgender and non-binary students while maintaining the privacy of all students and fostering cultural competence and professional development for school staff." [*Id.* at 8]. The Court agrees with Defendants that they have identified a legitimate government purpose that is furthered by rational means. *See*

Dismiss is respectfully **GRANTED** with respect to Count I. Count I is **DISMISSED without prejudice** for failure to state a claim under Rule 12(b)(6).[7]

II. Equal Protection—Count II

As a preliminary matter, the Court pauses to ascertain the nature of Count II. Count II is titled "COUNT II—Violation of Parental Rights Under the Fourteenth Amendment." [Doc. 1 at 29]. Its subheading

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Vesely v. Ill. Sch. Dist. 45, No. 1:22-cv-02035, 2023 WL 2988833, at *5 (N.D. Ill. Apr. 18, 2023) (recognizing a legitimate government interest in "maintaining a non-discriminatory environment for students and protecting students' privacy, mental well-being, and physical safety"), *appeal dismissed*, No. 23-2190 (7th Cir. July 14, 2023).

7. Defendants request that Count I be dismissed with prejudice. [Doc. 29 at 9]. "A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile." *Brereton*, 434 F.3d at 1219. While Defendants cite to the *Jones* recommendation in support of their request, they make no substantive futility argument. *See* [Doc. 29 at 9]. The Court declines to undertake a futility analysis sua sponte and instead will dismiss Count I without prejudice. *But see Jones*, 2021 WL 5264188, at *21 (concluding that amendment of claim would be futile because "there is no federal constitutional right for public school parents or families to get advance notice of and the right to opt-out of religiously offensive material"); *Parents for Priv.*, 949 F.3d at 1233 (affirming dismissal of Fourteenth Amendment claim with prejudice because "Supreme Court and Ninth Circuit case law . . . ha[d] not recognized the specific rights asserted by Plaintiffs" and "further foreclose[d] recognizing such rights as being encompassed by the fundamental parental rights protected by the Fourteenth Amendment's Due Process Clause").

asserts a "[d]enial of equal protection under the law by denial of a gender support plan to Plaintiff ML where other similarly situated students are granted gender support plans." [*Id.*]. The Complaint alleges that M.L. was "denied . . . the protection of the laws offered to other similarly situated children within the district and [was denied] his right to equal protection of the laws," [*id.* at ¶ 230], but also cursorily states that "[t]he Fourteenth Amendment to the United States Constitution provides that the right to direct and control the upbringing of children is the province of fit parents and that this right is fundamental," [*id.* at ¶ 231]. Count II does not plainly allege the violation of the Lees' parental rights under the Fourteenth Amendment. *Compare* [*id.* at ¶¶ 224-31], *with* [*id.* at ¶ 209 (explicitly alleging that Defendants violated the parent Plaintiffs' Fourteenth Amendment rights in the context of Count I)]. Defendants too construed Count II as asserting only an equal protection claim, *see* [Doc. 29 at 9-13], and Plaintiffs did not take issue with this interpretation or try to correct it in their Response, *see* [Doc. 37]. Instead, in their Response, Plaintiffs direct their Fourteenth Amendment due process arguments strictly to Count I, *see* [Doc. 37 at 4-10], and with respect to Count II, they raise arguments only under the Equal Protection Clause, *see* [*id.* at 10-13].[8]

8. Plaintiffs do briefly reference gender support plans in the context of arguing that "Defendants' efforts at concealment were a feature, not a bug, of the Defendants' policies and practices," stating: "[r]egarding the [gender support plans,] Defendants are again perfectly willing to exclude parents from the decision process and keep them ignorant of student decisions." [Doc. 37 at 6-7 (citing Doc. 1 at ¶¶ 169-70)]. The cited paragraphs in the Complaint allege

The Court is neither obligated nor permitted to construct legal theories on behalf of parties that they do not advance themselves. *See United States v. Davis*, 622 F. App'x 758, 759 (10th Cir. 2015) ("[I]t is not this court's duty, after all, to make arguments for a litigant that he has not made for himself."); *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 800 n.10 (10th Cir. 2001) (observing that the court has no obligation to make arguments or perform research on behalf of litigants); *Carrillo v. New Mexico ex rel. Child., Youth & Fams. Dep't*, 405 F. Supp. 3d 1048, 1055 (D.N.M. 2019). For the several reasons above, the Court assumes that the heading of Count II is a typographical error and that Count II does not assert a Fourteenth Amendment substantive due process claim. The Court thus limits its analysis on Count II to the Equal Protection Clause.

A. Standing

With respect to Count II, Defendants contend that Plaintiffs fail to allege facts establishing Article III standing on the part of the Lees or M.L. [Doc. 29 at 17-18]. Defendants' arguments related to Count II address

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that gender support forms may be completed without parental consent and that District personnel are not obligated to inform parents if their child completes a gender support form. [Doc. 1 at ¶¶ 169-70]. Notably, however, the Complaint does not allege that M.L. filled out a gender support form himself or that the District failed to notify the Lees of such; rather, the Complaint expressly alleges that it was the Lees who filled out a gender support form for M.L. *See* [*id.* at ¶ 85]. The Court thus does not construe Plaintiffs' due process argument in the Response to be directed to Count II.

only the first and third standing requirements—injury and redressability—and the Court's analysis is similarly limited.

Injury in Fact. Defendants assert that the Lees and M.L. fail to identify an injury in fact supporting Count II because "the Complaint is devoid of any alleged harm arising from [the Lees'] request for a gender support plan reiterating [M.L.'s] biological gender and pronouns—i.e., his status quo remained the same and there is no other alleged injury to M.L. evident in the Complaint." [*Id.* (emphasis omitted)].

For equal protection claims, the injury "is the denial of equal treatment resulting from the imposition of [a] barrier," *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993), i.e., the injury is the imposition of the barrier *itself, Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 493 (10th Cir. 1998). Here, Plaintiffs allege that the Lees requested a gender support plan for M.L., but their request was denied based on "the conjunction of [M.L.'s] biological sex and gender identity." [Doc. 1 at ¶¶ 83-88, 180]. While not robust, these allegations are sufficient to plausibly allege an injury in fact at the pleading stage.

Redressability. Next, Defendants argue that Plaintiffs fail to demonstrate that any injury suffered as a result of Defendants' actions would be redressed by a favorable judicial decision. They contend that the District's guidelines governing the provision of gender support plans

"follow both state law and District policies, all of which would still be in effect regardless of any court decision pertaining to the GSA meetings or Guidelines." [Doc. 29 at 20]. Plaintiffs respond that a "favorable decision would provide monetary damages fully redressing Plaintiffs' injuries," but do not directly address Defendants' argument. *See* [Doc. 37 at 18-19].

The Court is respectfully unpersuaded by Defendants' argument, which lacks meaningful development. First, the Court notes that Plaintiffs only requested injunctive relief with respect to Count I, *see* [Doc. 1 at 30], and that request has been dismissed, limiting the relief sought to monetary damages. Furthermore, if the Lees and M.L. are correct on their legal theory that the District's policies and conduct violated M.L.'s Fourteenth Amendment rights, their injury will be redressable by money damages regardless of any state law or District guidelines. *Cf. Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, No. 2:23-cv-01595-ALM-KAJ, 2023 WL 4848509, at *8 (S.D. Ohio July 28, 2023) ("Federal statutes must give way to the federal Constitution; an unconstitutional action cannot stand simply because it is authorized by a federal law. Thus, if the Policies violate the First or Fourteenth Amendments, then they must be enjoined even if the School District is compelled by Title IX to combat harassment on the basis of gender identity." (citation omitted)), *appeal docketed*, No. 23-3630 (6th Cir. July 31, 2023). The Court is respectfully unpersuaded by Defendants' argument and finds that the Lees' and M.L.'s alleged injuries could be redressed by a favorable court decision.

B. The Sufficiency of Plaintiffs' Allegations

The Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992). It does not create substantive rights, but instead "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997).

"Different types of equal protection claims call for different forms of review. A claim that a state actor discriminated on the basis of a suspect (e.g., race), quasi-suspect (e.g., gender), or a non-suspect classification calls for strict, intermediate, or rational basis scrutiny, respectively." *Brown v. Montoya*, 662 F.3d 1152, 1172 (10th Cir. 2011). In each instance, the plaintiff must make "a threshold showing that they were treated differently from others who were similarly situated to them." *Id.* at 1173 (quotation omitted). Individuals are "similarly situated" only if they are alike "in all relevant respects." *Requena v. Roberts*, 893 F.3d 1195, 1210 (10th Cir. 2018) (quotation omitted). "[A]lthough this is not a precise formula, it is nonetheless clear that similarly situated individuals must be very similar indeed." *Ebonie S. ex rel. Mary S. v. Pueblo Sch. Dist. 60*, 819 F. Supp. 2d 1179, 1189 (D. Colo. 2011) (quoting *United States v. Moore*, 543 F.3d 891, 896-97 (7th Cir. 2008)).

Appendix E

Defendants argue first that M.L.'s equal protection claim must be dismissed because Plaintiffs fail to allege that he was similarly situated to any students who allegedly received more favorable treatment. [Doc. 29 at 11]. In the alternative, they contend that rational basis review applies here and Defendants' conduct satisfies this standard. [*Id.* at 11-13].

1. Similarly Situated

Defendants contend that M.L., whose parents sought a gender support plan to ensure the use of his birth name and male pronouns, is not identical in all relevant respects to District students who requested and received gender support plans, as those students are presumably transgender or gender non-confirming; instead, according to Defendants, M.L. is "identical in all relevant respects to other cisgender students who may request and would be denied gender support plans." [*Id.* at 11]. Plaintiffs respond that "[c]ontrary to the Defendants' suggestion, the similarly situated pertinent groups are not 'transgender' and 'cisgendered' [sic] but rather any child that experiences gender who seeks 'access to a school environment that is affirming and is free from discrimination and harassment on the basis of gender identity and gender expression.'" [Doc. 37 at 11]. But then, Plaintiffs immediately go on to assert that the denial of a gender support plan was "based on [M.L.'s] sex," that "the Guidelines, on their face, deny gender support plans to cisgender children while granting them to transgender children," and that the denial of a gender support plan to M.L. "was based on the fact that M.L.'s sex aligned with his preferred pronouns." [*Id.* at 11-12 (emphasis omitted)].

To the extent Plaintiffs suggest that M.L.'s and any unidentified comparator students' cisgender or transgender status is not relevant to the Court's analysis or to M.L.'s claim, this assertion is contradicted by Plaintiffs' own allegations in their Complaint. The Complaint does not clearly define the group of students to whom Plaintiffs believe M.L. is similarly situated; instead, Plaintiffs cursorily assert that M.L. was denied protections "that are available to other, similarly situated children." [Doc. 1 at ¶ 89]; *see also* [*id.* at ¶ 230]. The Complaint alleges that M.L. was denied a gender support plan, but that gender support plans are generally available to transgender students. [*Id.* at ¶¶ 86, 229]. And Plaintiffs consistently allege that the reason for the denial of a gender support plan for M.L. was the "conjunction of the biological sex and gender identity of the student," [*id.* at ¶¶ 180, 182], and suggest that transgender status is a relevant consideration in the grant or denial of a gender support plan, *see* [*id.* at ¶ 229 ("Children who are considered transgender and who desire a gender support plan may have one. Children who are not considered transgender but who nevertheless desire a gender support plan may not have one.")]; *see also* [Doc. 37 at 11-12]. Indeed, Plaintiffs allege that the District denied the Lees' request "on the basis that the parents could not use a plan to re-affirm M.L.'s given name and biological gender," as District policy provides that the District "cannot accommodate parent requests that the school staff use pronouns that align with a student's biology." [Doc. 1 at ¶¶ 227-28]. Thus, notwithstanding Plaintiffs' suggestion in their Response that the relevant question is whether M.L. was similarly situated to "any child that experiences gender" who seeks a safe and

affirming educational environment, the Court agrees with *both* sides that the relevant question in this case is whether M.L., a cisgender child who requested and was denied a gender support plan, is similarly situated to the students for whom a gender support plan is allegedly available, i.e., transgender or non-binary students.

Notably, Plaintiffs cite no legal authority demonstrating, and raise no argument asserting, that M.L. is similar in *all relevant* respects to those students for whom a gender support plan is available. *See* [Doc. 37 at 10-11]. Nor does the Complaint specifically identify the students to whom M.L. is similarly situated. *See generally* [Doc. 1]. "The absence of firm comparators renders Plaintiff[s'] claim nebulous at best," and ambiguous allegations are insufficient to support a plausible claim. *Oliver v. Va. Bd. of Bar Examiners*, 312 F. Supp. 3d 515, 534 (E.D. Va. 2018). "An equal protection claim will not lie by 'conflating all persons not injured into a preferred class receiving better treatment' than the plaintiff." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005) (quoting *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986)). While the Complaint loosely compares M.L. to a student who could receive a gender support plan, *see, e.g.*, [Doc. 1 at ¶¶ 86, 229], the allegations are unclear as to whether M.L. is alike in *all* relevant respects to those students. As alleged in the Complaint, the Lees requested a gender support plan for M.L. so District personnel would "refer to M.L. by his biological gender and birth name," and the District rejected the request on the basis that gender support plans are only available for transgender students. [*Id.* at ¶¶ 85-86]; *see also* [*id.* at ¶ 176 (alleging

that a gender support plan is "intended to support a transgender or non-binary student in gaining access to a school environment that is affirming and is free from discrimination and harassment" (emphasis omitted))]. But the Court finds it highly relevant that the alleged purpose behind the Lees' request for a gender support plan for M.L.—to "affirm M.L.'s given name and biological gender," *see* [*id.* at ¶ 227]—is likely different from the reason a transgender or non-binary student would request a gender support plan. *Cf. Thompson v. LeNgerich*, No. 22-1128, 2023 WL 2028961, at *2 (10th Cir. Feb. 16, 2023) (where plaintiff asserted an equal protection claim based on the denial of access to a private shower, while transgender inmates received access to a private shower, concluding that inmate was not similar to transgender inmates in all *relevant* respects because "[w]hether an inmate is transgender . . . is relevant to the inmate's need for a private shower because transgender . . . inmates may face an additional risk of assault"). However, the Court is mindful that, in other contexts, the Tenth Circuit has cautioned that whether individuals are similarly situated is typically a fact question reserved for the jury. *See*, *e.g.*, *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1117 (10th Cir. 2007). Accordingly, the Court will assume, without deciding, that Plaintiffs have adequately alleged that M.L. was similarly situated to other students who could receive a gender support plan and will turn to whether Plaintiffs' allegations plausibly allege a denial of equal protection.

2. Rational Basis Scrutiny is Appropriate

Before deciding whether Defendants' alleged policy passes constitutional scrutiny, the Court must determine what level of scrutiny applies. "If the challenged government action implicates a fundamental right, or classifies individuals using a suspect classification, such as race or national origin, a court will review that challenged action applying strict scrutiny." *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1109 (10th Cir. 2008). If the government action classifies individuals based on a "quasi-suspect characteristic," such as gender, courts apply intermediate scrutiny. *Id.* Government conduct satisfies intermediate scrutiny if it serves "'important governmental objectives' and is 'substantially related to achievement of those objectives.'" *Id.* at 1110 (quoting *Concrete Works of Colo., Inc. v. City and Cnty. of Denver*, 321 F.3d 950, 959 (10th Cir. 2003)). And finally, if the government action does not implicate a fundamental right, a suspect class, or a quasi-suspect class, rational basis scrutiny applies. *Id.* In this circumstance, the government classification requires only "a rational relation to some legitimate end." *Id.* (quotation omitted).

The Parties disagree about what level of scrutiny applies here. Plaintiffs contend that intermediate scrutiny applies because "Defendants' denial of M.L.'s [gender support plan] was based on his sex." [Doc. 37 at 11]. Defendants disagree, arguing that intermediate scrutiny does not apply because the provision of gender support plans does not create a gender classification between male and female students, but instead creates

a classification between transgender or gender-non-confirming students and cisgender students. [Doc. 29 at 10-11]. Thus, Defendants contend, Defendants' policy should be reviewed for a rational basis. [*Id.* at 11-13].

The Court respectfully agrees with Defendants and disagrees with Plaintiffs. Plaintiffs attempt to frame this case as challenging a straightforward sex-based classification, asserting that the denial of the gender support plan "was based on sex discrimination." [Doc. 1 at ¶ 226]. However, this conclusory assertion is not plausible because it fails to account for the numerous allegations in the Complaint alleging that M.L. was denied a gender support plan due to the "conjunction of [M.L.'s] biological sex and gender identity" (i.e., M.L.'s cisgender status). *See, e.g.*, [*id.* at ¶¶ 86, 180-82, 227-29]; *see also* [*id.* at ¶ 226 ("[H]ad M.L. been a biological female, . . . [the District] would have granted M.L.'s gender support plan *for the use of male gender pronouns*." (emphasis added))]. The Complaint contains *no* allegations that a similarly situated female student who, *like M.L.*, requested a gender support plan to ensure the use of *female* pronouns was, or would have been, granted a gender support plan under the District's policies. *See generally* [*id.*]. Indeed, Plaintiffs expressly allege that a gender support plan is "not available to a biological male student who identifies as male nor a biological female student who identifies as . . . female," [*id.* at ¶ 177 (emphasis added)], i.e., that a gender support plan is *equally* unavailable to both male and female students who seek to "affirm" their biological sex. In other words, the Complaint plausibly alleges that M.L. was denied a gender support plan due

to his cisgender or non-transgender status, but does not plausibly allege that he was denied a gender support plan solely due to his sex. Plaintiffs' cursory legal conclusion that the denial of a gender support plan to M.L. "was based on sex discrimination" is thus not a well-pleaded factual allegation that the Court must take as true. *See Crane v. Utah Dep't of Corr.*, 15 F.4th 1296, 1303 (10th Cir. 2021) ("Courts do not assume as true allegations that are legal conclusions, formulaic recitations of elements, or naked assertions devoid of further factual enhancement."); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) (explaining that well-pled allegations are those that are "plausible, non-conclusory, and non-speculative").

The Supreme Court has only identified two classifications subject to intermediate scrutiny: "sex and illegitimacy." *Fowler v. Stitt*, No. 4:22-cv-00115-JWB-SH, ___ F. Supp. 3d. ___, 2023 WL 4010694, at *19 (N.D. Okla. June 8, 2023) (citing *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971), and *Trimble v. Gordon*, 430 U.S. 762, 767, 97 S. Ct. 1459, 52 L. Ed. 2d 31 (1977)), *appeal docketed*, No. 23-5080 (10th Cir. July 7, 2023). "[T]he Supreme Court has been reluctant to expand the scope of quasi-suspect classifications. In fact, since adding illegitimacy in 1977, the Supreme Court has declined every opportunity to recognize a new quasi-suspect class." *Id.* at *20 (collecting cases). There is "little guidance for determining whether intermediate scrutiny should apply to classifications based on characteristics beyond sex or illegitimacy." *Id.* at *19.

Appendix E

This Court could locate no case in which a cisgender plaintiff alleged that their equal protection rights were violated because they were treated less favorably than a transgender or non-binary individual. A number of courts have decided cases involving the reverse, i.e., a transgender plaintiff alleging they were treated less favorably than similarly situated cisgender individuals. Many of these courts "have analyzed the relevant factors for determining suspect class status and held that transgender people are at least a quasi-suspect class." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020) (collecting cases); *see also id.* at 611 (extrapolating from Supreme Court precedent four factors to consider when recognizing a new quasi-suspect class: whether the class has historically been subject to discrimination; whether the class has a defining characteristic that bears a relation to its ability to perform or contribute to society; whether the class may be defined as a discrete group by an "obvious, immutable, or distinguishing characteristic[]"; and whether the class is a minority class lacking political power).

Nearly two decades ago, the Tenth Circuit decided *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995). In *Brown*, a transgender inmate alleged that her equal protection rights were violated when prison officials denied her access to estrogen treatment. 63 F.3d at 969. The Tenth Circuit declined to hold that the plaintiff was a member of a quasi-suspect class, relying on the now-overruled Ninth Circuit decision in *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), *overruling recognized in Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000)). *See Brown*, 63 F.3d at 971 (stating that "[r]ecent research

. . . suggests reevaluating *Holloway*" but "declin[ing] to make such an evaluation in this case" and instead following *Holloway*). To date, the Tenth Circuit has not decided whether transgender individuals are members of a quasi-suspect class. *See Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015). District courts within the Tenth Circuit remain obligated to follow *Brown* and apply rational basis scrutiny when a transgender person brings an equal protection claim alleging discrimination based on their transgender status. *See*, *e.g.*, *Griffith v. El Paso Cnty.*, No. 21-cv-00387-CMA-NRN, 2023 WL 2242503, at *10 (D. Colo. Feb. 27, 2023), *report and recommendation adopted*, 2023 WL 3099625 (D. Colo. Mar. 27, 2023), *appeal docketed*, No. 23-1135 (10th Cir. Apr. 26, 2023); *Poe v. Drummond*, No. 4:23-cv-00177-JFH-SH, 2023 WL 6516449, at *7 (N.D. Okla. Oct. 5, 2023), *appeal docketed*, No. 23-5110 (10th Cir. Oct. 10, 2023); *Fowler*, 2023 WL 4010694, at *21.

While *Brown* and its progeny are not directly on point because M.L. does not claim discrimination based on transgender status, but *cis*gender status, the Court finds that these cases lend support to the conclusion that rational basis scrutiny is appropriate here. If the Court is bound by *Brown*'s holding that transgender individuals are not members of a quasi-suspect class, the Court simply cannot conclude that cisgender individuals are members of a quasi-suspect class by virtue of their cisgender status, particularly where "the Supreme Court has been reluctant to expand the scope of quasi-suspect classifications." *Fowler*, 2023 WL 4010694, at *20; *see also Flack v. Wis. Dept. of Health Servs.*, 328 F. Supp. 3d 931, 953 (W.D. Wis.

2018) ("[O]ther than certain races, one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people."). And Plaintiffs make no argument explaining why the Court should recognize a new quasi-suspect class. *See* [Doc. 37]. For these reasons, the Court agrees with Defendants that rational basis scrutiny applies here.

3. Defendants' Alleged Policy Passes Constitutional Scrutiny

Finally, the Court must determine whether Defendants' alleged policy of providing gender support plans only to transgender or non-binary students is rationally related to a legitimate government interest. Courts "accord a strong presumption of validity to [government actions] that neither involve fundamental rights nor proceed along suspect lines." *City of Herriman v. Bell*, 590 F.3d 1176, 1194 (10th Cir. 2010). A court will strike down the government's action only "if the state's classification 'rests on grounds *wholly irrelevant* to the achievement of the State's objective.'" *Id.* (emphasis in original) (quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71, 99 S. Ct. 383, 58 L. Ed. 2d 292 (1978))). "Because a classification subject to rational basis review 'is presumed constitutional, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Petrella v. Brownback*, 787 F.3d 1242, 1266 (10th Cir. 2015) (quoting *Armour v.*

City of Indianapolis, 566 U.S. 673, 681, 132 S. Ct. 2073, 182 L. Ed. 2d 998 (2012)).

"In the context of a motion to dismiss under 12(b)(6), this court accepts all of the allegations in the complaint as true and then considers these 'facts' according to the deferential rational basis standard." *Teigen v. Renfrow*, 511 F.3d 1072, 1083 (10th Cir. 2007). "To survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *Id.* (quotation omitted). The determination whether there is a conceivable basis for the government's classification "is a legal question which need not be based on any evidence or empirical data." *Id.* at 1084. But the Court is not limited to the Parties' arguments in determining what government interests the classification seeks to further. *Id.* "In fact, this Court is *obligated* to seek out other conceivable reasons for validating a state policy." *Id.* (quotation and alteration marks omitted) (emphasis in original).

Defendants contend that the District has a legitimate interest in "providing a safe and supportive environment for all its students, including those who are transgender or gender nonconforming." [Doc. 29 at 7]. They also contend that the District has an interest in "adhering to prohibitions against discrimination for sexual orientation, gender expression, or gender identity in state law and District policy while providing educational services to students." [*Id.* at 12]. The Court agrees that these are legitimate government interests. *See Vesely v. Ill. Sch. Dist. 45*, No. 1:22-cv-02035, 2023 WL 2988833, at *5

(N.D. Ill. Apr. 18, 2023); *see also Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S. Ct. 438, 88 L. Ed. 645 (1944) ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.").

The Court also finds that the District's policy of providing gender support plans to transgender or gender non-conforming students is rationally related to this objective. Here, the stated reason for the District's classification appears on the face of the Complaint. Plaintiffs allege that a gender support plan

> is intended to support a transgender or non-binary student in gaining access to a school environment that is affirming and is free from discrimination and harassment on the basis of gender identity and gender expression. Cisgender and gender normative students inherently have access to a gender-affirming school environment based on this held identity, and an Individual Gender Support Form's purpose is to work to ensure this access for students who have historically faced discrimination and harassment on the basis of gender identity and gender expression.

[Doc. 1 at ¶ 176 (emphasis omitted)]. In other words, the District's reason for providing gender support plans to transgender students is to provide those students access to a supportive environment to which the District says that cisgender students already "inherently" have access. And if the District believes that cisgender students already

have access to a gender-affirming environment, such that there is no need to provide gender support plans to these students, the District's classification is rationally related to that legitimate interest. *See City of Herriman*, 590 F.3d at 1194 (explaining that government conduct will be deemed unconstitutional only where it rests on grounds "wholly irrelevant" to the achievement of the state's objective). To the extent Plaintiffs could argue that gender-normative students do not have access to an affirming or supportive environment at District schools because, as Plaintiffs allege, these students experience gender-based pressure from District personnel, *see*, *e.g.*, [Doc. 1 at ¶¶ 54, 102], "[t]he fact that a [policy] is imperfect does not make it irrational," *Fowler*, 2023 WL 4010694, at *23, and the government "must be allowed leeway to approach a perceived problem incrementally," *FCC v. Beach Communications*, 508 U.S. 307, 316, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993).

Plaintiffs have not alleged any facts to overcome the presumption of rationality applied to the District's classifications. *See generally* [Doc. 1 at ¶¶ 78-89, 166-82, 223-31]. In their Response, they contend that Defendants' alleged actions fail to pass rational basis review because Defendants withheld a benefit from M.L. "because of his 'sexual orientation, gender identity, [or] gender expression'" and because "[i]t is impossible for there to be a reasonable fit between an interest of 'adhering to prohibitions against discrimination' and a policy that is itself discriminatory." [Doc. 37 at 12 (first alteration in original) (citing Colo. Rev. Stat. § 24-34-601(2)(a)]. Plaintiffs' argument ignores the fact that the

Equal Protection Clause "does not forbid classifications" outright, *Nordlinger*, 505 U.S. at 10, and permits the government to "treat unlike cases accordingly," *Vacco*, 521 U.S. at 799. And again, Plaintiffs have not asserted a state-law discrimination claim, and they have cited no case law demonstrating that the Court could or should analyze the propriety of Defendants' conduct under Colorado state law to determine whether it passes constitutional scrutiny. *See* [Doc. 37 at 12]; *see also Beach Communications*, 508 U.S. at 313 ("[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."). Plaintiffs fail to address Defendants' legitimate interest in providing a means to ensure that gender non-conforming students experience a non-discriminatory and gender-affirming environment, and thus, they fail to "negative every conceivable basis which might support" the government's actions. *Petrella*, 787 F.3d at 1266.

Because Defendants' classifications are rationally related to a legitimate state interest, the Court concludes that M.L. and the Lees as M.L.'s next friends have failed to state a claim under the Equal Protection Clause. The Motion to Dismiss is thus **GRANTED** with respect to Count II, and Count II is **DISMISSED without prejudice** under Rule 12(b)(6). The Court does not reach Defendants' remaining arguments.

Appendix E

CONCLUSION

For the reasons set forth herein, **IT IS ORDERED** that:

(1) Defendants' Motion to Dismiss Plaintiffs' Complaint [Doc. 29] is **GRANTED**;

(2) Count I is **DISMISSED without prejudice** for lack of subject matter jurisdiction under Rule 12(b)(1) to the extent it is asserted by H.J., C.L., or M.L.;

(3) Count I is **DISMISSED without prejudice** for failure to state a claim under Rule 12(b)(6) to the extent it is asserted by Jonathan Lee, Erin Lee, Nicolas Jurich, and Linnaea Jurich;

(4) Count II is **DISMISSED without prejudice** for failure to state a claim under Rule 12(b)(6);

(5) On or before **January 9, 2024**, Plaintiffs may file a motion to amend that complies with the Local Rules and the Federal Rules of Civil Procedure; and

(6) If no such motion to amend is filed by the Court's deadline, the Court will direct the Clerk of Court to close this case.

Appendix E

DATED: December 19, 2023

BY THE COURT:

/s/ Nina Y. Wang
Nina Y. Wang
United States District Judge

APPENDIX F — AMENDED MOTION FOR LEAVE TO AMEND COMPLAINT, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED JANUARY 18, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-cv-01117-NYW-STV

JONATHAN LEE; ERIN LEE; C.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS; M.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS; NICOLAS JURICH; LINNAEA JURICH; AND, H.J., A MINOR, BY AND THROUGH PARENTS NICOLAS AND LINNAEA JURICH AS NEXT FRIENDS,

Plaintiffs,

v.

POUDRE SCHOOL DISTRICT R-1, FT. COLLINS, COLORADO; AND, POUDRE SCHOOL DISTRICT R-1 BOARD OF EDUCATION,

Defendants.

AMENDED MOTION FOR LEAVE TO AMEND COMPLAINT (ORAL ARGUMENT REQUESTED)[1]

1. On January 12, 2024, Plaintiffs filed their first Motion for Leave to Amend Complaint (Doc. 60, the "Motion"). On January 16, 2024, this Court struck the Motion for failure to comply with

Appendix F

INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 15(a)(2) and the Memorandum Opinion and Order of this Court (Doc. 58, "Order") issued in response to the Defendants' Motion to Dismiss (Doc. 29), Plaintiffs hereby submit this Motion for Leave to Amend the Complaint, along with a proposed First Amended Complaint ("FAC") reflecting changes from the original complaint ("Complaint"). (A redline copy of the FAC is attached hereto at **Exhibit A**; a clean version is attached hereto at **Exhibit B**).

LEGAL STANDARD

Under Rule 15(a)(2), a party may seek to amend a pleading with leave of the court, and the "court should freely give leave when justice so requires." If an amendment will cause no prejudice to a party, leave to amend is normally granted. 6 Federal Practice and Procedure Civil, § 1484 (3d ed.), Wright and Miller, 2023. As the Supreme Court has noted, leave should be granted provided that the amendment is neither futile nor causes undue delay or prejudice to the other party or is not the result of bad faith or repeated failures to cure deficiencies in the pleadings. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Local Rule D.C.COLO.LCivR 7.1(a) (Doc. 63). Plaintiffs now submit this compliant Amended Motion for Leave to Amend Complaint with the following alterations from the Motion: (1) the inclusion of a Certificate of Conferral, in conformity with D.C.COLO.LCivR 7.1(a); (2) the addition of the word "Amended" to the caption; (3) an updated filing date in both the signature block and the Certificate of Service; and (4) the inclusion of this explanatory footnote.

As set forth below, Plaintiffs' respectfully request that this Court grant this Motion for Leave to Amend.

CHANGES TO THE COMPLAINT

In response to the Court's Order, the FAC reflects several changes to the parties and claims. The only Plaintiffs in the FAC are the parents, not the children, and the only Defendant in the FAC is the Poudre School District, not the Board of Education. While Plaintiffs continue to seek compensatory damages, the FAC does not seek injunctive relief or punitive damages. Lastly, Plaintiffs no longer pursue the equal protection claim from Count II, and only the Fourteenth Amendment claim in Count I remains in the FAC.

REVISIONS TO COUNT I

The most important change in the FAC is its focus on the broad policy of the District to unconstitutionally interfere with the parent/child relationship (the "District Secrecy Policy"). Specifically, the District Secrecy Policy violated the Fourteenth Amendment in two ways: (1) it disrupted a parent's right to direct their child's education by obstructing parents from being about the curriculum, and (2) it allowed the District to make secret, extra-judicial, determinations about the best interests of a child.

While the District has great discretion in setting the curriculum in its schools (*see, e.g., Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)), the District Secrecy Policy prevents parents from knowing what the District's curriculum

addresses and prevents parents from meaningfully exercising their right to determine *whether* to maintain their child's enrollment in a District school (*see, e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925)).

In addition to hiding the details of the curriculum from parents, the District Secrecy Policy improperly grants the District the ability to act in what it determines to be the best interests of a transgender child's welfare without informing the parents. The Supreme Court has rejected statutes that "accorded no deference" to an otherwise fit parent and placed a, "best-interest determination solely in the hands of . . . [a] judge." *Troxel v. Granville*, 530 U.S. 57, 67 (2000). If an open judicial proceeding is insufficient to overcome the Fourteenth Amendment's deference to parents as to the best interest of a child, the District Secrecy Policy is no less Constitutionally unsound as it mandates secrecy from parents and is undertaken without oversight from a neutral magistrate.

As a consequence, the District Secrecy Policy has violated the parental rights of Plaintiffs Jonathan Lee, Erin Lee, Nicholas Jurich, and Linnea Jurich in two distinct ways: (1) it deprived these Plaintiffs of their right to make a well-informed decision to send their children to District schools, and (2) it allowed the District to make unilateral determinations as to the best interests of children exploring their identity in violation of the principle that parents are presumed to act in the best interest of a child.

The District Secrecy Policy violates the best interest of the child standard set out in the Supreme Court's *Troxel*

decision. The *Troxel* Court addressed a statute allowing judges to grant visitation rights if the court determined that interaction with the petitioning party would "serve the best interest of the child." Doc. 37, pp. 5-6; *Troxel*, 530 U.S. at 60. The trial court in *Troxel* was confronted with a request from grandparents to visit their grandchildren over the objection of the mother (the grandparents were the parents of the recently deceased father). *Id.* at 61. Justice O'Connor declared the statute to be "breathtakingly broad" as it "places the best-interest determination solely in the hands of the judge" without giving primacy to the general rule that "there is a presumption that fit parents act in the best interest of their children." *Id*. at 67-68. The *Troxel* Court relied on the earlier decision in *Parham v. J.R.* that American "jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children . . . [and that] our constitutional system long ago rejected any notion that child is 'the mere creature of the state.'" 442 U.S. 584, 602 (1979) (citations omitted). The *Troxel* Court then held that so long as a parent is not found unfit, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69 (citations omitted).

The Court's Order suggested that Plaintiffs relied on *Troxel* for the proposition that "school districts must always defer to parents' preferences about what their children can and cannot be taught in schools, so long as there has been no determination that the parents are 'unfit.'" Order, p. 25. Plaintiffs respectfully submit

that they never cited *Troxel* for this proposition but rather for the proposition that, without a prior judicial determination that a parent is unfit, it is unconstitutional for the District to transition a student secretly and to keep information about its curriculum from their parents. *See, e.g.*, Doc. 37, P. 6 ("Starting with the GSA meetings, the Defendants' representatives encouraged children to treat the discussions as secret, and (despite no determination as to parental fitness) warned that it might not be safe to discuss the meetings with their families. Compl. ¶¶ 32-34, 58, 76, 103-05, 110-11."). In *Troxel*, the mother was notified of the grandparents' petition, afforded an opportunity to be heard, and was subject to an order issued by a neutral magistrate. Plaintiffs in the instant case have been afforded no such process. Furthermore, pursuant to the District Secrecy Policy, it is the District's intent that a child should be informed of transgenderism and offered the ability to opt into a gender transition plan through a process where the District and the child *actively collaborate* to keep fit parents ignorant of all of this. Plaintiffs' reliance on *Troxel* has nothing to do with the District's curriculum. Rather, if the judicial process in *Troxel* is insufficient to overcome the "presumption that fit parents act in the best interest of their children," a school district secretly conspiring with minors to undermine trust in their parents, hide the District's curriculum, and make best interest determinations as to the child's name and gender status—without any judicial oversight at all—is nothing short of a constitutional train wreck.

The Court's Order summarized the nature of Plaintiffs' claim in Count I in the following manner:

Appendix F

> Plaintiffs assert that their Fourteenth Amendment parental rights were violated when District personnel allegedly taught H.J. and C.L. about sexual orientation and/or gender identity without providing the parents with notice or the opportunity to opt their children out of GSA meetings. [Doc. 1 at ¶ 209].

Order, p. 22. While the Court's Order referenced the first and third provisions of Complaint ¶ 209, the Order overlooked the second provision. Complaint ¶ 209 reads as follows (emphasis supplied):

> Defendants have violated, are violating, and will continue to violate Plaintiffs' fundamental right to make decisions regarding the upbringing, education, custody, care, and control of their children by, *inter alia*, (i) teaching sexually themed matters that have not been disclosed to the parents, **(ii) undermining parental authority by encouraging students to confide in intimate personal secrets with teachers and not their parents,** and (iii) by not providing parents notice and opt-out choices regarding sexually themed educational topics.

The second provision highlighted above formed the crux of Plaintiffs' Complaint, and the FAC has been crafted to remove any ambiguity regarding the unconstitutional nature of the District Secrecy Policy.

The Court's Order noted that legal authority interpreting parental rights under the Fourteenth

Amendment does not generally support the ability of parents "to direct what their children learn in schools, receive notice of what students are learning in schools, or exempt their children from certain lessons or topics." Order, p. 25. Plaintiffs readily concede that precedent largely supports this conclusion; however, Plaintiffs never sought to control the Defendants' curriculum. Furthermore, Plaintiffs only sought notice and opt-out relief as a curative injunctive provision (now abandoned in the FAC) necessitated by the District Secrecy Policy. Plaintiffs' claim for compensatory damages is based on the injury caused by the District Secrecy Policy's infringement of Plaintiffs' parental rights.

The first and third provisions of Complaint ¶ 209 (teaching sexually themed materials and the failure to provide an opt-out provision) are inextricably intertwined with the second provision of Complaint ¶ 209, the District Secrecy Policy. The factual allegations in the Complaint and FAC detail the unconstitutional impact the District Secrecy Policy has on the parent/child relationship:

1. Complaint ¶ 31 / FAC ¶ 38: Importantly, the Defendants engaged in a pattern and practice of keeping the GSA activities secret from parents.

2. Complaint ¶ 32 / FAC ¶ 39: Not only were the GSA activities not disclosed to parents, the agents of the Defendant District who led the GSA meetings actively encouraged the children to treat the discussions as secret.

3. Complaint ¶ 33 / FAC ¶ 40: In fact, the Defendants' agents suggested directly and individually to Plaintiff C.L. and Plaintiff H.J. that discussing GSA materials at home with their families might not be safe.

4. Complaint ¶ 34 / FAC ¶ 41: This warning about parental trustworthiness came without any determination by the Defendants, much less any tribunal, that the parents of the children attending these GSA meetings were unfit.

5. Complaint ¶ 58 / FAC ¶ 42: Ms. Chambers repeatedly emphasized to the children that it might not be safe to tell their parents what happened at the GSA meeting or to talk about transgender issues.

6. Complaint ¶ 59 / FAC ¶ 72: Ms. Chambers suggested, however, that it would be safe to discuss these issues with Ms. Riep and herself.

7. Complaint ¶ 61 / FAC ¶ 75: In an act that further inserted herself in the minds of the students as being more trustworthy than their parents, Ms. Chambers handed out her phone number and invited them to connect with her on Discord so that they could contact her at any time.

8. Complaint ¶ 104 / FAC ¶ 115: Furthermore, H.J. was advised that her parents may not

be people with whom she should discuss the events of the GSA meetings.

9. Complaint ¶ 131 / FAC ¶ 147: The Defendants knew or should have known that the failure to provide notice, coupled with affirmative steps to discuss the topics secretly, would necessarily undermine parental authority.

10. Complaint ¶ 149 / FAC ¶ 163: The Guidelines direct that "[s]chool personnel should not disclose information that may reveal a student's transgender or non-binary status to others, **including** students, **parents**, or community members" without student permission. (Emphasis added).

11. Complaint ¶ 153 / FAC ¶ 167: The Guidelines require that when a school employee is "contacting or communicating with a parent/guardian of a transgender or non-binary student, school staff should use the name and pronouns that the student's parent or guardian use, unless the student requests otherwise." This requires the school to learn from children what names and pronouns they use so that they can, together with children, deceive parents and keep parents unaware of important information about their children.

12. Complaint ¶ 154 / FAC ¶ 168: This policy of deception and subterfuge extends to official

written documents. The Guidelines also guide staff to use the name and pronouns used by a child's parent on documents with or in front of the parent while concurrently using the name and pronouns elected by the child when at school and outside the presence of their parents.

13. Complaint ¶ 157 / FAC ¶ 170: A school counselor addressing a referred parent specifically inquiring on their child's gender expression in school is directed to "use their professional judgement to determine" whether the parent may be permitted to know how their child identifies and is addressed while in the custody of a PSD school.

14. Complaint ¶ 161 / FAC ¶ 176: Whether a parent is permitted to be informed that their child is discussing sexuality and gender identity privately with a school staff member is left to the full discretion of a school employee. The FAQ explains that school counselors must "**balance** the inherent right of parents and guardians to their student's information **and the potential impact this sharing** [of a child's transgender or non-binary status at school] **could have on the student and the student's trust in sharing future concerns with the school counselor.**" (Emphasis added).

> 15. Complaint ¶ 171 / FAC ¶ 188: Under the Guidelines, a parent who is unaware that their child has completed an Individual Gender Support Form will not be informed by any employee of PSD of the completion of the form unless that parent directly inquires of the school.

In addition to the above provisions from the Complaint that appear in the FAC, the FAC also includes numerous other details regarding the District Secrecy Policy. *See, e.g.,* FAC ¶¶ 151, 153, 161, 171, 177, 182-83, 206, and 210-20.

As alleged in the FAC, the District Secrecy Policy represents a concerted effort by the District to frustrate the Plaintiffs' ability to make informed and knowledgeable decisions about their children's education and unlawfully insert itself into the parent/child relationship. The Court's Order focused on a constitutional right to a notice and opt provision for sensitive subjects, stating:

> Plaintiffs direct the Court to no authority demonstrating that the Fourteenth Amendment confers a *constitutional right* to receive notice about topics discussed in the District's curriculum, and particularly, at after-school, voluntary extracurricular clubs that they may find objectionable, or the right to excuse their children from those discussions. *See generally* [Doc. 37].

Order, p. 22 (emphasis in original). Plaintiffs respectfully submit that no such authority was brought to the Court's

decision because the Complaint (as well as the FAC) was not focused on a notice and opt-out provision, but the District's manifest, well-documented, and unconstitutional efforts to *conceal* from the parents critical information that is highly relevant to their decision to entrust their children's education with the District.

The Court noted the holding from the Sixth Circuit in *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005), which held that parents have a "right to decide *whether* to send their child to a public school" but do not have a right "to direct *how* a public school teaches their child" (emphasis in original). Plaintiffs readily concede the principles espoused in *Blau* but submit that the FAC does not attack *how* the District educates their children but the District Secrecy Policy, which prevents parents from making informed decisions on *whether* they want to send their children to District schools.

For parents to be able to meaningfully execute their right to direct a child's education, including, as stated in *Blau*, the "right to decide *whether* to send their child to a public school," parents need timely and accurate information as to the nature of the education offered by the public school. The design of the District Secrecy Policy to *purposefully* keep parents in the dark about a child's education on transgender issues and *purposefully* undermine a child's trust in discussing with parents their personal experiences with transgenderism completely undermines the right of parents to direct their child's education. Plaintiffs have drafted the FAC to remove any doubt or ambiguity that Plaintiffs' claims are, in fact, based on the District Secrecy Policy, the injuries to their

parental rights flow directly from the District Secrecy Policy, and the relief sought (now purely retrospective compensatory damages), is a result of the District Secrecy Policy.

Full and correct information is fundamental to the decision as to *whether* to send their child to a public school. The necessity of information and knowledge to the meaningful exercise of parental rights is best analogized to that of another Fourteenth Amendment right: the right to refuse treatment. *See, e.g., Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 269 (1990) ("Th[e] notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment."); *White v. Napoleon*, 897 F.2d 103, 113 (3d Cir. 1990) (holding that the "right to refuse treatment is useless without knowledge of the proposed treatment"); *Licerio v. Lamb*, No. 20-cv-00681-WJM-STV, 2021 WL 4556092 at *15 (D. Colo. July 15, 2021) ("the Fourteenth Amendment right to refuse medical treatment includes the derivative right to such information as is reasonably necessary . . . to make an informed decision to accept or reject the treatment."). Both the right to determine "*whether* to send their child to a public school" and the right to determine whether to refuse treatment requires that the right holder be duly informed.

The Court's Order stated that Complaint had no allegations that the parents made inquiries of the District regarding their children's transgender status. Order. Pp. 27. Plaintiffs respectfully submit that whether the parents made an inquiry as to their children's status is immaterial

to the fundamental right at issue. In the instant case, the allegations in the FAC are replete with details that the District Secrecy Policy actively sought to undermine a child's trust in a parent by asserting that discussing transgender topics "at home with their families might not be safe." Complaint ¶ 33 / FAC ¶ 40. The right at issue is not simply the right of the parent to make inquiries, but the larger right to be adequately informed—free from state actors who by policy and custom conceal information—as to how a public school educates their children.

Moreover, the only potential justification for the District keeping a child's transgender status secret from parents is a presumption that the parents are not to be trusted with this information. It is nothing less than a flagrant violation of the Fourteenth Amendment for the District to think it has the authority, free from judicial oversight, to determine if a parent is fit to look after the best interests of a child. *See, e.g.*, *Troxel*, 560 U.S. at 68 ("there is a presumption that fit parents act in the best interests of their children"); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972), (Court invalidates a presumption that unwed fathers are unfit, noting that the State sees "no gain towards its declared goals when it separates children from the custody of fit parents."); *Parents Defending Education v. Linn-Mar Community School District*, 629 F.Supp.3d 891, 909 (N.D. Iowa 2022) ("Plaintiff is certainly correct no one can decide without proper process that a parent is unfit or should not be allowed to make decisions directed toward the care, custody, and control of their children."); *Jacinto-Castanon de Nolasco v. U.S. Immigration and Customs Enforcement*, 319 F.Supp.3d

491, 501 (D.D.C. 2018). ("While the need to protect children from unfit parents is a well-recognized compelling reason for burdening family integrity, defendants must make at least some showing of parental unfitness in order to establish such a compelling state interest.").

Not only is there no reason for the District to make secret unilateral decisions to transition students without parental knowledge, but the District's transgender policies are owed none of the deference normally due to school curricula, as a child's transgender status has *nothing* to do with a school's curriculum. In *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 134 F.3d 694 (10th Cir. 1998) the Tenth Circuit denied the request of home-schooled children to attend public school classes on a part-time basis, noting that public schools have wide leeway in setting their curricula:

> Federal courts addressing the issue have held that parents have no right to exempt their children from certain reading programs the parents found objectionable, or from a school's community-service requirement, or from an assembly program that included sexually explicit topics . . . [or] standardized testing to assess the quality of education the children are receiving, even over the parents' objections . . . [further] states may constitutionally require that teachers at religiously-oriented private schools be certified by the state.

Id. at 699. This list simply amplifies the principle set out by the Supreme Court in *Runyon v. McCrary*, 427 U.S.

160, 177, (1976), that the Fourteenth Amendment is not a vehicle by which a parent's "idiosyncratic" views may be imposed on a public school's operations.

To suggest that a parent's concern about the District secretly transitioning a child is an "idiosyncratic" request to control *Swanson*'s list of curriculum matters (sexually explicit topics, standardized testing, reading programs, community service requirements, teacher certifications) strains credulity.

The only possible justification for a wholesale, soup-to-nuts, District-wide policy designed to keep parents ignorant of a child's gender identity is a presumptive belief that the parents are not to be trusted. Undermining as it does the natural trust between a parent and a child, the District Secrecy Policy is simply indefensible in light of the warning from *Troxel* that "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69 (citations omitted).

THE FAC SATISFIES THE FUNDAMENTAL RIGHTS ANALYSIS

Lastly, the Plaintiffs' claim is based on a fundamental rights standard, as opposed to a shocks-the-conscience standard, under the Fourteenth Amendment. As noted by the Court in its Order, these claims are analyzed under a three-part test: (1) the determination of the presence of a fundamental right being at stake, (2) the

determination if that right has been infringed through total prohibition or direct and substantial interference, and (3) if the fundamental right violated was the result of a narrowly tailored government action designed to achieve a compelling government purpose.

The FAC satisfies all three conditions of this analysis. As noted in the Order, the rights of parents to direct the care, custody, and control of their children is perhaps the oldest fundamental liberty interest recognized by the Supreme Court. Order, p. 20.

As to the first point, the presence of a fundamental right, as detailed above and in the FAC, the parents have a right to raise their children free from the state's injection of itself into the private realm of the family.

The FAC also supports a conclusion that this fundamental right has been infringed through direct and substantial interference. The District Secrecy Policy disrupts parental rights by recruiting children to help keep the school's curriculum secret from parents and by making secret extra-judicial determinations about the best interests of the child.

Lastly, as to narrow tailoring for a compelling government purpose, the District Secrecy Policy is a spectacular failure. The unconstitutional process in Troxel provided notice to parents "best interest of the child"—all such safeguards are completely absent from the District Secrecy Policy. Absent a judicial determination that a parent is unfit or some sort of exigent circumstance, no school district should be making blanket statements to children that it may not be safe to discuss with

parents the very topics they discussed with teachers at school. Furthermore, no district should be conspiring with children to keep information about *how* a school educates children, which will be relevant for a parent's determination as to *whether* their child should be educated at the school. Finally, absent a judicial determination or an exigent circumstance, there is simply no pedagogical reason that could justify keeping parents in the dark about a child's decision to change genders or preferred pronouns; in this regard, the District Secrecy Policy is in many ways the paradigmatic example of *Troxel*'s prohibition on the state injecting, "itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69 (citations omitted).

In light of the above, Plaintiffs respectfully submit that the FAC addresses the concerns the Court raised in its Order and that leave should be granted to file a clean version of the FAC attached here at Exhibit B.

Respectfully submitted this 18th day of January 2024.

ILLUMINE LEGAL LLC

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APPENDIX G — FIRST AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED JANUARY 18, 2024

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No.:

JONATHAN LEE; ERIN LEE; NICOLAS JURICH; AND LINNAEA JURICH;

Plaintiffs,

v.

POUDRE SCHOOL DISTRICT R-1, FT. COLLINS, COLORADO,

Defendant.

FIRST AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action is brought to reassert that parents, not the state, govern the best interests of a child and the direction of that child's education and establish that a public school's custom and policy of secrecy infringes upon that right.

2. Imbued within the right to direct the education of one's child, is the right to seek and choose alternatives to public education and to make informed decisions about the educational outcomes best suited for one's child.

3. Firmly established in its history and tradition, a parent's right to direct a child's education is one of the oldest liberties recognized by this Nation.

4. The United States long ago rejected the notion that a child's education is in service to the state.

5. When a child is educated, the moral and cultural values of one generation are passed down to the next, and so the concerns of the parents—not the state—are paramount in this process.

6. The state defers to parents because the law presumes that parents, acting under the natural bonds of affection, act in the best interests of their children; the state may interfere with this relationship only upon a showing of unfitness on the part of the parents.

7. Put differently, parents carry a presumption of fitness and do not lose the right to direct the education of their children or the meaningful exercise of that right, without a judicial finding of unfitness.

8. A parent's capacity to meaningfully exercise their parental rights hinges on their access to

information about the education of their children; a parent cannot meaningfully exercise their right to elect alternatives to public education where the state, by custom and policy, conceals relevant information from parents regarding the education of their children.

9. This right is frustrated to the point of exhaustion where the state deliberately conceals information from parents, thereby extinguishing the possibility of informed decision-making regarding their child's education and well-being.

10. Where a school, through policy and custom, conceals, fails to notify, and instructs children to conceal information from their parents about transgender education and that child's own decisions about their gender identity, that school infringes on the parent's right to direct the education of their children and make decisions in the child's best interests.

11. Further, the only plausible reason for keeping such information secret as a matter of school district custom and policy is a result of that school district's determination that the parents are potentially untrustworthy and unsafe.

12. Parents who, by the function of a school's customs and policies of secrecy, do not know, and cannot reasonably discover, the nature of their child's interactions with transgenderism cannot

reasonably exercise their fundamental right to seek alternative education venues that would preserve the discussion of such matters to the parents.

13. Where a teacher, utilizing their native position of authority amongst their pupils, informs and directs a child that their parent may be unsafe or otherwise dangerous to disclose materials taught in the school setting by school personnel, that teacher not only frustrates the parent-child relationship, they also further restrict relevant and necessary information to parents—substantively infringing on that parent's parental rights.

14. The law recognizes that parents have a choice in pursuing alternatives to public education, and if this choice is to be meaningful, public schools must be transparent as to the curricula and activities that will form the child's education and, at a minimum, refrain from conspiring with students to conceal relevant information from their parents.

JURISDICTION AND VENUE

15. This action arises under the Civil Rights Act of 1871 (42 U.S.C. §§ 1983, 1988) and the Fourteenth Amendment to the United States Constitution.

16. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

17. Venue lies in the United States District Court for the District of Colorado because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in Larimer County, Colorado. 28 U.S.C. § 1391(b).

PARTIES

18. The Plaintiffs, members of the Lee and Jurich families, each had children enrolled at a school located in the jurisdiction of Defendant Poudre School District R-1 ("PSD," "Defendant District," "District" or "Defendant").

Plaintiffs

The Lee Family

19. Jonathan Lee is the father of minor child C.L., and his parental rights were violated by the customs, policies, and practices of Defendant.

20. Erin Lee is the mother of minor child C.L., and her parental rights were violated by the customs, policies, and practices of the Defendant.

21. C.L. is the minor child of Jonathan Lee and Erin Lee. C.L. is a former student at Wellington Middle School ("WMS," now consolidated into Wellington Middle-High School, a school within the Defendant District) who was directly impacted by the unlawful customs, policies, and

practices of the Defendant. At the time of the events that gave rise to this complaint, C.L. was in sixth grade.

22. At all relevant times, every member of the Lee family lived within the geographic area served by the PSD system.

The Jurich Family

23. Nicolas Jurich ("Nick") is the father of minor child H.J., and his parental rights were violated by the customs, policies, and practices of Defendant.

24. Linnaea Jurich is the mother of minor child H.J., and her parental rights were violated by the customs, policies, and practices of Defendant.

25. H.J. is the minor child of Nick Jurich and Linnaea Jurich. H.J. is a former student at WMS who was directly impacted by the unlawful customs, policies, and practices of the Defendant. At the time of the events that gave rise to this complaint, H.J. was in sixth grade. At all relevant times, every member of the Jurich family lived within the geographic area served by the PSD system.

26. Jonathan Lee, Erin Lee, Nick Jurich, and Linnaea Jurich are collectively referred to herein as the "Plaintiffs."

Appendix G

Defendant

27. Poudre School District (R-1) is a K–12 public school district in Larimer County, Colorado. Poudre School District (R-1) manages the public schools in the cities of Fort Collins, Wellington, Timnath, Loveland, Windsor, Laporte, and Livermore. WMS (now consolidated as Wellington Middle-High School) is a school within the Poudre School District (R-1).

28. At the time of the events that gave rise to this Complaint, WMS was in the Town of Wellington, Colorado, and was within and under the authority of Defendant PSD.

29. At the time of the events that gave rise to this complaint, Kelby Benedict ("Benedict") served as the principal of WMS.

30. At the time of the events that gave rise to this complaint, Jenna Riep ("Riep") served as an art teacher at WMS.

31. At the time of the events that gave rise to this complaint, Kimberly Chambers was a substitute teacher in PSD who also worked with an organization, SPLASH, which was invited by agents of the Defendant District to address an after-school club at WMS.

Appendix G

FACTUAL ALLEGATIONS

Defendant Unlawfully Deprived Plaintiffs of their Constitutional Rights

Overview

32. The Defendant and its agents have engaged in a custom and practice of secrecy (the "District Secrecy Policy") which prevents parents from being informed about unilateral decisions the District takes regarding the best interests of their children, and prevents parents from being fully informed about the nature of the District's curriculum.

33. The District Secrecy Policy manifests itself through verbal statements by the District's agents as well as its written policies.

34. Plaintiffs' children first encountered the District Secrecy Policy through verbal statements at a school-sponsored after-school organization, the Genders and Sexualities Alliance ("GSA").

35. At the GSA meeting, the Defendant introduced concepts of gender fluidity and various types of sexual attraction.

36. PSD runs ten GSA clubs at its schools.

37. No Defendant disclosed the GSA as part of Defendant's curriculum.

38. Importantly, the Defendant engaged in a pattern and practice of keeping the GSA activities secret from parents.

39. Not only were the GSA activities not disclosed to parents, but the agents of the Defendant District who led the GSA meetings actively encouraged the children to treat the discussions as secret.

40. In fact, the Defendant's agents directly and individually approached C.L. and H.J., suggesting that discussing GSA materials at home with their families might be dangerous.

41. This warning about parental trustworthiness and safety came without any determination by the Defendant, much less any tribunal, that the parents of the children attending these GSA meetings were unfit.

Lee Family

42. During the relevant period, C.L. attended WMS, which at that time included grades six through eight.

43. At the time, C.L. was a 12-year-old sixth grader at WMS.

44. C.L. started at WMS in the fall of 2020, following her family's recent move to Wellington, Colorado.

45. At that time, due to government shutdowns, WMS classes were being held remotely, later transitioning to two days a week in-person with masks.

46. As a consequence, C.L. had not made friends at her new school.

47. Jenna Riep was C.L.'s homeroom teacher and art teacher at WMS; she remains a PSD employee.

48. Ms. Riep was the WMS staff sponsor of the school-sponsored GSA club.

49. On May 4, 2021, Ms. Riep personally invited C.L. to attend that afternoon's GSA club meeting, describing it as an after-school club called the "GSA Art Club."

50. According to the PSD website, there are no GSA Art Clubs in PSD. Upon information and belief, there never have been.

51. Ms. Riep did not explain the acronym "G.S.A." for C.L., who was unaware that it stood for Genders and Sexualities Alliance; C.L. had to look it up upon her return home later that evening.

52. Because C.L. is interested in art and is artistic, she hoped to attend.

53. C.L. texted her parents and asked to be picked up later than usual to accommodate her attendance at what she thought would be an art club.

54. Her parents, Plaintiffs Jonathan and Erin Lee, were happy to receive C.L.'s text message asking if she could attend the art club since they knew of and encouraged her artistic talent.

55. C.L.'s parents were also excited that their shy daughter, who had not had much opportunity to make friends, was asked to become involved with school activities.

56. Ms. Riep, along with Ms. Caitlin Delahunt, a school counselor at WMS, invited Ms. Kimberly Chambers to be a guest speaker at the "GSA Art Club" on May 4, 2021, the date C.L. attended.

57. Ms. Chambers, a part-time teacher with PSD, also runs an organization called "SPLASH" (Supporting Pride Learning and Social Happenings), which seeks to educate school-aged children on topics of sexuality and gender identity.

58. School-sponsored clubs at WMS are permitted to have guest speakers only if the guest speaker is approved by PSD's Teaching and Learning Department and/or the Language, Culture, and Equity Department.

59. As WMS's GSA sponsor, Ms. Riep was accountable for the actions of any guest speaker at the GSA meeting.

60. PSD is also accountable for the actions of guest speakers, given that its Teaching and Learning Department and/or the Language, Culture, and Equity Department must approve guest speakers.

61. On May 4, 2021, C.L. attended the GSA meeting Ms. Riep invited her to, hosted by both Ms. Riep and Ms. Chambers.

62. The May 4, 2021, GSA meeting lasted for around 90 minutes, longer than most PSD after-school activities.

63. In principal part, the GSA meeting involved a lecture-style discussion led by Ms. Chambers, where student attendees were encouraged to discuss, share, and ask questions about their personal gender identity and sexual orientation.

64. As part of her talk on May 4, 2021, Ms. Chambers told the children that if they are not completely comfortable in their bodies, that means that they are transgender. When asked later by C.L.'s mother, Plaintiff Erin Lee, what exactly Ms. Chambers had said to her daughter in the May 4 GSA meeting, Ms. Chamber recalled saying "Transgender is when you don't completely feel

like you align with the sex assigned to you at birth."

65. At that time, C.L. was experiencing puberty, and the natural discomfort of that time, coupled with Ms. Chambers' lesson, drove her to call into question her gender identity.

66. Prior to meeting Ms. Chambers at the GSA meeting, C.L. had never believed that her gender differed from her biological sex. She had never experienced any symptoms of gender dysphoria nor expressed ideations of being transgender.

67. Despite this, the persuasive language used by Ms. Chambers throughout the GSA meeting within the academic environment caused C.L. to believe that she may be transgender, precipitating a period of gender crisis.

68. Additionally, for children who "came out" as transgender at the GSA meeting, Ms. Chambers awarded LGBTQ paraphernalia such as toys, flags, and other swag as prizes.

69. Several students declared their transgender status in that meeting, and, feeling pressure to do the same and wanting to receive Ms. Chambers' prizes, C.L. declared herself to be transgender.

70. Ms. Chambers repeatedly emphasized to the children that it might not be safe to tell their

parents what happened at the GSA meeting or to talk about transgender issues.

71. Utilizing the authoritative position of a guest lecturer in an academic environment, Ms. Chambers instilled a sense of distrust between the students and their parents, fomenting a breakdown of the parent-child trust-based relationship.

72. Ms. Chambers suggested that, while parents may be unsafe for gender-related conversations, it would be safe to discuss these issues with Ms. Riep and herself. In doing so, agents of Defendant District supplanted themselves as the trustworthy, safe, and authoritative figures in the children's lives for conversations regarding gender identity, sexual orientation, and sex.

73. At the GSA meeting, Ms. Riep and Ms. Chambers discussed and educated the student attendees on the following topics:

    a. Polyamory;

    b. Suicide;

    c. Puberty blockers;

    d. Transgenderism and gender identities;

    e. Sexualities; and,

    f. Changing names & pronouns.

74. Most importantly, Ms. Riep and Ms. Chambers discussed keeping the GSA discussions secret from parents.

75. In an act that further inserted herself in the minds of the students as being more trustworthy than their parents, Ms. Chambers handed out her phone number and invited them to connect with her on Discord so that they could speak with her at any time. This further positioned Ms. Chambers as *the* trusted adult for gender and sexuality conversations and questions, not merely for learning about these topics but also for personal discussions regarding individual gender identities and sexualities of the students.

76. As C.L. was leaving the GSA meeting, Ms. Riep pulled her aside for a private one-on-one conversation, where Ms. Riep told C.L. that she ought not to feel pressured into discussing the GSA meeting with her parents. This advised caution encompassed both the topics discussed at the GSA meeting and C.L.'s own personal gender identity. Ms. Riep reiterated that if C.L. needed a safe person to talk to, C.L. should feel free to contact her or Ms. Chambers.

77. C.L. told Ms. Riep that because her mother's best friend was gay, she was going to tell her mom that she was transgender. Ms. Riep's reiterated and restated her previous advisement of caution, stating "but remember, you don't have to tell your parents."

78. This brief conversation built upon numerous other private conversations Ms. Riep had with C.L., where Ms. Riep primed C.L. into doubting her gender identity. In the months preceding the May 4 GSA meeting, Ms. Riep held numerous one-on-one conversations with C.L. about gender identity and pronouns, where Ms. Riep taught C.L. about rejecting her feminine pronouns and the availability of alternative pronouns.

79. In accordance with the prevailing custom of secrecy, Ms. Riep took measures to make sure these conversations took place in private locations on school grounds where other students and faculty could not overhear them, most often during C.L.'s lunch period.

80. Like the GSA meeting, these conversations were never disclosed to Plaintiffs Jonathan and Erin Lee.

81. As mentioned above, Ms. Chambers also planted the notion of a higher likelihood of suicide by transgender youth, pointing to statistics of proportionally higher instances of suicide attempts and suicide ideation in transgender youth.

82. At the time of the statement, C.L. did not even fully understand what suicide is.

83. Prior to her attendance at the GSA meeting on May 4, 2021, C.L. had never contemplated committing suicide.

84. Yet C.L. left the GSA meeting that day believing that she was transgender and that suicidality affirmed that conclusion.

85. C.L.'s experience at the GSA club led to a months-long emotional decline of gender and sexuality confusion that required counseling and included suicidal thoughts.

86. Notably, no art-related activities were undertaken at GSA "Art" Club on May 4, 2021.

87. Upon her return home from GSA Art Club, C.L. announced to her mother that she would be transitioning to male—despite never having had any thoughts about transgenderism before the meeting.

88. Prior to May 4, 2021, Plaintiffs Jonathan and Erin Lee had never heard of the GSA club at WMS or the highly sexual nature of topics discussed therein. Like their daughter, they thought C.L. was going to an art club—not a place where the most fundamental and demonstrable aspects of who their daughter is would be challenged.

89. C.L. and her parents, Jonathan and Erin, had several difficult and stressful conversations that

evening regarding sexuality, gender identity, and gender confusion. The stress, difficulty, and subsequent emotional pain of these conversations were exacerbated by the hesitations in trust sowed by Ms. Chambers and Ms. Riep at the GSA meeting. During these conversations C.L. tearfully shared that her teacher had advised her that her parents might be untrustworthy and unsafe to talk to about these topics.

90. The next day, astonished that their daughter was advised to keep secret from them the important discussions held at the GSA club, Plaintiffs Jonathan and Erin Lee disenrolled C.L. from WMS and ultimately moved her to a private school the following academic year.

91. C.L.'s announcement that she would be transitioning (which she has since abandoned) heavily impacted her relationship with her father, Plaintiff Jonathan Lee, and for several weeks, they found it very difficult to communicate with each other.

92. The strained parent-child relationship was, in substantive part, caused by, motivated by, and the result of, PSD agents teaching C.L. that her parents may not be safe to talk to.

93. After the disenrollment, the Lees made a concerted effort to speak with the WMS principal, Kelby Benedict, to learn about GSA Art Club.

94. Finally, on May 14, 2021, Mr. Benedict agreed to meet with the Lees, but he insisted on meeting the Lees at their house.

95. The Lees later learned that WMS staffers had discussed seeking a child protective services well-child check in light of their having pulled C.L. from WMS; Mr. Benedict's visit to their home was, in reality, a *de facto* well-child check.

96. Mr. Benedict confirmed to Plaintiff Jonathan Lee that in order to create a "safe space," the GSA clubs created an expectation of confidentiality, and students were strongly encouraged to keep the discussions at GSA meetings private.

97. Mr. Benedict's visit serves as yet another example of PSD agents making unilateral decisions on the fitness of the Lee parents absent any judicial determination; Mr. Benedict sought, without warrant or reason, to investigate the Lee parents.

98. No Defendant ever provided Jonathan or Erin Lee notice of the GSA's activities, agenda, or materials; that an employee of PSD would solicit C.L.'s attendance without notice and consent from her parents; or that PSD had a policy, as confirmed by Benedict, of usurping parents' rights by keeping all these things secret from parents and encouraging children to do the same.

99. The combination of the PSD customs and practices to (1) not disclose the subject matters discussed in its after-school school-sponsored activities; (2) obfuscate the purpose of its after-school activities by incorrectly referring to them as *art clubs*; and (3) direct students that their parents may be neither trustworthy nor safe, amounts to a frustration and infringement of the parental right to direct the education of one's children.

100. A parent who can not expect accurate information from either school faculty or from their own child—who has been taught to distrust that parent as an unsafe person by school personnel—is left incapable of making an informed decision on whether to seek alternatives to public education. A parent subject to the PSD customs and practices is functionally left without an avenue to discover whether curricula, topic matters, or common discussions at a PSD school-sponsored club diverge from that parent's desires for the education of their child.

Jurich Family

101. Like C.L., H.J. was also a 12-year-old sixth grader at WMS during the 2020–2021 academic year (C.L. and H.J. did not know each other at WMS).

102. In May 2021, H.J. advised her parents that she wanted to attend an after-school "Anime Club" at WMS.

103. H.J. knew that there was no such "Anime Club" at WMS and was, in fact, planning to attend the school-sponsored GSA club.

104. H.J. misled her parents due to the influence of a transgender friend, who counseled that her parents might not be willing to let her attend if they knew the true nature of the GSA club.

105. This sort of misdirection reflected the secrecy and subterfuge in which the GSA club encouraged children to engage, as well as the mistrust of parents and the destruction of the parent-child relationship that the GSA club engendered.

106. H.J. was also separately solicited by Ms. Riep to attend a GSA meeting.

107. Nick and Linnaea Jurich were ignorant of the fact that WMS did not have an "Anime Club" and were also unaware of the presence of the GSA club, but willingly let their daughter stay after school to attend what they thought was "Anime Club."

108. H.J. attended two meetings of the GSA club on May 11 and May 18, 2021.

109. Ms. Riep was present at these GSA club meetings, despite Plaintiff Erin Lee expressing her concerns to WMS administration about the scope of the club meetings and their related secrecy policies in the intervening time between the May 4 GSA meeting and the GSA meetings attended by H.J.

110. The experiences of H.J. closely resembled those of C.L.

111. H.J. was told about gender fluidity and that gender "assignment" at birth can be a mistake made by parents or doctors.

112. The GSA club discussed the heightened connections between transgenderism and suicide.

113. During the meetings H.J. attended, Ms. Riep suggested to the students that if they did not like their bodies, they were most likely not the gender they were "assigned" at birth.

114. Like C.L., H.J. was advised that the meetings should be confidential and that if anyone asks a participant about the meetings, they do not have to say anything.

115. Furthermore, H.J. was advised that her parents may not be people with whom she should discuss the events of the GSA meetings.

116. At no less than three separate occasions per GSA meeting, Ms. Riep reiterated to the attendees that they should not feel the need to tell their parents about the topics discussed at the GSA meetings, that their parents may be unsafe or untrustworthy people to have these conversations with or some substantially similar message.

117. Accordingly, the advice H.J. received from her friend, who encouraged her to mislead her parents, was only compounded by Ms. Riep, who similarly encouraged secrecy, confidentiality, and suspicion about whether her parents could be trusted with these discussions.

118. Based on the substance of the discussions at the GSA meetings, H.J. believed that the message of the clubs was that anyone who was neither transgender nor a supporter of the transgender community was a bad person and untrustworthy to have conversations about gender identity.

119. In one GSA meeting, H.J. verbally expressed that she was questioning her gender and had doubts regarding her female gender identity. Ms. Riep's verbal warnings regarding the potential safety hazard of talking to her parents about her gender identity caused H.J. to conceal her thoughts and emotions on the topic from her parents.

120. After attending the two GSA meetings, Ms. Riep invited H.J. to attend a meeting with SPLASH, the organization to which Ms. Chambers was, and remains, the executive director.

121. H.J. attended no other GSA meetings, and when courses resumed in the fall of 2021, Ms. Riep approached H.J. multiple times and invited her to resume attending the GSA meetings.

122. No Defendant, or agent thereof, ever provided Nick or Linnaea Jurich notice of the GSA club's activities, agenda, or materials.

123. No Defendant, or agent thereof, ever notified Nick or Linnaea Jurich that an employee of WMS would solicit H.J.'s attendance to the GSA meetings without notice to or permission from her parents.

124. No Defendant, or agent thereof, ever notified Nick or Linnaea Jurich that an employee of WMS would advise their daughter H.J. that H.J. need not tell her parents about attendance at, or the material covered, at the GSA meetings.

125. The effect of the GSA meetings on H.J. was nothing less than horrific.

126. After the GSA meetings, H.J. began to have her first suicidal thoughts. The suicidal thoughts derived from H.J. questioning her gender and

having been taught at the GSA meetings that suicidality was more likely in transgender individuals; this began a positive feedback loop of gender confusion and suicidality. The more suicidal H.J. felt, the more she believed she was transgender, and the more H.J. believed she was transgender, the more suicidal she felt.

127. In the summer of 2021, H.J. began leaving notes to her parents that she is "aromantic" and "asexual" and started to leave notes about transgenderism for her parents.

128. Later, in the fall of 2021, H.J. began to openly question her gender identity and began thinking she may be transgender (which she has since abandoned).

129. After her experiences at the GSA club, her relations with her friends deteriorated, and she was not comfortable with the idea of potentially taking classes with Ms. Riep.

130. H.J. underwent a significant emotional decline, including a request in December 2021 to be homeschooled.

131. Shortly after the request to be homeschooled, H.J.'s emotional decline culminated in an attempted suicide by drinking an ounce of bleach.

132. H.J. soon recognized and verbalized that her disturbed emotional state began when she first attended a GSA meeting at WMS.

133. H.J. was able to receive immediate medical treatment and, after a week in the hospital, was able to make a physical recovery.

134. The months to follow included numerous sessions with a therapist and psychiatrist for H.J.'s psychological recovery.

135. After H.J.'s suicide attempt, Nick and Linnea Jurich elected to homeschool H.J. for the remainder of the 2021-2022 school year. In the fall of 2022, they angain enrolled H.J. in WMS.

136. Shortly after the start of the 2022-2023 school year at WMS, H.J. expressed to her parents that she did not feel safe in a building with Jenna Riep, at which point Nick and Linnaea Jurich enrolled H.J. in a non-PSD charter school.

137. Prior to attending the GSA meetings, H.J. had never questioned her gender identity, nor had she contemplated suicide.

Appendix G

Defendant's Unlawful Acts Were a Direct Result of the District's Secrecy Policy

Overview

138. The steps the Defendant took to keep Jonathan and Erin Lee and Nick and Linnaea Jurich in the dark about the GSA club's activities demonstrate an unequivocal attempt to repudiate parental authority.

139. Like all parents, Plaintiffs believe that schools should not undermine the parent-child relationship or adopt customs, policies, or practices that have the effect of driving a wedge between parents and their children or of depriving parents of their fundamental rights to direct the upbringing of their children.

140. The GSA meetings regularly address sex, sexualities, mental health, suicide, sexual orientation, gender identities, and other topics in discussions, lectures, and distributed materials.

141. Gender identities and sexual orientations are aspects of a child's core sense of identity and often implicate significant medical decisions where gender identity diverges from biological sex.

142. The Jurich and Lee families both have strong and sincere religious convictions regarding the education of their children on these sensitive

topics; had they been notified of the highly sexual nature of the topics discussed at the GSA meetings, they would have had the capacity to (1) direct their minor children not to attend the GSA meetings; or (2) make an informed decision on whether to seek an alternative to public education at WMS.

143. Had the Plaintiffs been provided notice of the topics planned for discussion and germane to GSA, they would have elected to opt their child out of PSD public schools and sought alternative education based on these deeply held religious beliefs.

144. Parental concern about sexually themed topics is no stranger to public schools, and the fact that transgenderism is no less charged an issue should have been obvious to the Defendant.

145. For example, recent national polling[1] demonstrates that the topic of transgenderism among school-age children reveals strong public reactions:

a. 66% of parents would encourage the child to retain his or her biological gender if a school-aged child said he or she wanted to transition;

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1. RMG Research, Inc., survey of 1,000 registered voters conducted April 18-19, 2023.

b. 69% of voters say children should not be allowed to receive puberty blockers or surgery to change their gender;

c. 71% of voters believe boys should not be allowed in bathrooms or locker rooms designated for girls;

d. Nearly 60% of voters believe that gender transition surgery is a form of child abuse;

e. Importantly, 62% of voters say that a teacher or school encouraging a student to change his or her gender is a form of child abuse; and,

f. 71% of voters say that if a boy tells his teacher he wants to identify as a girl, the teacher or school should notify the parents.

146. Given the nature of the discussions at GSA meetings, ordinary prudence should have compelled the Defendant to, at the very least, not conspire with students to keep parents like the Plaintiffs in the dark.

147. The Defendant knew or should have known that the failure to provide notice, coupled with affirmative steps to discuss the topics secretly, would necessarily undermine parental authority and informed parental decision-making on whether to seek alternative education for their children.

148. In failing to notify Plaintiffs and directing students to distrust Plaintiffs, Defendant's agents were complying with PSD's custom and policy of concealing information relating to transgenderism from parents. Where Ms. Riep and Ms. Chambers taught C.L. and H.J. that they were trusted adults and that Plaintiffs may not be safe or trustworthy, they were enacting PSD custom and policy of concealing transgender-related information from parents.

149. While published PSD policy and guidelines limit parental disclosure in discrete and particular instances, taken together, they evidence a broader custom and unwritten policy at PSD to exclude parents from making well-informed decisions regarding the education of their children as it pertains to transgenderism, sexual orientation, and diverging gender identity.

150. Below are a few examples of written PSD policies that evidence the broader custom of secrecy and concealment.

District Policy Regarding Parental Involvement

A. *THE ILLUSORY NOTICE POLICY*

151. Official PSD policy deliberately mollifies parental anxiety and caution regarding the teaching of highly sexual themes at PSD schools.

152. PSD Policy IHAM (the "Illusory Notice Policy") holds that "Parents/guardians shall be provided written notice before the commencement of any unit or lesson that is part of the District's comprehensive health education program at their child's school which **shall include** (1) an overview of the substantive content of the unit or lesson to be presented; (2) notice of when and where the associated curriculum and materials are available for inspection; and (3) **notice that parents/guardians may excuse their child, upon written request, from some or all of the comprehensive health education program**. . . ." (Emphasis added).

153. PSD's Illusory Notice Policy encourages parents to rely on PSD's open disclosure of sexual themes discussed in their schools by school personnel.

154. The Illusory Notice Policy was enacted by PSD.

155. PSD holds sole authority to enforce its Illusory Notice Policy within the schools comprising the school district.

156. PSD is, at a minimum, aware of its obligations under its Illusory Notice Policy.

157. No Defendant has ever notified the Plaintiffs that PSD would not comply with the obligations of the Illusory Notice Policy with regard to the GSA meetings.

158. The Defendant's representations through the Illusory Notice Policy would lead the reasonable parent to conclude that all planned in-school educational discussions of sexual themes or topics are noticed to the parent with an opportunity for the parent to opt their child out.

B. THE DECEPTIVE REASSURANCE POLICY

159. PSD Policy KD Public Information and Communications (the "Deceptive Reassurance Policy") obliges PSD and the schools therein to "[k]eep the public informed about the **policies**, administrative operations, objectives, and **educational programs** of the schools." (Emphasis added).

160. This policy recognizes the significance of transparency and the cruciality of avoiding secrecy and deception. The Deceptive Reassurance Policy directs that there shall be placed "great importance on the role of the **teacher as communicator and interpreter** of the school program **to parents**[.]" (Emphasis added).

161. Just as with the Illusory Notice Policy, the Deceptive Reassurance Policy would lead a reasonable parent and did lead Plaintiffs, to rely on PSD to notify parents of the highly sexual themes taught and discussed in its school-sponsored activities.

Appendix G

District's Transgender Policies:
Cutting out the Parents

A. *THE GUIDELINES*

162. PSD maintains a set of Guidelines for Supporting Transgender and Non-Binary Students ("Guidelines"), which require that, within their communications, school staff deliberately deceive parents of potentially transgender students who refer to their child by that child's birth name. The Guidelines represent PSD policies, customs, and practices. The Guidelines were published in 2023, but based on information and belief, PSD maintained customs and practices substantially similar to those reflected in the published Guidelines, whether written or unwritten, at the time of the May 2021 WMS GSA meetings. Ex. 1.

163. The Guidelines direct that "[s]chool personnel should not disclose information that may reveal a student's transgender or non-binary status to others, **including** students, **parents**, or community members" without student permission. (Emphasis added).

164. The Guidelines supplant the role of the parent with school employees and reflect the broader PSD custom of concealing topics regarding transgenderism from parents.

165. The Guidelines place within the discretion of a school when and if a parent ought to learn that their child has identified as transgender.

166. The Guidelines specifically say that a "school counselor will work with the student in coming out to their family and others, as appropriate," with the determination of appropriateness left to the discretion of the counselor.

167. The Guidelines require that when a school employee is "contacting or communicating with a parent/guardian of a transgender or non-binary student, school staff should use the name and pronouns that the student's parent or guardian use, unless the student requests otherwise." This requires the school to learn from children what names and pronouns they use so that they can, together with children, deceive parents and keep parents unaware of important information about their children.

168. The Guidelines also guide staff to use the name and pronouns used by a child's parent on documents with or in front of the parent while concurrently using the name and pronouns elected by the child when at school and outside the presence of their parents.

169. Where a parent specifically asks a school employee whether their child uses a name other than their birth name or a pronoun other

than that associated with the child's sex, the Guidelines direct the staff to refuse to answer and "refer [parents] to the school counselor. . . ."

170. A school counselor addressing a referred parent specifically inquiring on their child's gender expression in school is directed to "use their professional judgement to determine" whether the parent may be permitted to know how their child identifies and is addressed while in the custody of a PSD school.

171. Plaintiffs were deprived of the opportunity to be lied to by a PSD school counselor because PSD personnel directed C.L. and H.J. to distrust and conceal the conversations at the GSA meetings from the Plaintiffs, including C.L.'s declared transgender status.

172. When informing C.L. and H.J. that the Plaintiffs may be untrustworthy and unsafe, Ms. Riep and Ms. Chambers were effectuating the broader PSD custom of secrecy, wherein C.L. identified herself as transgender at a GSA meeting, and H.J. identified herself as gender questioning, these District agents followed the PSD custom of removing parents from the initial conversation.

B. THE FAQ

173. To better inform parents and community members of the rules and policies of PSD, the

District maintains official responses to frequently asked questions ("FAQ").

174. In a PSD Gender Support FAQ,[2] the District announces that school staff will not inform a parent or guardian of conversations that school staff privately have with their child regarding sex, sexual orientation, or gender identity.

175. The FAQ, in fact, announces that the District will aid a student in obstructing a parent from discovering that school employees are discussing sex, sexual orientation, and gender identity with their children. The FAQ declares that to "the extent possible, [a] school counselor will not out the student to their parent(s)/guardian(s) before the student is ready to come out themselves."

176. Whether a parent is permitted to be informed that their child is discussing sexuality and gender identity privately with a school staff member is left to the full discretion of a school employee. The FAQ explains that school counselors must "**balance** the inherent right of parents and guardians to their student's information **and the potential impact this sharing** [of a child's transgender or non-binary status at school] **could have on the student and the student's trust in sharing future concerns with the school counselor.**" (Emphasis added).

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2. https://www.psdschools.org/programs-services/PSD-Gender-Support-FAQs, accessed on May 2, 2023.

177. The FAQ perfectly reflects the broader custom in PSD: on topics regarding gender identity, parents come second, and students and educators come first—with no determination of unfitness, PSD personnel are not only encouraged but required to conceal relevant information from parents.

178. Ms. Riep and Ms. Chambers followed this custom to a tee: a student who expresses gender confusion must first have a conversation with a trusted adult, such as a school counselor, who will then use their professional discretion to determine if and when a parent should be informed. The custom at PSD is to distrust parents on topics regarding transgenderism, and it is that custom that led Ms. Riep and Ms. Chambers to caution C.L. and H.J. about the trustworthiness and safety of Plaintiffs.

C. THE TOOLKIT

179. PSD maintains a toolkit for Supporting Transgender and Gender Expansive Nonconforming Students (the "Toolkit"), which directs school staff on how to address day-to-day challenges regarding transgender students.

180. The Toolkit directs school staff to use their discretion as to whether a parent may even be involved in consideration of their child's gender identity.

181. The Toolkit states that "[p]rior to notification of any parent/guardian or guardian [sic] regarding the transition process, school staff should work closely with the student to assess the degree, **if any**, the parent/guardian will be involved in the process" of the child's gender transition (Emphasis Added).

182. This premise is mirrored throughout the Toolkit, such as where it states, "[w]hen a student elects to transition during the school year, the school should schedule a meeting with the student and parents/guardians (**provided they are involved in the process**)[.]" (Emphasis added).

183. Ms. Riep's and Ms. Chambers' actions further comport with the Toolkit in presuming, without cause, that parents should be excluded from initial conversations regarding transgenderism.

D. DISTRICT GENDER SUPPORT PLANS

184. PSD also maintains an official policy of shielding and concealing requests by a child to change his or her pronouns and/or name within the school from parents.

185. An Individual Gender Support Form is an official document included in a child's education records, which directs school engagement with the child. The Individual Gender Support Form dictates how PSD school employees are expected to address a particular child.

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186. Individual Gender Support Forms may be completed wholly by a child without parental notice or consent.

187. The Guidelines do not oblige any school employee to notify parents that their child has completed an Individual Gender Support Form.

188. Under the Guidelines, a parent who is unaware that their child has completed an Individual Gender Support Form will not be informed by any employee of PSD of the completion of the form unless that parent directly inquires of the school. A notably preempted prerequisite, as PSD schools make deliberate efforts to prevent parental discovery of the underlying information that would supply such an inquiry.

189. The Guidelines specifically contemplate the exclusion of parents in the submission of an Individual Gender Support Form, noting that "it is helpful as the school counselor meets with the student and parents/guardians, **if involved**, to discuss if others are aware of the student's gender identity[.]" (Emphasis added).

190. The policy surrounding Individual Gender Support Plans serves as yet another example of where the individual treatment of a student's diverging gender identity must be concealed from their parents.

Appendix G

The District's De Facto Policies

A. WMS's GSA

191. PSD deliberately shirks its parental disclosure expectations under the Illusory Notice Policy regarding GSA clubs.

192. In PSD, a school-sponsored club is considered part of the school program and/or relates to a school's curriculum.

193. PSD requires that school-sponsored clubs designate a school employee as a "sponsor" who supervises, advises, facilitates, coaches, and or/ instructs the activity or organization.

194. Guest speakers to school-sponsored clubs must be approved by PSD's Teaching and Learning Department and/or the Language, Culture, and Equity Department.

195. A school-sponsored club may be established by the school principal, subject to approval by the Assistant Superintendent of Secondary Schools.

196. The WMS GSA is a school-sponsored club.

197. The WMS GSA regularly discusses, lectures, and teaches students about sexual health in health education.

198. Despite being a school-sponsored club that advances the health education curriculum at WMS, the school, and the club sponsors have a *de facto* policy of refusing to notify parents of the child's participation.

199. WMS administration does not inform parents of their child's attendance at the school-sponsored GSA. And students are advised that the GSA meetings are confidential.

200. WMS administration does not inform parents of the content of the GSA school meetings.

201. The WMS GSA regularly discusses sex, sexual health, mental health, suicide, sexual orientations, gender identities, and other health-related topics.

202. The WMS administration's failure to notify or provide parents with an opportunity to review the sexual and gender-based discussions and topics that regularly occur at GSA meetings directly inhibited Plaintiffs from opting for alternative education venues.

203. WMS administration does not notify parents of when third-party personnel will appear as guest lecturers on topics including sex, sexual health, mental health, suicide, sexual orientation, gender identity, and similar topics.

204. WMS administration considers membership and student attendance in the GSA meetings to be strictly confidential.

205. Student attendees to the WMS GSA meetings, including C.L. and H.J., are directed not to discuss what is said within those meetings with others who did not attend the GSA meetings.

206. GSA attendees are taught to keep the gender and sexuality discussions had at GSA meetings private and to conceal them from others—a principle that was reemphasized with regard to C.L.'s and H.J.'s parents.

B. *PSD PERSONNEL TRAINING*

207. PSD Personnel are regularly encouraged to attend professional training sessions such as the "ABCs of LGBTQ" and "How to be a Trusted Adult." These training sessions, and others like them, train PSD personnel to not reveal a student's in-school transgender or gender non-conforming identity to that student's parents.

208. Furthering the points taught in these professional training sessions, PSD personnel are directed that they need not disclose to parents the names and pronouns used to address students in roll calls. Personnel are further directed to use a child's preferred name and pronouns when addressing the child but to use the child's birth

name and pronouns when communicating with the child's parents, who use the same.

209. These instances are numerous and further display a *de facto* policy followed by PSD personnel to obstruct and frustrate the fundamental rights of parents to direct the education and upbringing of their children.

C. *CIRCUMVENTING PARENTAL NOTICE*

210. A common practice amongst PSD personnel was discussing the best means of circumventing parental notice where students sought to use alternate names and pronouns in school.

211. For example, PSD utilizes an internal record-keeping system commonly referred to as *Synergy*, which contains identifying information for each student. Based on information and belief, a student's identifying information in *Synergy* could only be altered by parental action or by means that would notify the parent.

212. On numerous occasions, PSD personnel sought internal guidance on means to circulate internally made lists of students' preferred names and pronouns amongst PSD faculty and staff without notifying the parents through an update or change to *Synergy*.

213. The existence and maintenance of these lists and the caution taken to prevent and circumvent parental notice are indicative of the broader PSD policy and custom of parental secrecy on matters regarding transgenderism.

214. PSD officials consistently directed the inquiring PSD personnel to share the lists as needed but to caution any PSD employee who could potentially interact with parents to avoid revealing the divergent name and pronoun use to parents. On one occasion, the PSD official stressed the importance of additional guidance and caution stating, "[s]taff may need further conversations about why it's important to use an affirming name/pronouns at school and refer to them [students] as a different name with families."

215. On another occasion, PSD medical staff sought guidance on how to maintain and utilize records containing students' preferred pronouns and names in a way that would not be discoverable by parents under FERPA (Family Educational Rights and Privacy Act) disclosures.

216. A PSD official responded with legal guidance that writings used for personal memory aids ought not to be subject to FERPA disclosures, such that a handwritten roster of preferred names and pronouns of students should be free from parental exposure. The PSD official went on to state that PSD policy requires PSD personnel

to always defer to the student regarding the time frame of when and if the parent should be notified of their child's transgender or divergent gender identity.

217. Yet another example includes PSD personnel asking for guidance in circumstances where parents express a clear and unequivocal request that PSD personnel use a child's birth name and pronouns when referring to the child. Even in circumstances with no reasonable doubt as to the wishes of the parents, PSD guidance directed PSD personnel to defer to the student and use their preferred name and pronouns in school, while using their given name and pronouns in communications with parents. This guidance was consistently given no matter the age of the student.

D. MISLEADING RESPONSES TO PARENTAL INQUIRY

218. On two separate occasions, WMS Principal Kelby Benedict concealed relevant information from Plaintiffs regarding WMS practices upon direct inquiry by Plaintiffs.

219. Plaintiff Nick Jurich, in a 2022 meeting with Mr. Benedict, asked the principal directly whether lessons on sexuality were taught at WMS's GSA meetings. Mr. Benedict responded curtly "GSA did not have sexuality lessons last fall or spring,"

referring to the 2020-2021 academic school year. This was patently false as sexuality was openly discussed at the GSA meetings both C.L. and H.J. attended, and student attendees were encouraged to ask questions regarding differing sexualities in those meetings.

220. Plaintiff Erin Lee, in a 2022 meeting with Mr. Benedict, asked the principal about the nature of the relationship between her daughter, C.L., and Ms. Riep. Mr. Benedict characterized the relationship as not inappropriate, despite Ms. Riep's repeated and secret one-on-one conversations regarding pronouns with C.L., Ms. Riep's deceptive solicitation of C.L. to the GSA meeting, and Ms. Riep's personalized warning to C.L. that her parents may be unsafe and untrustworthy.

221. Taken together, the broad language on excluding parents from information and conversations regarding the gender identity of their children and gender education provided to their children, plus the common practices taken to ensure that parental exclusion amount to a broad policy of secrecy at PSD schools.

222. The fundamental presumption under the District Secrecy Policy regarding parental involvement with transgender information is that some parents are a danger to their gender-divergent children. Because of this presumption,

all parents are treated as a potential risk of danger to their respective children, regardless of the circumstances. In accordance with the Secrecy Policy, PSD personnel will willfully conspire with students to either inform or further conceal that child's transgender or gender-questioning identity from their parents. These presumptions lead to a custom where parents are innately distrusted by PSD personnel, and PSD personnel believe it is their duty under this custom to teach this distrust to students who question their gender identity. In the name of safety, all parents of gender-questioning students are suspect, and their children must be warned of their parents' potential danger.

223. Taken together, PSD's official and *de facto* policies evidence a custom and unwritten policy of secrecy towards parents on matters regarding transgenderism, sexual orientation, and gender identity.

224. PSD personnel acted in accordance with the District Secrecy Policy when they:

a. led Plaintiffs to believe that it would disclose sex-based education but willfully concealed the highly sexual nature of its GSA organizations and the topics discussed therein;

b. encouraged student attendees to keep GSA meeting discussions confidential;

c. discussed highly sexual content with both C.L. and H.J. at its WMS GSA meetings without parental notice;

d. taught and reiterated to both C.L. and H.J. that the Plaintiffs might not only be untrustworthy, but also unsafe; and,

e. conveyed to C.L. and H.J. that it might be a bad decision to discuss their own gender identity with their respective parents.

225. In total, the District Secrecy Policy deprived Plaintiffs of the meaningful exercise of their parental rights. By concealing necessary and relevant information, PSD prevented Plaintiffs from making informed decisions on the education of their children, including exercising the right to seek alternative education. Furthermore, the Secrecy Policy preempted and frustrated the parental involvement of Plaintiffs in conversations regarding the fundamental identity of their respective children.

Appendix G

COUNTS

COUNT I—Violation of Parental Rights Under the Fourteenth Amendment

(Denial of right of the Plaintiffs to direct the education and upbringing of their children—Plaintiffs Jonathan Lee, Erin Lee, Nick Jurich, and Linnea Jurich against Defendant)

226. Plaintiffs incorporate the preceding allegations contained in paragraphs 1-225 as if set forth in full.

227. The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects the fundamental right of parents to direct the education, upbringing, care, custody, and control of their children.

228. This right, based on United States Supreme Court precedent, was well established at the time of the Defendant's offending conduct.

229. This right would have been understood by any reasonable person, and all involved with public education have a duty to be aware of and honor this right.

230. Defendant has violated Plaintiffs' fundamental right to make decisions regarding the best interests and education of their children by, *inter alia*, preventing the Plaintiffs from being

fully informed as to the District's curriculum and efforts to control the best interests of their children.

231. Defendant's unconstitutional conduct involves affirmative, coercive, compelled conduct by the Defendant.

232. This includes but is not limited to Ms. Chambers and Ms. Riep's academic discussion of sex, sexualities, mental health, suicide, sexual orientation, gender identities, and other sex-related content with no parental disclosure, as well as their encouragement to C.L. and H.J. to keep GSA activities secret from parents.

233. This avoidance of parental disclosure and encouraged student secrecy was undertaken as part of the custom and standard operating procedures of Defendant PSD.

234. Kimberly Chambers was a willing participant in joint activity with Defendant PSD.

235. Jenna Riep and Kimberly Chambers knowingly engaged in concerted action that impacted the Plaintiffs' parental rights to direct their children's education.

236. Jenna Riep and Kimberly Chambers knowingly engaged in activity that actively undermined the Plaintiffs' relationship with their Children.

237. Defendant has no pedagogical interest in discussing topics related to transgenderism in a manner not fully disclosed to parents.

238. Defendant has no pedagogical interest in undermining parental authority by suggesting to students that fit parents may be both untrustworthy and unsafe.

239. There is no pedagogical value or purpose in encouraging students to keep their own potentially diverging gender identity and the questions, feelings, and thoughts relating thereto from their respective parents where there has been no determination of unfitness to those parents.

240. Defendant has acted with reckless disregard for Plaintiffs' fundamental parental rights by purposefully and intentionally interfering with Plaintiffs' ability to make decisions directly related to their children's best interests and education.

241. Defendant's reckless disregard for Plaintiffs' rights has resulted in the deprivation of Plaintiffs' fundamental constitutional rights.

242. Defendant's violation of Plaintiffs' fundamental constitutional rights has caused and continues to cause Plaintiffs undue hardship and irreparable harm.

Appendix G

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask that this Court enter judgment in its favor and provide the following relief:

A. Compensatory damages to be proven at trial including, *inter alia*, private school tuition, medical expenses, counseling fees, compensation for damage to the Plaintiffs' reputation, transportation, and emotional anguish;

B. Reasonable attorneys' fees and costs incurred in prosecuting this litigation; and

C. Any and all other relief that the Court deems appropriate.

Respectfully submitted,

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APPENDIX H — DEFENDANTS' AMENDED RESPONSE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED FEBRUARY 13, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-cv-01117-NYW-STV

JONATHAN LEE; ERIN LEE; C.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS; M.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS; NICOLAS JURICH; LINNAEA JURICH; AND H.J., A MINOR, BY AND THROUGH PARENTS NICOLAS AND LINNAEA JURICH AS NEXT FRIENDS,

Plaintiffs,

v.

POUDRE SCHOOL DISTRICT R-1, FT. COLLINS, COLORADO; AND, POUDRE SCHOOL DISTRICT R-1 BOARD OF EDUCATION,

Defendants.

Filed February 13, 2024

Appendix H

DEFENDANTS' AMENDED RESPONSE TO PLAINTIFFS' AMENDED MOTION FOR LEAVE TO AMEND THE COMPLAINT

Defendants, Poudre School District R-1 ("PSD" or the "District") and the PSD Board of Education (the "Board") (collectively, "Defendants"), submit this Amended Response to Plaintiffs' Amended Motion for Leave to Amend the Complaint.

STANDARD OF REVIEW

Although leave to amend "shall be freely given," the matter is still committed to the sound discretion of the court. *Fed. Ins. Co. v. Gates Learjet Corp.,* 823 F.2d 383,387 (10th Cir. 1987). Refusing leave to amend is justified upon a showing of futility. *E.g. Frank v. U.S. West, Inc.,* 3 F.3d 1357,1365 (10th Cir. 1993).A proposed amendment is futile if the complaint would be subject to dismissal for any reason. *E.g. Watson v. Beckel,* 242 F.3d 1237,1239-40 (10th Cir. 2001).

ARGUMENT

I. Plaintiffs' Proposed Amendment is Futile.

Plaintiffs' attempt to reassert their substantive due process claim runs afoul of the same problems this Court identified in its dismissal order.

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A. Plaintiffs' proposed due process claim is still based on a narrow right to control their children's education that does not encompass disclosure of sex-related discussion or protection from encouraging confidentiality at school.

The proposed Fourteenth Amendment claim is essentially the same: that Defendants violated the parent Plaintiffs' alleged "fundamental right . . . to direct the education, upbringing, care, custody, and control of their children," (Doc. 64-1, ¶ 227), through what allegedly occurred at GSA club meetings and more generally under the Guidelines, (*see, e.g., id.* at ¶¶ 32-35, 39-40). The notable difference between the claim as initially presented and in the proposed amended complaint is what the District is alleged to have done wrong. Before, Plaintiffs alleged the District was: "(i) teaching sexually themed matters that have not been disclosed to the parents, (ii) undermining parental authority by encouraging students to confide in intimate personal secrets with teachers and not their parents, and (iii) . . . not providing parents notice and opt-out choices regarding sexually themed educational topics." (Doc. 1, ¶ 209). Now, they allege, in more conclusory words, that the District is "preventing the Plaintiffs from being fully informed as to the District's curriculum and efforts to control the best interests of their children." (Doc. 64-1, ¶ 230). The only specific conduct alleged in the body of the claim is "Ms. Chambers and Ms. Riep's academic ***discussion*** of sex, sexualities, mental health, suicide, sexual orientation, gender identities, and other sex-related content with no parental disclosure, as well as their ***encouragement*** to C.L. and H.J. to keep GSA

activities secret from parents." (*Id.* at ¶ 232 (emphasis added); *cf.* Doc. 1, ¶ 211 (including word "consent" and referring to unspecified "children")).

Plaintiffs' proposed amended still fails to state a claim because parents do not have a fundamental right to advance disclosure of discussion of sex-related content at an after-school club or protection from school employees and invited guests from encouraging children to keep such discussions confidential. As this Court emphasized when dismissing the initial complaint, a parent's constitutional right to direct their children's education is "limited in scope" and only extends "up to a point." (Doc. 58, pp. 9, 20 (quoting *Swanson v. Guthrie Indep. Sch. Dist. No. I-L,* 135 F.3d 694, 699 (10th Cir. 1998)). It "does not permit a parent 'to control each and every aspect of their children's education and oust the state's authority over that subject.'" (Doc. 58, p. 9 (quoting *Swanson,* 135 F.3d at 699).

While "a parent has the right to control where their child goes to school . . . , that is where their control ends." (Doc. 58, pp. 21-22 (quoting *Doe v. Bethel Loc. Sch. Dist. Bd. of Educ.,* No. 3:22-cv-00337, 2023 WL 5018511, at *13 (S.D. Ohio Aug. 7, 2023)). There simply is "no authority demonstrating that the Fourteenth Amendment confers a constitutional right to receive notice about topics discussed in the District's curriculum, and particularly, at after-school, voluntary extracurricular clubs that they may find objectionable, or the right to excuse their children from those discussions," and "the weight of authority demonstrates that the Fourteenth Amendment right does not extend so far." (Doc. 58, p. 22 (citing cases from First, Second, and Ninth Circuits).

As this Court pointed out, another decision from this district, *Jones v. Boulder Valley School District RE-2,* No. 20-cv-03399, 2021 WL 5264188 (D. Colo. Oct. 4, 2021), underscores that the interest Plaintiffs continue to assert is not protected. (Doc. 58, p. 23). In *Jones,* parents alleged their due process rights were violated when a school district planned a performance by a transgender choir with accompanying videos and classroom discussion. 2021 WL 5264188, at *2. The district court held the parents' disapproval of perceived "indoctrinat[ion]" of their children about LGBTQ-affirming and transgender-affirming principles, which allegedly conflicted with their religious beliefs, failed to allege a constitutional violation. *Id.* at *15. The parents had "cite[d] no federal case under the Due Process Clause which has permitted public school parents to demand an exemption for their children from mere exposure to certain concepts or ideas," and the court concluded, "there is no federal constitutional right for public school parents . . . to get advance notice of and the right to opt-out of religiously offensive material." *Id.* at **15, 21.

B. The District's Guidelines refute Plaintiffs' suggestions of purposeful and intentional interference with their ability to make decisions about their children's education.

Rather than even address *Jones's* reasoning, Plaintiffs try a reframe-dodge, arguing "a parent cannot meaningfully exercise their right to elect alternatives to public education where the state, by custom and policy, ***conceals*** relevant information from parents regarding

the education of their children." (Doc. 64-1, 8 (emphasis added)). Note the not-so-subtle shifting verbiage. As a threshold matter, this allegation, along with the subsequent suggestions of a "direct[ive]," (*Id.* at ¶¶ 148, 171), or "undermin[ing]," (*Id.* at ¶¶ 139, 147, 236), are not well pled. Such characterizations are conclusory and overstate the "encouragement" the parent Plaintiffs allege when specifying what was ***said*** to their children. (*Id.* at ¶ 232; *see also id.* at ¶ 116 ("Ms. Riep reiterated to the attendees that they should not feel the need to tell their parents about the topics discussed at the GSA meetings. . . ."); *id.* at ¶¶ 76-77 ("Ms. Riep told C.L. that she ought not to feel pressured into discussing the GSA meeting with her parents," and "'[R]emember, you don't have to tell your parents.'"). Encouraging students to confide in trusted adults at school and advising that disclosing gender expression or identity to parents may not be safe does not plausibly amount to a policy of directed concealment or undermining. Absent is any allegation that the children Plaintiffs were told, "Don't tell your parents."

Moreover, the plain language of the District's Guidelines, which Plaintiffs attach to their proposed amended complaint, contradict their allegations of "purposeful[] and intentional[] interfere[nce] with [their] ability to make decisions directly related to their children's best interests and education." (*Id.* at ¶ 240).[1] According to Plaintiffs:

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1. Documents attached to a complaint are properly considered with a motion to dismiss. *E.g. Tal v. Hogan,* 453 F.3d 1244, 1264 n.24 (10th Cir. 2006).

> "The Guidelines direct that '[s]chool personnel should not disclose information that may reveal a student's transgender or non-binary status to others, including students, parents, or community members' without student permission." (*Id.* at 163).
>
> . . .
>
> "The Guidelines require that when a school employee is 'contacting or communicating with a parent/guardian of a transgender or non-binary student, school staff should use the name and pronouns that the student's parent or guardian use, unless the student requests otherwise.'" (*Id.* at ¶ 167).
>
> . . .
>
> "A school counselor addressing a referred parent specifically inquiring on their child's gender expression in school is directed to use their professional judgement to determine' whether the parent may be permitted to know how their child identifies and is addressed while in the custody of a PSD school." (*Id.* at ¶ 170).

These cherry-picked excerpts mischaracterize the Guidelines by omitting key provisions.

While disclosure is generally discouraged, student consent is not the only factor; in one of the provisions

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Plaintiffs selectively quote, the Guidelines expressly recognize that school personnel may be "legally required" to reveal a student's transgender or non-binary status to parents. (Doc. 64-1, p. 58). Indeed, the Guidelines emphasize parents' ability to receive information relating to their child's gender expression or identity from the District upon request:

> Transgender and non-binary students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how to share private information. The school counselor will work with the student in coming out to their family and others, as appropriate, and collaborate with families to promote consistent gender support. . . . Parents/guardians have the right under FERPA to view all education records of their student upon request, which would include a student's Individual Gender Support Form. (*Id.*).

An overarching purpose of the Guidelines is to "support healthy communication between educators and parents/guardians to further the successful educational outcomes and well-being of every student" (Doc. 64-1, p. 57). Thus, contrary to the allegations in the proposed amended complaint, the District does not have a policy of keeping students' gender expression or identity a secret from their parents. The plain terms of the Guidelines must control, *see, e.g., Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081,1105 (10th Cir. 2017), and the District's

stated policy is to balance parents' rights with students' rights and collaborate with families on gender support.[2]

C. Substantive due process does not entitle Plaintiffs to necessarily know everything that may be happening at school.

Regardless, even taking Plaintiffs' characterizations at face value, they still cannot evade either the holding in *Jones* or the extensive authority supporting it. Whether phrased as undermining or interfering, the alleged conduct Plaintiffs challenge is effectively the same as what the parents in *Jones* dubbed indoctrination at school. Peeling away the rhetoric, the district court there found the crux of the complaint to be a school's exposure of the parents' children to ideas that conflicted with their family's beliefs, without advance notice. Plaintiffs' claim here is still no different. Alleging parents must be "fully informed as to the District's curriculum and efforts to

2. Plaintiffs go further by suggesting the District might be transitioning students in secret. (*See* Doc. 64-1, ¶¶ 181-83). Such speculation is likewise not well pled. The Guidelines are plainly written to support transgender and non-binary students, but they cannot be read to establish a policy, let alone a practice, of secret gender transitions. The closest Plaintiffs come to alleging something tangible is the statement that "Ms. Riep primed C.L. into doubting her gender identity." (*Id.* at ¶ 78). The context exposes that as Plaintiffs' subjective opinion. The only specific conduct alleged is that "Ms. Riep held numerous one-on-one conversations with C.L. about gender identity and pronouns, where Ms. Riep taught C.L. about rejecting her feminine pronouns and the availability of alternative pronouns." (*Id.*) That does not plausibly allege a "custom of secrecy." (*Id.* at ¶ 79).

control the best interests of their children," (Doc. 64-1, ¶ 230), is Plaintiffs' way of saying either that they have exclusive right over sexual education or that after-school discussion of issues pertaining to gender identity and expression can only occur after parent notification.

Again, both assertions are wrong as a matter of law and cannot state a violation of substantive due process. "[D]ecisions as to . . . what curriculum to offer or require, are uniquely committed to the discretion of local school authorities. . . ." *Swanson,* 135 F.3d at 700. "Parents have a right to inform their children when and as they wish on the subject of sex; they have no constitutional right, however, to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so." *Fields v. Palmdale Sch. Dist.,* 427 F.3d 1197, 1206 (9th Cir. 2005). Stated another way, "A parent has the right to control where their child goes to school. But that is where their control ends." *Blau v. Ft. Thomas Pub. Sch. Dist.,* 401 F.3d 381, 395-96 (6th Cir. 2005); *see also Parker v. Hurley,* 514 F.3d 87, 105 (1st Cir. 2008) (rejecting parents' "claim of 'indoctrination': that the state has put pressure on their children to endorse an affirmative view of gay marriage and has thus undercut the parents' efforts to inculcate their children with their own opposing religious views").

Plaintiffs attempt in their motion to analogize a right of informed consent as it relates to the fundamental right to refuse medical treatment. That is a bridge too far. The physician-patient relationship is clearly different than

the relationship between state-sponsored educators and parents, and physicians' interests in treatment pale in comparison to the state's interests in educating children. Moreover, the right to refuse treatment, and its "derivative right to such information as is reasonably necessary . . . to make an informed decision," directly pertains to a recognized fundamental right—the right to bodily integrity. *Licerio v. Lamb,* No. 20-cv-00681, 2021 WL 4556092 at *15 (D. Colo. July 15, 2021). What Plaintiffs seek to invoke here is much narrower. Public education itself is not a fundamental right, *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 34-40 (1973), and the limited scope of parents' right to direct their children's education is well established, *e.g., Swanson,* 135 F.3d at 699. Since parents have no right "to pick and choose" what they want their children exposed to in a public school, *id.* at 700, it necessarily follows that no derivative right to know everything that is happening at school could possibly attach. *See Doe,* 2023 WL 5018511, at *13 ("The Fourteenth Amendment does not confer parents with an unfettered right to access information about what their children are learning."); *see also Willey v. Sweetwater Cnty. Sch. Dist. No. I Bd. of Trustees,* No. 23-CV-069, 2023 WL 4297186, at *7 (D. Wyo. June 30, 2023) ("[N]othing provided to this Court would support that the enactment or application of the Policy constitutes medical or health care for which parental consent would be required.").

The Supreme Court's decision in *Troxel v. Granville,* 530 U.S. 57, 65 (2000), does not change the analysis. As this Court previously explained, "*Troxel* concerned parental visitation rights; it did not discuss a right of parents to direct the policies of or lessons taught in public schools

or a right to receive notice about topics planned for discussion." (Doc. 58, p. 25 (citing, *inter alia, Troxel,* 530 U.S. 57 at 67-73). Plaintiffs persist in trying to shade the District's Guidelines and various alleged actions through the lens of *Troxel.* While, again, their tint is far more argumentative than factual, this ultimately is not a case where the state, acting through a school, has improperly taken something with constitutional protection away—like control over parenting time. There continues to be no authority supporting Plaintiffs' notion that post-*Troxel*, schools cannot make policy/curriculum-based decisions or offer after-school activities that support transgender and non-binary students absent parental unfitness. *See, e.g., Leebaert v. Harrington,* 332 F.3d 134, 142 (2d Cir. 2003).

D. This is not a case where school personnel were directed to withhold children's gender identity or expression from parents.

Plaintiffs' other apparent strategy, to align this case with *Wiley,* 2023 WL 4297186, cannot succeed. As this Court noted, *Willey* Involved a challenge to a school district policy that prohibited, or could be read to prohibit, school district personnel from answering parents' questions about their children's use of pronouns at school." (Doc. 58. p. 26). While *Willey* stands as a non-binding outlier decision, its reasoning was based on "the denial of information after parental inquiry"—that is, "the school's withholding of information or active deception, despite the[parent's] inquiry." (Doc. 58, pp. 26-27 (quoting *Willey,* 2023 WL 4297186, at *14)). Just as in their initial complaint, Plaintiffs do not allege they asked District personnel about their children's gender identity,

expression, or use of pronouns at school but were denied such information. They even admit as much when they assume they "were deprived of the opportunity to be lied to by a PSD counselor. . . ." (Doc. 64-1, ¶ 171). Obviously, such self-serving speculation is not well pled and cannot establish direct and substantial interference with any purported constitutional right.

While Plaintiffs now say they base their Fourteenth Amendment claim on the District's Guidelines, that does not make the claim viable. The Guidelines do not require student consent or prohibit school employees from sharing a student's gender identity or expression upon parental request. Rather, the Guidelines state, "If a school counselor receives questions from a parent/guardian, they should use their professional judgment to determine how best to follow up with the student and then the parent/guardian." (*Id.* at 58). The policy at issue in *Wiley* precluded disclosure under certain circumstances, stating that a student's request for confidentiality would be honored "until the student consents to the disclosure and/or the District completes an individualized assessment and rules out any particularized and substantiated concern of real harm. . . ." 2023 WL 4297186, at *4. There was no allowance for parents' right to obtain their child's education records, and the policy in *Willey* did not recognize that disclosure may be legally required.

Additionally, since there is no allegation here that the parent Plaintiffs requested and were either denied information or were lied to by school staff, their proposed claim based on the Guidelines is, at best, a nonjusticiable facial challenge. *See, e.g., West v. Derby Unified Sch. Dist.*

No. 260, 206 F.3d 1358, 1367 (10th Cir. 2000) (noting one inapplicable exception for First Amendment overbreadth challenges); *see also Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 450 (2008) ("Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.") (internal quotation omitted). Of course, for the reasons explained above, plaintiffs cannot win a facial challenge to the Guidelines because they cannot establish unconstitutionality in all applications. *See, e.g., id.* at 449.[3]

3. Plaintiffs' challenge is more closely related to executive action—i.e., an independent, specific act of a governmental officer, than a challenge to legislative action, which would trigger the shocks-the-conscience approach. *See Doe v. Woodard,* 912 F.3d 1278, 1300 (10th Cir. 2019) (citing cases). Unsurprisingly, Plaintiffs want it both ways, trying to hold their allegations regarding the GSA club meetings in 2021 under an umbrella of the Guidelines (which date from 2023) because they simply do not allege "a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience-shocking." *Mandy v. Indep. Sch. Dist. No. 1 of Delaware Cnty., Okla.,* No. 16-CV-525, 2017 WL 2783990, at *11 (N.D. Okla. June 27, 2017) (quoting *Uhlrig v. Harder,* 64 F.3d 567, 574 (10th Cir. 1995). The alleged injuries here were not "so severe, . . . so disproportionate to the need presented, and . . . so inspired by malice of sadism, rather than a merely careless or unwise excess of zeal, that [they] amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Muskrat v. Deer Creek Pub. Schs.,* 715 F.3d 775, 786-87 (10th Cir. 2013); *cf. Abeyta v. Chama Valley lndep. Sch. Dist. No. 19,* 77 F.3d 1253, 1257 (10th Cir. 1996) (holding standard not met where teacher verbally harassed 12-year-old student by calling her "whore" several times in front of other students, who then proceeded to harass student with similar statements).

II. The District's Guidelines Are Rationally Related to the Legitimate Interest in Supporting Transgender and Non-Binary Students.

Although the Court need not apply any scrutiny to the District's Guidelines, as it previously concluded, (Doc. 58, pp. 28-29 & n.6), there certainly is a rational basis. *See, e.g., United States v. Hardman,* 297 F.3d 1116, 1126 (10th Cir. 2002). The District has a strong interest in providing a safe and supportive environment for all students, including those who are transgender or gender nonconforming. "[A] State's interest in safeguarding the physical and psychological well-being of a minor is compelling." *New York v. Ferber,* 458 U.S. 747, 756-57 (1982) (internal quotation omitted). Indeed, gender identity and expression are protected under both federal and state anti-discrimination law. *Bostock v. Clayton Cnty.,* 140 S. Ct. 1731, 1741-42 (2020) (analyzing Title VII); C.R.S. § 24-34-601(2)(a) (prohibiting discrimination by places of public accommodation on basis of "sex, sexual orientation, gender identity, [and] gender expression"); 3 C.C.R. 708-1, § 81.6 (stating prohibited conduct includes "intentionally causing distress to an individual by disclosing to others the individual's sexual orientation.").[4] School districts in

4. Title IX, 20 U.S.C. § 1681(a), prohibits discrimination on the basis of sex in any public school that receives federal assistance. The Department of Education interprets this provision to include discrimination based on gender identity. Enforcement of Title IX with Respect to Discrimination Based on Sexual Orientation and Gender Identity, 86 Fed. Reg. 32,637 (June 22, 2021) (citing *Bostock,* 140 S.Ct. 1731), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf; *but see Tennessee et al. v. United States Dept of Educ.,* 615 F. Supp. 3d 807, 838

Colorado are even required to adopt policies prohibiting discrimination on the basis of gender identity or gender expression. C.R.S. § 22-32-109(1)(11)(I)(A). As the Court has held, these are legitimate government interests. (Doc. 58, pp. 28-29, 43 & n.6 (citing cases)).

Nor can there be any serious dispute that the objectives of the Guidelines are rationally related to achieving a safe and supportive environment for transgender and non-binary students. (*See id.*) Again, the Guidelines clarify how anti-discrimination laws and District policies apply to transgender and non-binary students based on their gender identity and/or gender expression, and they promote student privacy while respecting parental access and involvement. Rather than delineate hard and fast rules for every possible situation, the Guidelines stay flexible by outlining general policy so that "the needs of individual students [can] be assessed on an individual basis." (Doc. 64-1, pp. 56-57). *Cf. Vesely v. Ill. Sch. Dist.*, No. 22-CV-2035, 2023 WL 2988833, at *5 (N.D. Ill. Apr. 18, 2023) (holding school district policy of allowing students to socially transition to different gender identity at school passed constitutional muster).

III. Plaintiffs Still Cannot Establish Municipal Liability.

Plaintiffs' proposed amendment is also futile because they still fail to plead facts, which if true, could impose

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(E.D. Tenn. 2022) (enjoining interpretation in several states, not including Colorado).

liability on the District.[5] A governmental entity cannot be liable for civil rights violations under a theory of respondeat superior. *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). To establish liability pursuant to Section 1983 against the District, Plaintiffs must plausibly allege an employee committed a constitutional violation caused by an official policy or custom. *See, e.g., Murphy v. City of Tulsa,* 950 F.3d 641, 644 (10th Cir. 2019); *Murrell v. Sch. Dist. No. 1, Denver, Colo.,* 186 F.3d 1238, 1249 (10th Cir. 1999). Again, Plaintiffs' do not state a constitutional violation.

They are deficient on the second prong, too. Although the proposed amended complaint references the Guidelines, as well as several formal District policies adopted by its governing Board, Plaintiffs make clear that they seek to hold the District liable for "a broader ***custom*** and ***unwritten*** policy at PSD to exclude parents from making well-informed decisions regarding the education of their children as it pertains to transgenderism, sexual orientation, and diverging gender identity." (Doc. 64-1, ¶ 149 (emphasis added)). An informal custom amounting to a widespread practice only can bind a municipality if it is so permanent and well-settled as to constitute a custom or usage with the force of law. *E.g. Murphy,* 950 F.3d at 644 (internal quotation omitted). A single incident is insufficient. *City of Okla. City v. Tuttle,* 471 U.S. 808, 823-24 (1985); *Nielander v. Bd. of Cnty. Comm'rs of Cnty. of Republic, Kan.,* 582 F.3d 1155, 1170 (10th Cir. 2009).

5. The District asserted this same ground for dismissal of the initial complaint, (*see generally* Doc. 29, pp. 14-17), but this Court had no occasion to reach municipal liability.

Plaintiffs' specific allegations of parental exclusion relate to a sole District employee (Ms. Riep) in relation to one GSA club at a single District school over a narrow span of time.[6] That is not enough to state a plausible custom or usage having the force of law. *Compare Starrett v. Wadley,* 876 F.2d 808, 820 (10th Cir. 1989) (emphasizing "isolated and sporadic acts of sexual harassment directed at few specific female [staff] members" do not amount to a "persistent and widespread practice"), *with Trujillo v. City & Cnty. of Denver,* No. 16-CV-1747, 2017 WL 1364691, at *7 (D. Colo. Apr. 14, 2017) (allowing Section 1983 claim to proceed where plaintiff alleged numerous incidents of excessive force without discipline, including four involving individual defendant police officer). Despite Plaintiffs' efforts to slice and dice the Guidelines and formal District policies, again, their characterizations of concealment, directives, and undermining, (Doc. 64-1, ¶¶ 8, 139, 147-48, 171, 236), are refuted by what the Guidelines actually say. Their case, therefore, must rest on alleged rogue acts. Such a scenario can impose municipal liability only when the employee was a final policymaker. Plaintiffs' proposed amended complaint gives no indication that Ms. Riep possessed final policymaking authority, under the requisite legal delegation. *See, e.g., Milligan-Hitt v. Bd. of Trustees, Sheridan Cnty., Sch. Dist. No. 2,* 523 F.3d 1219, 1230 (10th Cir. 2008); *Murrell,* 186 F.3d at 1249.

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6. Another individual, Ms. Chambers, is alleged to have been invited to a GSA meeting at WMS in her third-party capacity with a community organization that educates school-aged children on topics of sexuality and gender identity. (Doc. 64-1, ¶¶ 31, 56-57).

Appendix H

CONCLUSION

For the foregoing reasons, allowing Plaintiffs to amend their complaint would be futile. The proposed reasserted substantive due process claim still fails because Plaintiffs do not allege a violation of the fundamental right to direct the upbringing of their children, the District's Guidelines are rationally related to the legitimate interest in supporting transgender and non-binary children at school, and the alleged course of conduct regarding a single GSA club cannot trigger municipal liability. Plaintiffs' motion for leave to amend should be denied.

RESPECTFULLY SUBMITTED this 13th day of February, 2024.

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APPENDIX I — REPLY IN SUPPORT OF PLAINTIFFS' AMENDED MOTION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED FEBRUARY 27, 2024

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-cv-01117-NYW-STV

JONATHAN LEE; ERIN LEE; C.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS; M.L., A MINOR, BY AND THROUGH PARENTS JONATHAN AND ERIN LEE AS NEXT FRIENDS; NICOLAS JURICH; LINNAEA JURICH; AND, H.J., A MINOR, BY AND THROUGH PARENTS NICOLAS AND LINNAEA JURICH AS NEXT FRIENDS,

Plaintiffs,

v.

POUDRE SCHOOL DISTRICT R-1, FT. COLLINS, COLORADO; AND, POUDRE SCHOOL DISTRICT R-1 BOARD OF EDUCATION,

Defendants.

Filed February 27, 2024

REPLY IN SUPPORT OF PLAINTIFFS' AMENDED MOTION FOR LEAVE TO AMEND COMPLAINT

Appendix I

INTRODUCTION

Plaintiffs' Amended Motion for Leave to Amend Complaint [ECF 64] (the "Motion") and the Proposed First Amended Complaint [ECF 64-1] (the "FAC") clearly and plausibly state claims upon which relief can be granted. Defendants' Response to Plaintiffs' Motion for Leave to Amend Complaint [ECF 67] (the "Response") fails to grasp the points advanced in Plaintiffs' Motion. Plaintiffs' Motion for Leave to Amend Complaint makes it abundantly clear that the FAC asserts a cognizable constitutional injury to Plaintiffs' fundamental parental rights to both determine the best interests of their children and direct their education.

ARGUMENT

I. Plaintiffs' Motion is Not Futile.

As the party opposing the Motion to Amend, Defendants bear the burden of establishing futility, showing that it would be subject to dismissal. *Openwater Safety IV, LLC v. Great Lakes Insurance SE*, 435 F.Supp.3d 1142, 1151 (D.Colo. 2020). A proposed pleading is analyzed using the same standard as a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and the Court "accept[s] well-pleaded facts as true[.]" *Id.* Plaintiffs' Motion and proposed Amended Complaint assert sufficient facts upon which relief can be granted, and Defendants failed to meet their burden to establish futility.

Appendix I

A. Plaintiffs' Motion and FAC Assert a Claim Upon which Relief can be Granted.

The crux of Defendants' futility argument is that the Plaintiffs' Motion and FAC assert the same claim that this Court dismissed in its Memorandum Opinion and Order [ECF 58] (the "Order"). ECF 67, at 2-4. But Plaintiffs' Motion and FAC directly address the core failings identified in the Order by supplying additional factual assertions and amending the principal count to establish a claim upon which relief can be granted. While it is certainly true that that core constitutional injury remains the same, the Motion and FAC explain that Defendants' broad policy and custom of concealing relevant information from parents (the "Secrecy Policy") (1) disrupted Plaintiffs' right to seek alternative education venues for their children; and (2) directed Poudre School District (the "District") agents to make secret, extrajudicial determinations about the best interest of Plaintiffs' children. ECF 64, at 3.

In short, Plaintiffs' Motion and FAC allege that Defendants' Secrecy Policy closed the channel of information to District parents—information that, if known, would have brought Plaintiffs to seek out alternative education venues for their children. The Secrecy Policy firmly establishes agents of Defendant as arbitrators of the best interest of the child. Acting with pure discretion, and without consideration of the presumed fitness of Plaintiffs as parents, *Troxel v. Granville*, 530 U.S. 57,68 (2000) ("there is a presumption that fit parents act in the best interests of their children"), Defendants'

agents closed the channel of information to Plaintiff parents. Both C.L. and H.J. were covertly invited to attend the Genders and Sexualities Alliance meetings after school, ECF 64-2, ¶¶ 49-56, 86**;** both were told that if they were uncomfortable in their bodies, they were likely transgender, ECF 64-2, ¶¶ 64, 113; both were told that suicidality was common for transgender and gender non-conforming children, ECF 64-2 ¶¶ 73, 81, 112; and both were directed to distrust their parents as potentially unsafe, ECF 64-2 ¶¶ 72, 92, 99, 116, 119, 172. Acting in compliance with the Secrecy Policy, Defendants' agents concealed highly relevant information from Plaintiffs and directed Plaintiffs' children to conceal the same. As a consequence, Plaintiffs lost all meaningful access to the information necessary to effectively exercise their parental rights. A parent's right to decide *whether* to maintain their child's enrollment in school cannot be meaningfully exercised when the government withholds crucial information that would inform that decision.

Defendants repeatedly attempt to frame Plaintiffs' Motion and the FAC as an attempt to control curriculum, relying heavily on cases like *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*. ECF 67, at 2, 3, 7-10. However, Plaintiffs' Motion and FAC do not seek to control the Defendants' curriculum, nor do they trace their constitutional injury to an inability or failure to affect the school curriculum previously. Instead, the Motion and FAC make it abundantly clear that the constitutional injury arises out of compliance with the District's Secrecy Policy. Plaintiffs were constitutionally injured when District agents explicitly frustrated the exercising of fundamental parental rights. Defendants readily concede

that "'a parent has the right to control where their child goes to school[,]'" ECF 67, at 3 (quoting the Order), and it is that right which the District Secrecy Policy violates. Not only were school personnel directed under the Secrecy Policy to keep Plaintiffs in the dark, but District agents also promoted deception and concealment by Plaintiffs' children. The right to control where one's child goes to school, as recognized by Defendants, is trampled when the school actively withholds from parents the very information that parents rely upon to exercise that right.

Decisions are, by definition, reached by evaluating information. To say that schools can literally lie to and conceal from parents—both through that school's agents and through perversive influence over students—about information that is crucial to their decision-making process is vacuous and defies the most elementary principles of reasoning. Yet, Defendants seem to contend that Plaintiffs' parental rights—if they exist at all—do not include the right to accurate information about their own children's free public education,[1] nor to even the basic access of information in the first instance. Defendants structure their argument against the notion that the Fourteenth Amendment protects the right of parents to receive notice about topics discussed at school. But Defendants failed to grasp the core of Plaintiffs' Motion and FAC: to the extent that schools hold information relevant to a parents' continued choice to keep a child matriculated, policies that conceal that actively information, and encourage the child to do the same are odious to the parents' constitutional rights.

1. Free public education is a right under the Colorado Constitution. Colo. Const. art. IX, § 2.

B. Defendants Mischaracterize the Amended Complaint.

Defendants argue that "[t]he only specific conduct alleged in the body of the claim is 'Ms. Chambers and Ms. Riep's academic discussion of sex, sexualities, mental health, suicide, sexual orientation, gender identities, and other sex-related content with no parental disclosure, as well as their encouragement to C.L. and H.J. to keep GSA activities secret from parents.'" ECF 67, at 3. But the FAC contains many allegations of specific conduct that demonstrate the violations by the District, including that "[o]n numerous occasions, PSD personnel sought internal guidance on means to circulate internally made lists of students' preferred names and pronouns amongst PSD faculty and staff without notifying the parents through an update or change to Synergy[,]" ECF 64-2, ¶ 212; "violated Plaintiffs' fundamental right to make decisions regarding the best interests and education of their children by, inter alia, preventing the Plaintiffs from being fully informed as to the District's curriculum and efforts to control the best interests of their children[,]" ECF 64-2, ¶ 230; "avoidance of parental disclosure and encouraged student secrecy was undertaken as part of the custom and standard operating procedures of Defendant PSD[,]" ECF 64-2, ¶ 233; "Kimberly Chambers was a willing participant in joint activity with Defendant PSD[,]" ECF 64-2, ¶ 234. The examples are too numerous to mention. Regardless, there is no legal significance to a charge about specific conduct alleged in the body of a claim. It is merely a component of Defendants' effort to muddy the waters amid the lack of substantive legal basis for their opposition to the Motion to Amend.

Defendants' Response makes an important mistake. It asserts, "Plaintiffs' proposed amended [sic] still fails to state a claim because parents do not have a fundamental right to advance disclosure of discussion of sex-related content at an after-school club or protection from school employees and invited guests from encouraging children to keep such discussions confidential." ECF 67, at 3. Defendants cling to the unsupportable notion that Plaintiff parents aim "'to control each and every aspect of their children's education and oust the state's authority over that subject.'" ECF 67 at 3. However, Plaintiffs have never purported to have the authority to control each and every aspect of what happens at school. Plaintiffs simply claim that when the District lies to students to dupe them into attending their political, sociological, and ideological meetings, and when those lies also dupe the parents, as intended, the District has unconstitutionally restricted Plaintiff parents' fundamental rights.

C. Plaintiffs' FAC is Clearly Distinguishable from *Jones*.

Defendants' heavy reliance on *Jones v. Boulder Valley School District Re-2*, ECF 67, at 4-7, is misplaced as Plaintiffs' FAC is clearly distinguishable. As a threshold matter, *Jones* contemplated a school district that openly disclosed the presence of educational transgender discussions to school district parents. 2021 WL 5264188 at *2-4. The court in *Jones* understood the pleadings as seeking to control the curriculum of a public school district and found there was no Fourteenth Amendment right to do so. *Id.* at *15-16. As made clear in the Motion,

Plaintiffs never sought to control or direct the curriculum in Defendants' school. ECF 64, at 6, 12. And unlike the open disclosure in *Jones*, it was the compliance with Defendants' Secrecy Policy that caused Plaintiffs' constitutional injuries.

Defendants may try all they want to dress Plaintiffs' Motion and Amended Complaint as a "reframe-dodge" and "not-so-subtle shifting" of *Jones*, ECF 67, at 4, but at end, Defendants concede the two pursue entirely different claims. The parents in *Jones* had access to information that Plaintiffs did not by consequence of the Defendants' Secrecy Policy. Defendants readily concede that regarding parental notification, under the Guidelines, "disclosure is generally discouraged[.]" ECF 67, at 6. Defendants then cite favorably to the one provision of the Guidelines where, under federal law (FERPA), an agent of the school district *may* be compelled to inform a parent. ECF 67 at 6.

The absurd result of Defendants' position is that parents would have to make FERPA requests about every facet of their children's government education experience, including those facets that they do not know exist. Under this theory, in the instant case, Plaintiff parents, upon receiving a text from their daughter requesting to attend "art" club, should have made formal information requests to the District, including asking whether the "art" club was really a transgender/sexualities club that would inform their daughters that they are probably transgender for feeling uncomfortable in their bodies, that they are likely to commit suicide, and that their parents are not to be trusted.

The notion that parents must somehow know what questions to ask or else they deserve not to get the truth and also that they lack any legal recourse is wholly inconsistent with the preeminent place that the fundamental rights of parents enjoy in our legal system as recognized in *Meyer v. Nebraska* (262 U.S. 390, 399, 401 (1923)) (the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own" [ECF 64 at 3]), *Pierce v. Society of Sisters* (268 U.S. 510, 534–535, (1925)) (the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control" [ECF 64 at 3], and in *Wisconsin v. Yoder* (406 U.S. 205, 232 (1972)) ("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 United States Supreme Court's resounding recognition of parents' primary role in the upbringing of their children, including to "direct" and "control the education" of their children means nothing if it does not mean that parents have a substantive due process right to *know* about the upbringing and education of their children while they are in schools like those run by the District and formerly attended by Plaintiffs' children.

Defendants' argument here also fails to address how the FERPA exception to broader Guidelines, under which "disclosure is generally discouraged," ECF 67, at 6, served as a dog whistle to strengthen the District's Secrecy Policy further. As articulated in the FAC, the Secrecy Policy was

so prevalent and entrenched in the District that District personnel repeatedly sought to cleverly avoid FERPA detection. ECF 64-2, ¶¶ 215-16.

D. Plaintiffs Have Established Municipal Liability.

Under *Monell*, asserting liability against a municipality requires a pleading of (1) an official policy or custom of which (2) a policymaker can be charged with actual or constructive knowledge and (3) a constitutional violation whose moving force is that policy or custom. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978); *Jauch v. Choctaw Cty.*, 874 F.3d 425 at 435 (5th Cir. 2017). Despite Defendants' arguments to the contrary, Plaintiffs' have clearly pled facts sufficient to establish municipal liability under *Monell*.

Defendants' Response first argues that Plaintiffs failed to state a constitutional violation. ECF 67, at 14. As argued above, Plaintiffs clearly articulated a constitutional injury to their fundamental parental rights: By effectuating district policy, district agents frustrated and prevented the Plaintiffs' from exercising their right to seek alternative education venues for their children.

Next, Defendants point to the fact that the Secrecy Policy is an unwritten custom. ECF 67, at 14. But, *Monell* clarifies that "[l]ocal governments may be sued for constitutional deprivations visited pursuant to governmental custom even though such a custom has not received formal approval through the body's official

decision-making channels." 436 U.S. at 691. Defendants argue that a single incident of a constitutional violation is insufficient, ECF 67 at 14, but Plaintiffs' Motion articulated numerous instances in which C.L. and H.J. were impressed upon to distrust their parents. ECF 64, at 5, 7-9. Furthermore, the question is not whether Plaintiffs endured numerous assaults on their constitutional rights but whether the offending action was consistent with a broader policy instead of a one-off occurrence. And Plaintiffs clearly articulated numerous instances in which District employees complied with or sought to comply with the District's Secrecy Policy. ECF 64-2, ¶¶ 191-215.

For the purposes of the futility argument presented by Defendants, Plaintiffs' Motion sufficiently established (1) the existence of the District's Secrecy Policy; (2) that Defendants' agents acted in compliance with the Secrecy Policy; and (3) that Plaintiffs suffered a constitutional injury because of that compliance. As such, under *Monell* and its progeny, Plaintiffs have sufficiently pled facts to establish municipal liability.

II. Constitutional Injuries Cannot be Justified by Unrelated Interests.

In their Response, Defendants argue that the District's Guidelines are supported by the state's interest in preventing discrimination. ECF 67, at 12-13. This argument is wholly irrelevant. Plaintiffs' Motion makes clear that the constitutional injury suffered arose from the District's Secrecy Policy, not the District's Guidelines. To be sure, Plaintiffs refer to the District's written Guidelines as evidence of the broader Secrecy Policy, but

the constitutional injury suffered arose from the Secrecy Policy, not the Guidelines. Defendants clearly recognized this distinction as they attacked the unwritten nature of the Secrecy Policy in the municipal liability section of their Response. ECF 67, at 14.

While the Court need not examine the persuasiveness of the state interest in the District's Secrecy Policy at this time (which is properly preserved for the merits stage), it is important to note that Defendants cannot insulate themselves from inflicting constitutional injuries by relying on wholly unrelated interests. Defendants rely on federal and Colorado law for the proposition that gender identity is protected from gender discrimination. ECF 67, at 12-13. Regardless of how compelling the state's interest is in antidiscrimination, that interest is wholly irrelevant to whether the state has a compelling interest in a secrecy policy that deprives parents of the information needed to reasonably exercise their parental rights. As argued above, whether the state may assert itself as the arbitrator of what is best for a child rests wholly on an analysis of their parents' fitness. Any articulated interest in antidiscrimination by Defendants cannot overcome the presumption of fitness parents enjoy. *Troxel*, 530 U.S. at 68.

When Defendants' agents violated Plaintiffs' parental rights, in accordance with the District's Secrecy Policy, they asserted themselves as the arbitrator of C.L.'s and H.J.'s best interest. Defendants' interest in antidiscrimination is neither compelling, narrowly tailored, nor even substantively related so as to justify this injury.

Appendix I

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion.

RESPECTFULLY SUBMITTED this 27th day of February 2024.

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APPENDIX J — POUDRE SCHOOL DISTRICT GUIDELINES FOR SUPPORTING TRANSGENDER AND NON-BINARY STUDENTS, REVISED JANUARY 13, 2023

Guidelines for Supporting Transgender and Non-Binary Students

The Guidelines use "transgender" as an adjective to refer to individuals with a gender identity that differs from the sex they were assigned at birth. The Guidelines use "non-binary" as an umbrella adjective to refer to individuals with gender identities outside of the male-female gender binary system, and this encompasses identities such as agender, bigender, genderqueer, gender non-conforming, and gender-fluid. The adjectives "transgender" and "non-binary" relate to an individual's gender identity, which is separate from sex and sexual orientation, and therefore the Guidelines use the term "gender identity" to refer to an individual's innate sense of their gender. However, some of the policies and laws referenced in these Guidelines define the terms "sex" and/or "sexual orientation" to include an individual's gender identity, gender expression, and/or transgender status. Therefore, these Guidelines will use the term(s) "sex" and "sexual orientation" when referencing a policy or law that defines the term(s) in this manner, as the policy or law would be applicable to transgender and non-binary students.

Definitions of select terms related to gender identity and gender expression, including those used in these Guidelines, can be found in the Terminology and Definitions section at the end of these Guidelines.

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Purpose

Poudre School District (PSD) strives to fulfill its mission to educate every child, every day in connection with the District vision to support and inspire every child to think, to learn, to care, and to graduate prepared to be successful in a changing world. PSD staff members work to create and sustain welcoming, affirming, inclusive, and supportive educational environments for all students, while recognizing that students holding certain identities have historically been discriminated against in places of public accommodation.

As an educational institution, PSD is considered a place of public accommodation and is prohibited by Colorado law from engaging in discrimination. Discrimination occurs in a place of public accommodation when people are treated differently based on or because of a person's protected class and when the enforcement or application of a rule, policy, or procedure disproportionately adversely impacts a particular protected class. Protected classes in Colorado include disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, and ancestry.

In addition to this law, PSD is committed to the District policy that no otherwise qualified individual shall be denied access to, be excluded from participation in, be denied the benefits of, or be subjected to unlawful discrimination under, any District program or activity on the basis of race, color, creed, religion, national origin, ancestry, sex, sexual orientation, gender identity,

gender expression, marital status, veteran status, age, or disability. Additionally, harassment based on the foregoing protected classifications is a form of unlawful discrimination. District policies AC, GBAA, and JBB address discrimination in further detail.

These Guidelines were created to clarify how antidiscrimination laws and District policies apply to our transgender and non-binary students based on their gender identity and/or gender expression. To protect students' legal rights and safety, these Guidelines set out protocols for school and district staff to address the needs of our transgender and non-binary students in various situations. However, these Guidelines do not anticipate every situation that might occur for our transgender and non-binary students, and the needs of individual students should as assessed on an individual basis.

These Guidelines should be interpreted consistent with the goals of reducing the stigmatization of and improving the educational experiences and outcomes of transgender and non-binary students, maintaining the privacy of all students, and fostering cultural competence and professional development for school staff. Furthermore, these Guidelines support healthy communication between educators and parents/guardians to further the successful educational outcomes and well-being of every student.

Discrimination and Harassment on the Basis of Gender Identity and Expression

It is the responsibility of each school and the district to ensure that our transgender and non-binary students

have access to an educational environment that is free from discrimination based on their gender identity and/or gender expression. This includes students having access to participate in educational activities, course offerings, athletics, counseling, employment assistance, and extracurricular activities regardless of their gender identity or gender expression.

District Policy AC, Nondiscrimination/Equal Opportunity, states that harassment based on gender identity or gender expression is a form of unlawful discrimination. District Policy JBB, Harassment of Students, defines harassment based on gender identity or gender expression to include unwelcome, hostile, or offensive verbal, written, or physical conduct based on or directed at the characteristics of a student's actual or perceived gender identity or gender expression, such as name-calling and imitating mannerism, and deliberately misusing a transgender student's preferred name, form of address, or gender-related pronoun. Harassment also includes the use of hate speech or drawing, displaying, or posting images or symbols of hate on school grounds or at a school-sponsored event or activity that are reasonably expected to be divisive or demeaning and that express animus against a particular group or individual on the basis of gender identity or gender expression. Policy JBB specifies that harassment based on gender identity or gender expression is a violation of the policy when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of a student's education; (2) submission to or rejection of such conduct is used as the basis for educational decisions affecting the student; or

(3) such conduct has the purpose or effect of adversely affecting a student's ability to participate in or benefit from District program(s), or of creating an intimidating, hostile, or offensive environment. Policy AC directs all District employees who witness such harassment to take prompt and effective action to stop it and to then report it. The Policy outlines remedial and/or disciplinary actions against those who engage in harassment.

This is in compliance with C.R.S. 24-34-601, which states that, "it is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of ... sex, sexual orientation, gender identity, [or] gender expression... the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colorado law defines unlawful harassment as "severe or pervasive conduct that creates an environment that is subjectively and objectively hostile, intimidating, or offensive on the basis of sexual orientation." For use in this context, within 3 C.C.R. 708-1, the definition of "sexual orientation" includes one's transgender status.

This is also in compliance with Title IX of the Educational Amendments of 1972, which guarantees that, "no person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." The U.S. Department of Education clarified their enforcement authority over discrimination based on gender identity

under Title IX as of June 2021. Additionally, Title IX prohibits gender-based harassment, which is defined as unwelcome conduct based on an individual's actual or perceived gender identity or nonconformity with sex stereotypes.

Confidentiality and Privacy

Students have a general right to keep their transgender or non-binary status private from other students, parents, or third parties. Information about a student's transgender status, legal name, or sex assigned at birth may constitute personally identifiable information. Disclosing this information to other students, parents, or third parties may violate privacy laws, such as the federal Family Educational Rights and Privacy Act (FERPA). School personnel should not disclose information that may reveal a student's transgender or non-binary status to others, including students, parents, or community members, unless legally required to do so or unless the student has authorized such disclosure. Such information existing within a student's education record may be shared with other school personnel to the extent the school personnel have a legitimate educational interest in knowing the information.

Transgender and non-binary students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how to share private information. PSD supports our students in having autonomy over when and how they come out and to whom. When discussing an individual student's gender identity

at school, school staff will respect the degree to which the student is out. Prior to disclosing any information about a transgender or non-binary student related to their gender identity, staff should work with the student to discuss the manner, time, and message of that disclosure. The school counselor will work with the student in coming out to their family and others, as appropriate, and collaborate with families to promote consistent gender support.

When contacting or communicating with a parent/guardian of a transgender or non-binary student, school staff should use the name and pronouns that the student's parent/guardian use, unless the student requests otherwise. If a parent/guardian asks a staff member about whether their student uses another name/pronoun at school or has other gender-related questions, the staff member should refer them to the school counselor, who can address questions and concerns that the parent/guardian may have. If a school counselor receives questions from a parent/guardian, they should use their professional judgment to determine how best to follow up with the student and then the parent/guardian.

Parents/guardians have the right under FERPA to view all education records of their student upon request, which would include a student's *Individual Gender Support Form*. This form is discussed in the Facilitation and Communication of an *Individual Gender Support Form* section of these Guidelines. If a request for student education records is made, staff should forward the request to the Records Department to process.

Intentionally causing distress to a student by disclosing their transgender or non-binary identity may constitute harassment in Colorado law. This is in compliance with 3 C.C.R. 708-1, Rule 81.6, which states that prohibited conduct includes, "intentionally causing distress to an individual by disclosing to others the individual's sexual orientation." Within 3 C.C.R. 708-1, the definition of "sexual orientation" includes one's transgender status.

Name and Pronouns

A student has the right to be addressed by the name and pronoun that corresponds to the student's gender identity and gender expression. A court-ordered name or gender change is not required, and official records need not be changed. Staff should use the student's affirming name whether the name has been legally changed or not, not unlike the common practice of using a nickname by which others refer to the student rather than their legal name.

Transgender and non-binary students may request that their name and/or gender be updated in Synergy by completing a *Name and/or Gender Update Request Form* from their school counselor, which includes a parent/guardian signature. This will update the student's Synergy profile that is visible in StudentVUE, ParentVUE, and TeacherVUE to promote clarity of the student's affirming name and gender. The options for gender within Synergy will be based on state reporting requirements and may not be inclusive of every student's gender identity, and PSD will update the gender options in Synergy as state reporting requirements are updated.

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If a student submits a *Name and/or Gender Update Request Form*, applicable staff must ensure that the student's name is appropriately changed in/on Synergy, cumulative file, IEPs/504 Plans/ALPs, seating charts, rosters, school photos, student identification/library cards, yearbooks, IT accounts (within PSD's capability), after-school program lists, unofficial school-home communication, official school-home communication, outside district personnel or providers, summons to the office, posted lists, certificates, and anywhere else their name may appear, aside from situations where legal name changes are required. The Official Records section of these Guidelines address the situations where legal name changes are required.

If a student does not submit a *Name and/or Gender Update Request Form* due to a lack of a parent/guardian signature, staff should use the student's affirming name and pronouns at school and the name and pronouns that the student's parent(s)/guardian(s) use on any communication or document with, in front of, or to the parent(s)/guardian(s), as addressed in the Confidentiality and Privacy section of these Guidelines. In some rare circumstances when a student cannot obtain a parent/guardian signature but is out to their parent(s)/guardian(s), District staff may determine that it is in the best interest of the student to update the name and/or gender in Synergy to support an affirming school environment. If this determination is made, staff will notify the parent(s)/guardian(s) prior to making this update.

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If a staff member unintentionally deadnames or misgenders a student by using the student's incorrect name or pronouns, this must be addressed as appropriate for each situation and practice should occur so that the staff member does not repeatedly use the student's incorrect name or pronouns. If a student unintentionally deadnames or misgenders another student by using the other student's incorrect name or pronouns, a staff member should correct the student to promote an environment where students are addressed in an affirming manner.

The deliberate or persistent refusal to respect a student's gender identity or gender expression by intentionally using an incorrect name and/or pronoun is a violation of these Guidelines and may constitute harassment. Policy JBB specifies that harassment based on sexual orientation, gender identity, or gender expression includes deliberately misusing a transgender student's preferred name, form of address, or gender-related pronoun. Toward that end, any District employee who engages in harassment of a student shall be subject to remedial and/or disciplinary action, as set forth in Policy GBAA, Harassment of Employees, and any student who engages in harassment of another student shall be subject to remedial and/or disciplinary actions, as set forth in Policy JBB, Harassment of Students.

This is in compliance with 3 C.C.R. 708-1, Rule 81.6, which prohibits conduct that constitutes sexual orientation harassment, including deliberately misusing an individual's preferred name, form of address, or gender-related pronoun.

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Official Records

As addressed in the Name and Pronouns section of these Guidelines, to the extent that the school is not legally required to use a student's legal name and gender on school records and documents, the school should use the affirming name and gender identity of the student.

To comply with state reporting requirements, the District shall maintain a permanent student record ("official record") that includes a student's legal name and gender. To help maintain the privacy of transgender and non-binary students who submit a *Name and/or Gender Update Request Form*, the legal name and/or gender is included in their official record as protected information, which can only be viewed by certain District and school staff, not all staff. The district will amend a student's official record to reflect a legal update in first name, middle name, and/or gender upon the receipt of appropriate documentation, such as a court order from the parent/guardian substantiating the legal change.

Staff should alert and prepare students and families that the student's legal name, often referred to as their deadname, will appear on certain documents and communications due to legal reporting requirements. In situations where school staff or administrators are required by law to use or report a transgender or non-binary student's legal name and/or gender, such as during standardized testing, school staff and administrators shall adopt practices to avoid the inadvertent disclosure of such confidential information as well as to avoid the

student having to write, select, or see their deadname and/or incorrect gender.

Dress Codes

Students may dress in accordance with the student's gender identity and gender expression within the constraints of the District's dress code policy and the dress code adopted by the school. School staff should not enforce the district or school's dress code more strictly against transgender and non-binary students than other students. This includes prom and other school events.

This follows the District Policy JICA, Student Dress.

This is in compliance with 3 C.C.R. 708-1, Rule 81.8, which states, "Covered entities may prescribe standards of dress or grooming that serve a reasonable business or institutional purpose, provided that they shall not require an individual to dress or groom in a manner inconsistent with the individual's gender identity."

Restroom Accessibility

All students shall have access to a restroom that corresponds with their gender identity, including transgender and non-binary students. The use of restrooms by transgender and non-binary students should be assessed on an individual basis with the goals of maximizing the student's social integration, ensuring the student's safety and comfort, and minimizing stigmatization of the student. In no case shall any student

be required to use a restroom that conflicts with the student's gender identity.

PSD schools and buildings should have male, female, and gender-inclusive restroom options to ensure all students have access to a restroom that aligns with or is inclusive of their gender identity. School administrators should take steps as reasonably possible to designate gender-inclusive restrooms on their campus to ensure access to restrooms for all students while considering the accessibility of the locations. If the location of this facility requires students to travel in ways that could delay their timely arrival to school commitments, an accommodation plan should be developed.

Any student who has a need or desire for increased privacy, regardless of the underlying reason, can request to be provided with a reasonable alternative, such as access to a single stall restroom. However, no student shall be required to use a single stall restroom if there is another restroom option that aligns with or is inclusive of their gender identity, unless required as part of a school safety plan or other plan.

This is in compliance with 3 C.C.R. 708-1, Rule 81.9, which states, "All covered entities shall allow individuals the use of gender-segregated facilities that are consistent with their gender identity. Gender-segregated facilities include ... restrooms."

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Locker Room Accessibility

All students shall have access to a locker room that corresponds with their gender identity, including transgender and non-binary students. The use of locker rooms by transgender and non-binary students should be assessed on an individual basis with the goals of maximizing the student's social integration and equal opportunity to participate in physical education classes and sports, ensuring the student's safety and comfort, and minimizing stigmatization of the student. In no case shall any student be required to use a locker room that conflicts with the student's gender identity.

Relevant PSD schools and buildings should have male, female, and gender-inclusive options for locker rooms to ensure all students have access to a locker room that aligns with or is inclusive of their gender identity. School administrators should take steps as reasonably possible to designate gender-inclusive locker rooms or gender-inclusive restrooms with lockers in them on their campus to ensure access to locker rooms for all students while considering the accessibility of the locations. If the location of this facility requires students to travel in ways that could delay their timely arrival to school commitments, an accommodation plan should be developed.

Any student who has a need or desire for increased privacy, regardless of the underlying reason, can request to be provided with a reasonable alternative changing area, such as the use of a private area (e.g., a nearby restroom stall with a door, an area separated by a curtain,

or a P.E. instructor's office in the locker room), or with a separate changing schedule (e.g., using the locker room that corresponds to their gender identity before or after other students). However, no student shall be required to use a separate changing area if there is another option that aligns with or is inclusive of their gender identity, unless required as part of a school safety plan or other plan.

This is in compliance with 3 C.C.R. 708-1, Rule 81.9, which states, "All covered entities shall allow individuals the use of gender-segregated facilities that are consistent with their gender identity. Gender-segregated facilities include... locker rooms... In gender-segregated facilities where undressing in the presence of others occurs, covered entities shall make reasonable accommodations to allow access consistent with an individual's gender identity."

Physical Education Classes

Schools are encouraged to create gender-inclusive physical education classes to ensure access to opportunities for students of all gender identities. Schools must follow regulations regarding single-sex classes within Title IX of the Educational Amendments of 1972, including ensuring these classes meet the requirements of allowable sex-segregation and providing a substantially equal gender-inclusive class in the same subject for those who are excluded based on sex.

Participation in gender-segregated physical education classes shall be facilitated in a manner consistent with the student's gender identity. For non-binary students

who wish to participate in a class that is segregated along the male-female gender binary that does not have a gender-inclusive alternative option, the school should work with the student to determine the gender with which the student chooses to participate.

This follows the Poudre School District Board Policy AC – Nondiscrimination/Equal Opportunity, which states, "No otherwise qualified student shall be excluded from participation in, be denied the benefits of, or be subject to discrimination under any District program or activity on the basis of ... sex, sexual orientation, gender identity, [or] gender expression[.]"

This is in compliance with Title IX of the Educational Amendments of 1972, which guarantees that, "no person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." The U.S. Department of Education clarified their enforcement authority over discrimination based on gender identity under Title IX as of June 2021.

Student-Centered Activities, Clubs, and Programs

Schools and staff are encouraged to reduce or eliminate activities that segregate students by gender. In activities where students are segregated by gender, students should be included in the group that corresponds to their gender identity, and staff should work to create options that are inclusive of all gender identities.

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Schools are encouraged to create gender-inclusive clubs and programs to ensure access to opportunities for students of all gender identities. Schools must follow regulations regarding single-sex activities within Title IX of the Educational Amendments of 1972, including ensuring these activities meet the requirements of allowable sex-segregation and providing a substantially equal gender-inclusive activity in the same subject for those who are excluded based on sex.

Participation in gender-segregated clubs and programs shall be facilitated in a manner consistent with the student's gender identity. For non-binary students who wish to participate in a club or program that is segregated along the male-female gender binary that does not have a gender-inclusive alternative option, the school should work with the student to determine the gender with which the student chooses to participate.

This follows the Poudre School District Board Policy AC – Nondiscrimination/Equal Opportunity, which states, "No otherwise qualified student shall be excluded from participation in, be denied the benefits of, or be subject to discrimination under any District program or activity on the basis of ... sex, sexual orientation, gender identity, [or] gender expression[.]"

This is in compliance with Title IX of the Educational Amendments of 1972, which guarantees that, "no person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or

activity receiving Federal financial assistance." The U.S. Department of Education clarified their enforcement authority over discrimination based on gender identity under Title IX as of June 2021.

Athletics and Activities Sanctioned by the Colorado High School Activities Association

Schools will follow the Colorado High School Activities Association (CHSAA) Constitution & Bylaws for all students. According to the CHSAA Constitution & Bylaws, the CHSAA "recognizes the right of transgender student-athletes to participate in interscholastic activities free from unlawful discrimination based on sexual orientation. In order to ensure appropriate gender assignment for purposes of athletic eligibility, a transgender student-athlete's home school will perform a confidential evaluation to determine the gender assignment for the prospective student-athlete. The CHSAA will review athletic eligibility decisions based on gender assignment of transgender student-athletes in accordance with its approved policies and appeals procedures." The CHSAA Bylaw states that the school will be the first point of contact for determining the student's eligibility to participate in CHSAA sanctioned event(s). The CHSAA states that, "The student and parent(s)/guardian must notify the school in writing that the student has a consistent gender identity different than the student's gender assigned at birth and list the sanctioned event(s) in which the student would like to participate. The consistent gender identity as stated in the school letter will be the gender recognized for the entirety of the student's participation

in CHSAA athletics/activities." Therefore, staff should allow a transgender student to participate in accordance with their gender identity. Transgender students may fill out the *Transgender Student-Athlete Statement of Gender Identity for CHSAA* from their school counselor to comply with CHSAA policy.

The CHSAA Constitution & Bylaws also state that, "[gender fluid] students that want to participate in CHSAA athletics and activities must select one gender in which to participate. The process for gender identification and notification to the school is the same as stated [for transgender students]." According to the CHSAA, this also applies to non-binary students. Staff should work with gender fluid and non-binary students who wish to participate in a gender-segregated sport to determine the gender with which the student chooses to participate. Schools will follow the CHSAA's procedures regarding the recognized gender of each student, which is currently one gender recognized for the entirety of the student's participation in CHSAA athletics/activities but allows for multiple written requests to be submitted for approval at the local level. Gender fluid and non-binary students may fill out the *Transgender Student -Athlete Statement of Gender Identity for CHSAA* from their school counselor to document their selection of a gender to participate with to comply with CHSAA policy.

Overnight Activity and Athletic Trips

All students shall have access to an overnight room arrangement that corresponds with their gender identity,

including transgender and non-binary students. In the planning of sleeping arrangements during overnight activity and athletic trips, the needs of transgender and non-binary students should be considered on a case-by-case basis with the goals of maximizing the student's social integration and equal opportunity to participate in overnight activity and athletic trips, ensuring student safety and comfort, and minimizing stigmatization of the student. Under no circumstance should any student be required to share a room with students whose gender identity conflicts with their own.

Staff should involve transgender and non-binary students in identifying safe and supportive peers to room with to help maintain confidentiality and safety when determining room arrangements. In most cases, transgender students who identify as male or female should be assigned to share overnight accommodations with other students who share the student's gender identity. Staff should work to create inclusive and supportive options for non-binary students who may not identity as male or female when room assignments are based on the male-female gender-binary to ensure that all students are roomed based on their gender identity and not their sex assigned at birth.

Staff should not disclose any student's transgender or cisgender status to other students or parents/guardians, as addressed in the Confidentiality and Privacy section of these Guidelines. If a student or a student's parent(s)/guardian(s) express concerns or request that the student not be roomed with someone who is transgender, staff should address that individually and in a manner that

ensures that no other student's protected information is inappropriately shared, such as by stating that the student will be roomed with other students who hold their gender identity.

Any student who has a need or desire for increased privacy, regardless of the underlying reason, can request to be provided with a reasonable alternative, which may include a private room. However, no student shall be required to sleep in a private room if there is another rooming option that aligns with or is inclusive of their gender identity, unless required as part of a school safety plan or other plan.

This follows the Poudre School District Board Policy AC – Nondiscrimination/Equal Opportunity, which states, "No otherwise qualified student shall be excluded from participation in, be denied the benefits of, or be subject to discrimination under any District program or activity on the basis of ... sex, sexual orientation, gender identity, [or] gender expression[.]"

This is in compliance with 3 C.C.R. 708-1, Rule 81.9, which states, "All covered entities shall allow individuals the use of gender-segregated facilities that are consistent with their gender identity. Gender-segregated facilities include... dormitories. In gender-segregated facilities where undressing in the presence of others occurs, covered entities shall make reasonable accommodations to allow access consistent with an individual's gender identity."

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Facilitation and Communication of an *Individual Gender Support Form*

While these Guidelines support staff understanding of how to foster an inclusive and affirming environment for transgender and non-binary students, it is important to understand each student's story, experience, and needs to provide individualized and purposeful support. It is important to keep in mind that each situation, student, and school community are unique. There is no one answer for how to best support all transgender and non-binary students, and therefore PSD has an *Individual Gender Support Form* to intentionally connect these Guidelines to an individual student. Transgender and non-binary students, or the student's parent(s)/guardian(s), can elect to complete an *Individual Gender Support Form* with school staff members, and the school counselor will facilitate that conversation.

An *Individual Gender Support Form* is intended to support a transgender or non-binary student in gaining access to a school environment that is affirming and is free from discrimination and harassment on the basis of gender identity and gender expression. Cisgender and gender normative students inherently have access to a gender-affirming school environment based on this held identity, and an *Individual Gender Support Form*'s purpose is to work to ensure this access for students who have historically faced discrimination and harassment on the basis of gender identity and gender expression.

An *Individual Gender Support Form* is helpful in ensuring student knowledge of their rights and what opportunities,

supports, or resources are available to them. It is also helpful in documenting individual student supports and communicating these to relevant school staff to ensure access to an affirming school environment. There is no one best way to manage communication with classmates, parents/guardians, and staff. Therefore, it is helpful as the school counselor meets with the student and parents/guardians, if involved, to discuss if others are aware of the student's gender identity, if they plan to share this information, and whether they require communication or confidentiality from the involved staff member(s).

While a student's age and grade level should be considered in the planning of appropriate support, it should never be used by the school to justify delaying or denying affirming a student's gender identity. Schools should use appropriate materials with students at any grade level to support a student's gender identity while creating greater awareness and space for every child's gender identity and expression. If school staff believe that a student's gender identity or expression is presenting the need for support, it is appropriate for the school counselor to discuss this with the student and then use their professional judgment related to approaching the student's parent(s)/guardian(s).

For most elementary-aged and some secondary-aged transgender and non-binary students, their parent(s)/guardian(s) may inform the school of this identity rather than the student themselves. Together, the family and school can then identify appropriate ways for staff to support the student through the facilitation and completion of an *Individual Gender Support Form* by the school counselor.

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If a student initiates a conversation about needing support at school related to the student's gender identity or gender expression, the school counselor will encourage and discuss with the student how to inform and/or include the parent(s)/guardian(s) in this process. While it is not unusual for a student's identity to be first communicated at school, PSD recognizes the importance of involving the student's parent(s)/guardian(s) to promote congruent and affirming environments through the student's daily experiences. If a student requests not to inform or include their parent(s)/guardian(s) at the time of creating or reviewing an *Individual Gender Support Form*, staff will work with the student to support them in their coming out process, and there are exceptions for student safety. For some transgender and non-binary students, notifying their parent(s)/guardian(s) can carry risks for the student. Other students may not yet be ready to come out to their family for another personal reason. Staff will support students as they navigate the emotional, complex, and personal decision to come out to others and will advocate for the student themselves to be the one who comes out. Regardless of the student's out status with their family, staff will work to ensure that the student is affirmed and free from discrimination and harassment at school as outlined in these Guidelines, and this may include the facilitation of an *Individual Gender Support Form* with the school counselor.

School counselors should review and update a student's *Individual Gender Support Form* as individually necessary, such as when the student changes schools or as new needs arise.

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Transgender and non-binary students are encouraged to meet with their school counselor to complete this form in order to ensure clear and consistent knowledge of the student's individual needs for gender support through communication of the form with relevant staff members. However, completion of this form is not required for the student to use an affirming name/pronoun or access the facilities, programs, and activities that align with their gender identity because such access is protected by policy and law, as addressed in these Guidelines. A student's completed *Individual Gender Support Form* should not be added to their cumulative folder to protect their privacy, unless otherwise requested, but the form would be considered as part of the student's education records. As addressed in the Privacy and Confidentiality section of these Guidelines, parents/guardians have the right to view all education records of their student upon request, which would include an *Individual Gender Support Form*. If a request for student education records is made, staff should forward the request to the Records Department to process.

Resources

Resources specific to these Guidelines will be included and updated on the LGBTQIA+ Support subpage within PSD's Student Services website.

Terminology and Definitions

Definitions of select terms related to gender identity and gender expression are below. Definitions are from

the Human Rights Campaign, Safe Zone Project, and Merriam-Webster.

Affirm: Validate, confirm. *Throughout this document, the term "affirm" is used in the context of the name, pronouns, or gender identity that is affirming to the student, meaning the name, pronouns, or gender identity that validates or confirms the student's internal sense of self.*

Agender: A person with no (or very little) connection to the traditional system of gender, no personal alignment with the concepts of either male or female, and/or someone who sees themselves as existing without gender.

Androgyny: A gender expression that has elements of both masculinity and femininity.

Bigender: A person who fluctuates between traditionally "male" and "female" gender-based behavior and identities, identifying with both male and female genders. Or, identifying with either a male or female gender, as well as a third, different gender.

Biological sex: A medical term used to refer to the chromosomal, hormonal, and anatomical characteristics that are used to classify an individual as male, female, or intersex. Often referred to as simply "sex," "physical sex," "anatomical sex," or specifically as "sex assigned at birth."

Cisgender: A term used to describe a person whose gender identity aligns with those typically associated with the sex assigned to them at birth.

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Deadname (noun): The name that a transgender person was given at birth and no longer uses upon transitioning.

Deadname (verb): To speak of or address someone by their deadname.

Gender binary: A system in which gender is constructed into two strict categories of male or female. Gender identity is expected to align with the sex assigned at birth and gender expressions and roles fit traditional expectations.

Gender dysphoria: Clinically significant distress caused when a person's assigned birth gender is not the same as the one with which they identify.

Gender-expansive: A person with a wider, more flexible range of gender identity and/or expression then typically associated with the binary gender system. Often used as an umbrella term when referring to young people still exploring the possibilities of their gender expression and/or gender identity.

Gender expression: External appearance of one's gender identity, usually expressed through behavior, clothing, body characteristics or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.

Gender-fluid: A person who does not identify with a single fixed gender or has a fluid or unfixed gender identity.

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Gender identity: One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.

Gender non-conforming: A broad term referring to people who do not behave in a way that conforms to the traditional expectations of their gender, or whose gender expression does not fit neatly into a category. While many also identify as transgender, not all gender non-conforming people do.

Gender normative: Someone whose gender presentation, whether by nature or by choice, aligns with society's gender-based expectations.

Genderqueer: Genderqueer people typically reject notions of static categories of gender and embrace a fluidity or gender identity and often, though not always, sexual orientation. People who identify as "genderqueer" may see themselves as being both male and female, neither male nor female, or as falling completely outside these categories.

Gender variant: Someone who either by nature or by choice does not conform to gender-based expectations of society.

Intersex: Intersex people are born with a variety of differences in their sex traits and reproductive anatomy. There is a wide variety of difference among

intersex variations, including differences in genitalia, chromosomes, gonads, internal sex organs, hormone production, hormone response, and/or secondary sex traits.

Misgender: To identify the gender of a person incorrectly, as by using an incorrect label or pronoun.

Mx.: An honorific (e.g., Mr., Ms., Mrs., etc.) that is gender neutral. It is often the option of choice for folks who do not identify within the gender binary. Mx. is pronounced as "mix" or "schwa."

Neopronouns: Pronouns besides the ones most commonly used in a particular language. As one's pronouns are ultimately a reflection of their personal identity, the number and types of (neo)pronouns a person may use is limitless. Examples of neopronoun sets include: xe/xem/xir, ze/zir/zirs, and fae/faer/faers.

Non-binary: An adjective describing a person who does not identify exclusively as a man or a woman. Non-binary people may identify as being both a man and a woman, somewhere in between, or as falling completely outside of these categories. While many also identify as transgender, not all non-binary people do. Non-binary can also be used as an umbrella term encompassing identities such as agender, bigender, genderqueer, or gender-fluid.

Out: Having one's LGBTQ+ sexual orientation or gender identity publicly known.

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Outing: Disclosure of another person's sexual orientation, gender identity, or intersex status without their prior consent to such disclosures.

Personal pronoun: A pronoun (such as *I, you,* or *they*) that expresses a distinction of person.

Queer: A term people often used to express a spectrum of identities and orientations that are counter to the mainstream. Queer is often used as a catch-all to include many people, including those who do not identify as exclusively straight and/or folks who have non-binary or gender-expansive identities. This term was previously used as a slur but has been reclaimed by many parts of the LGBTQ+ movement.

Questioning: A term used to describe people who are in the process of exploring their sexual orientation or gender identity.

Sex assigned at birth: The sex – male, female, or intersex – that a doctor or midwife uses to describe a child at birth based on their external anatomy.

Transgender: An umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation.

Transitioning: A series of processes that some transgender people may undergo in order to live more

fully as their true gender. This typically includes social transition (such as changing name and pronouns), medical transition (which may include hormone therapy or gender affirming surgeries), and legal transition (which may include changing legal name and sex on government identity documents). Transgender people may choose to undergo some, all, or none of these processes.

Two-spirit: An umbrella term traditionally within Native American communities to recognize individuals who possess qualities or fulfill roles of both male and female genders.