MATTHEW J. PLATKIN, ATTORNEY GENERAL OF NEW JERSEY, and SUNDEEP IYER, DIRECTOR OF THE NEW JERSEY DIVISION ON CIVIL RIGHTS,

Plaintiffs-Respondents,

v.

MANALAPAN-ENGLISHTOWN REGIONAL BOARD OF EDUCATION and MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT,

Defendants-Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET No. A-00046-23

Civil Action

On appeal from:
Superior Court of New Jersey
Chancery Division, Monmouth County

Sat Below:
Honorable David F. Bauman, J.S.C.

Docket No. MON-C-79-23

BRIEF AND APPENDIX OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AND GARDEN STATE EQUALITY

Date Submitted: March 5, 2024

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TABLE OF CONTENTS

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONS AND STATUTES

REGULATIONS

OTHER AUTHORITIES

TABLE OF ABBREVIATIONS OF BRIEFS AND APPENDICES

Abbreviation	**Source**
Manalapan/Middletown Db	Manalapan/Middletown Brief
Da	Manalapan/Middletown Appendix
Marlboro Db	Marlboro Brief
D2a	Marlboro Appendix
Manalapan Pb	State's Brief in Manalapan Appeal
Manalapan Ra	State's Appendix in Manalapan Appeal
Marlboro Pb	State's Brief in Marlboro Appeal
Marlboro Ra	State's Appendix in Marlboro Appeal
Middletown Pb	State's Brief in Middletown Appeal
Middletown Ra	State's Appendix in Middletown Appeal
CAL Br.	Amicus Center for American Liberty Brief
Aa	Amici ACLU and GSE Appendix

STATEMENT OF INTEREST OF AMICI CURIAE[1]

For more than 60 years, the **American Civil Liberties Union of New Jersey** ("**ACLU-NJ**") has defended liberty and justice guided by the vision of a fair and equitable New Jersey for all. The ACLU-NJ's mission is to preserve, advance, and extend the individual rights and liberties guaranteed to every New Jerseyan by the State and Federal Constitutions in courts, legislative bodies, and communities. Founded in 1960 and based in Newark, the ACLU-NJ is a nonpartisan organization that operates on several fronts—legal, political, cultural—to bring about systemic change and build a more equitable society. In all these arenas, the ACLU-NJ advocates for the rights of LGBTQ+ individuals, including children, on equal terms with all others. The ACLU-NJ is the state affiliate of the American Civil Liberties Union and has 30,000 members in New Jersey and hundreds of thousands of additional supporters. ACLU-NJ members and supporters include transgender and gender-nonconforming students and their parents and guardians.

Garden State Equality Education Fund ("GSE") was founded in 2004 and is the largest LGBTQ+ advocacy organization in New Jersey, with more than 150,000 members. Its mission is to provide quality, innovative community

[1] Amici file identical briefs in the Middletown, Manalapan, and Marlboro appeals.

programs, educate and train service providers, and pass pro-equality policies to protect and meet the needs of LGBTQ+ New Jerseyans.

In the arena of education, GSE engages in advocacy, policy work, and trainings to ensure that New Jersey schools are safe and affirming environments for transgender and nonbinary students. GSE engages with stakeholders in New Jersey schools at all levels, including by:

- Providing training and guidance to school administrators and staff,
- Advocating for students at state and local board of education meetings,
- Presenting at student assemblies,
- Supporting parents of transgender students, and
- Providing direct support to and programming for transgender and nonbinary students.

PRELIMINARY STATEMENT

The Constitution does not compel schools to notify parents, over the objection of their children, when their children express nonconforming gender identities at school. While the substantive component of the Due Process Clause protects the rights of parents to direct the upbringing of their children, nothing in the Constitution demands that governmental actors assist parents in exercising that right by outing students against their will. Whether or not they receive notice from their children's schools, parents remain free to talk to their children about gender identity and offer whatever direction they like about how their children explore and express their gender, in school and elsewhere. Likewise, students remain free to talk to their parents about these issues and even to seek their schools' help in broaching the subject at home. The school districts' original policies of presumptive nondisclosure, absent student consent, neither coerced parents to act nor prevented them from acting. The Constitution imposes no duty on the districts to alter their original policies, and certainly not to mandate parental notification over the student's objection.

The districts cannot rescue this unavailing constitutional defense by relying on the argument first raised by their amicus that social transition constitutes medical treatment requiring parental consent. Students who have been diagnosed with gender dysphoria may have health care providers who

recommend social transition to relieve the symptoms of this condition, which can be exacerbated by living in a way that does not match their gender identity. But that does not transform social transition into medical care. A student who changes their clothing and hairstyle, who asks to be called by a new name and pronouns, or who asks to use a different bathroom or join a different club is not seeking health care, and schools that honor these requests are not offering health care. Instead, the schools are showing courtesy and maintaining an inclusive and egalitarian environment where all students feel safe and affirmed in their gender identity, whether they are cisgender or transgender.

Even if a policy of presumptive nondisclosure conflicted with the rights of parents, however, the State has shown compelling interests in both enforcing nondiscrimination law and avoiding harm to students. These interests overcome the asserted parental right to affirmative notification of gender nonconformity, and the injunction the State seeks is narrowly tailored to achieve its objective of protecting students.

Moreover, the Court should defer to the State's straightforward interpretation of the Law Against Discrimination ("LAD") to prohibit a parental notification mandate that is triggered only when nonconforming students express their gender identities at school and not when cisgender students put their masculinity or femininity on display. Mandatory notification policies that

target gender-nonconforming students offend the New Jersey Constitution's independent and broad protection for equal rights. To avoid a constitutional problem, the Court should accept the State's reading of the LAD and affirm the preliminary injunction entered by the trial court.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt the Procedural Histories and Statements of Facts in the briefs of the Attorney General and Director of the Division on Civil Rights. Middletown Pb4–12; Manalapan Pb4–12; Marlboro Pb4–12.

Each school district's Amended Policy 5756, entitled "Transgender Students" ("Mandatory Notification Policies"), requires the school to notify a gender-nonconforming student's parent or legal guardian about the student's gender identity as expressed in school, regardless of the student's consent, unless doing so would harm the student. Under Marlboro's policy, notification is triggered by a "student's change in gender identity or expression," and under the Manalapan and Middletown policies, notification is triggered when a student requests "a public social transition accommodation." Marlboro Amend. Pol'y (D2a45); Middletown Amend. Pol'y (Da152); Manalapan Amend. Pol'y

(Da169–70).[2] Notification is required even when the student objects unless the harm exception applies.[3]

The school districts' pre-amended (2019) versions of the policies ("Original Policies") are currently in place under the trial court's orders of August 18, 2023, preliminarily enjoining the Mandatory Notification Policies pending resolution of this matter. The Original Policies contain the following identical provision: "There is no affirmative duty for any school district staff member to notify a student's parent of the student's gender identity or expression." Marlboro Orig. Pol'y 5657 (D2a54); Middletown Orig. Pol'y 5657 (Middletown Ra8); Manalapan Orig. Pol'y 5657 (Manalapan Ra8). While imposing no blanket requirement of parental notification, the Original Policies

[2] See Table of Abbreviations of Briefs and Appendices, supra p. x.

[3] Manalapan and Middletown assert that their policies do not require parental notification when a student asks to use a different name or pronouns in classrooms or extracurricular activities, but only when a student seeks to change their official school records. Manalapan/Middletown Brs. at 18. The districts make this assertion based on draft regulations that the superintendents of each district attest they "intend to enact." Alfone Cert. ¶ 14 (Da160); Middletown draft regs ¶ A.1.-2. (Da162); Santora Cert. ¶ 10 (Da235); Manalapan draft regs ¶ A.1.-2. (Da262). Because the proposed regulations do not appear to have been promulgated, Amici treat the language of the policies as the operative mandate. Even if parental notification were not triggered by a student's request to use a different name or pronouns while at school, however, the policies still mandate parental notification over the student's objection if the student asks for other accommodations, such as to use a different restroom, play on a different sports team, or sing in a different chorus.

permit disclosure to parents in an array of circumstances, including "as allowed by law," and "[d]ue to a specific and compelling need, such as the health and safety of a student or an incident of bias-related crime." Marlboro Orig. Pol'y (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8–9). In the trial court, the State clarified further that it seeks to prohibit parental notification only when the student objects and that schools are obligated to answer truthfully if parents inquire about their children's gender expression at school.[4] The Original Policies also include instruction for school personnel on how to manage potential disagreements between students and their parents about how the schools accommodate the students' gender identity. Marlboro Orig. Pol'y (D2a54–55); Middletown Orig. Pol'y 5657 (Middletown Ra8–9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8–9).

ARGUMENT

I. Substantive Due Process Does Not Require School Districts to Provide Affirmative Notice to Parents About Their Children's Gender Identity.

The school districts argue that enjoining the Mandatory Notification Policies interferes with parents' fundamental rights because it "deprives parents

[4] Platkin v. Marlboro/Manalapan/Middletown Twp. Bds. of Educ., Nos. MON-C-78-23, MON-C-79-23, MON-C-80-23, slip op. at 9 n.2 (N.J. Super. Ct. Aug. 18, 2023) ("Tr. Ct. Op.") (Da127).

. . . of LGBTQ+ students of information critical to the parents' ability to actively guide and foster their children's moral and psycho-social development." Manalapan/Middletown Db29. This argument fails because, although parents have a fundamental right under the Due Process Clause of the Fourteenth Amendment "to make decisions concerning the care, custody, and control of their children," Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion), that right does not extend to being notified of their children's gender identity as expressed in school over their children's objections. The Constitution prohibits governmental actors from interfering with parental decision-making on matters of great importance, but it does not require governmental actors (here, the school districts) to assist parents in exercising their parental authority. Nor does the constitution prevent school districts from continuing to implement a policy of presumptive nondisclosure.

The districts' amicus, Center for American Liberty ("CAL"), advances an even more extreme parental rights claim: CAL argues that a student's social transition is medical care requiring parental consent in all cases. But this is wrong. A teacher who calls a student by their requested name or allows them to use the bathroom consistent with their gender identity is practicing decency, not medicine.

Moreover, even if fundamental parental rights were at stake—which they are not—such parental rights are not absolute or beyond regulation. Here, the State has demonstrated an overriding interest in creating a safe, inclusive learning environment, which precludes outing students to their parents over the students' objections.

A. Because the Original Policies neither compel nor constrain any conduct by students or their parents, there is no violation of parental rights and no constitutional duty to mandate affirmative notice to parents of their children's gender identity over the students' objection.

While federal and New Jersey courts have repeatedly recognized that parents have a liberty interest in the care, custody, and nurture of their children, Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Troxel, 530 U.S. at 65–66; Moriarty v. Bradt, 177 N.J. 84, 101–02 (2003), courts have set a high standard for demonstrating unconstitutional interference with the parent-child relationship.

In J.S. ex rel. Snyder v. Blue Mountain School District, the Third Circuit held that "[a] conflict with the parents' liberty interest will not be lightly found, and, indeed, only occurs when there is some 'manipulative, coercive, or restraining conduct by the State.'" 650 F.3d 915, 933–34 (3d Cir. 2011) (quoting Anspach ex rel. Anspach v. City of Phila., Dep't of Pub. Health, 503 F.3d 256, 261 (3d Cir. 2007)). The court further explained that "parents' liberty

interest will only be implicated if the state's action 'deprived them of their right to make decisions concerning their child,' and not when the action merely 'complicated the making and implementation of those decisions.'" Id. at 934 (quoting C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 184 (3d Cir. 2005)). Applying these factors, the court held that a school's decision to suspend a student did not violate her parents' fundamental rights because it did not interfere with their "ability to make decisions concerning their daughter's upbringing." Ibid. The school's actions "in no way forced or prevented J.S.'s parents from reaching their own disciplinary decision, nor did its actions force her parents to approve or disapprove her conduct." Ibid.

Similarly, in Anspach, the court held that a public health center did not violate the plaintiff-parents' liberty interests by providing emergency contraception to a minor without first notifying her parents or encouraging her to consult them, because "the conduct complained of was devoid of any form of constraint or compulsion." 503 F.3d at 264. "[N]o one prevented [the minor] from calling her parents before she took the pills she had requested" or tried to dissuade her from speaking to her parents, and she was "only given the pills

because she asked for them." Id. at 264–65. Under such circumstances, there was no "coercion" and no constitutional violation. Id. at 265.[5]

The Anspach court explained further that the "real problem alleged by [the] [plaintiff-parents] is not that the state actors interfered with [them] as parents; rather, it is that the state actors did not assist [them] as parents or affirmatively foster the parent/child relationship." Id. at 266. But there is no "constitutional obligation on state actors to contact parents of a minor or to encourage minors to contact their parents." Id. at 262; accord Parents United for Better Schs., Inc. v. Sch. Dist. of Phila. Bd. of Educ., 148 F.3d 260, 275 (3d Cir. 1998) (condom distribution program in high schools did not "intrude" on the "strong parental interest in deciding what is proper for the preservation of their childrens' [sic] health" because "[p]articipation in the program is voluntary"); Doe v. Irwin, 615 F.2d 1162, 1168 (6th Cir. 1980) ("We can find no deprivation of the liberty interest of parents in the practice of not notifying them of their children's voluntary decisions to participate in the activities of [a

[5] Cf. Gruenke v. Seip, 225 F.3d 290, 303–07 (3d Cir. 2000) (finding student was coerced into a course of action she objected to and that her mother's parental liberty interest was violated when a school swim coach, without the student's invitation and against her wishes, spoke with her regarding his suspicion that she was pregnant, asked other school officials to speak with her to confirm the pregnancy, paid for a pregnancy test, and discussed the pregnancy with other school officials and parents of other students, but never with the student's mother).

publicly funded family planning clinic]."); C.N., 430 F.3d at 185 (fundamental parental right not violated by student participation in survey seeking information about drug and alcohol use, sexual activity, physical violence, and suicide attempts).

In cases involving school policies relating to the treatment of transgender and gender nonconforming students, courts have similarly refused to find a violation of parents' due process rights when there is no coercive conduct.[6] Indeed, just last month, the District of New Jersey declined to issue a temporary restraining order against a school board policy that is substantively identical to the Original Policies here. Doe v. Del. Valley Reg'l High Sch. Bd. of Educ., No. 24-cv-00107 (GC) (JBD), 2024 WL 706797, at *2, 13 (D.N.J. Feb. 21, 2024) (Aa17). Relying on the precedents reviewed above, the court held that "Board Policy 5756 does not impose the kind of 'constraint or compulsion' that the Supreme Court and the Third Circuit have found violative of parental rights."

[6] Amicus CAL wrongly relies on Ricard v. USD 475 Geary Cnty., Kan. Sch. Bd., No. 5:22-cv-04015-HLT-GEB, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022), voluntarily dismissed per settlement, ECF. No. 37 (Aa27), and Mirabelli v. Olson, No. 3:23-cv-00768-BEN-WVG, 2023 WL 5976992, at *9 (S.D. Cal. Sept. 14, 2023) (Aa44-45), to argue that courts have recognized a parental substantive due process claim in this context. CAL Br. at 17–18. Those cases involved plaintiff teachers who alleged that withholding a student's transgender status from their parents violated the teachers' free speech and religious free exercise rights under the First Amendment; the substantive due process rights of parents were not directly at issue in those cases.

Id. at *7 (Aa10). "[T]he Board Defendants only began referring to Jane by her preferred gender identity at Jane's request, did not coerce Jane into making the request, and did not prevent or discourage Jane from discussing the transition with Plaintiff [her father]." Id. at *9 (Aa11–12). In the absence of "proactive, coercive interference with the parent-child relationship," id. at *8 (Aa10), the court found no likelihood that the plaintiff could show a constitutional violation, id. at *13 (Aa17).

Other jurisdictions have reached the same conclusion. In Doe v. Manchester School District, No. 216-2022-cv-00117, at *7 (N.H. Super. Ct. Sept. 5, 2022), argued, No. 2022-0537 (N.H. Apr. 27, 2023) (Aa66), the court held that a policy prohibiting school personnel from disclosing information that may reveal a student's transgender status or gender-nonconforming presentation without the student's consent did not infringe on parents' fundamental rights:

> [T]he policy does not encourage or prevent students from sharing information with their parents. Moreover, the Policy does not prevent parents from observing their children's behavior, moods, and activities; talking to their children; providing religious or other education to their children; choosing where their children live and go to school; obtaining medical care and counseling for their children; monitoring their children's communications on social media; choosing with whom their children may socialize; and deciding what their children may do in their free time. In short, the Policy places no limits on the plaintiff's ability to parent her child as she sees fit.

See also Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ., No. 2:23-cv-01595, 2023 WL 4848509, at *18–19 (S.D. Ohio July 28, 2023) (no due process violation where "[t]here is nothing in the Policies that suggests that they prohibit parents from discussing gender identity issues with their children, or reach in some other way into the privacy of families' homes"), appeal docketed, No. 23-3630 (6th Cir. July 31, 2023) (Aa99–101); John and Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 622 F. Supp. 3d 118, 134 (D. Md. 2022) (no "coercive interference with the parent-child relationship" in school guidelines that prohibit disclosure of student's gender identity over student's objection), vacated and remanded for lack of standing, 78 F.4th 622 (4th Cir. 2023), petition for cert. docketed, No. 23-601 (U.S. Dec. 5, 2023); Regino v. Staley, No. 2:23-cv-00032-JAM-DMC, 2023 WL 4464845, at *3 (E.D. Cal. July 11, 2023) (declining to expand parental substantive due process rights to require affirmative notice of child's transgender identity and parental consent to use child's requested name and pronouns), appeal docketed, No. 23-16031 (9th Cir. July 25, 2023) (Middletown Ra65–66).[7]

[7] The decisions the districts rely on are not to the contrary. In Tatel v. Mt. Lebanon School District, 37 F. Supp. 3d 295, 326–27 (W.D. Pa. 2022), clarified on denial of reconsideration, No. 22-837, 2023 WL 3740822 (W.D. Pa. May 31, 2023) (Aa103-131), the district court held that parents raised a plausible substantive due process claim where the allegations included conduct by a first-grade teacher that could be construed as coercive interference with the parent-child relationship.

As in these cases, parental rights are not implicated here because there is no coercive conduct and no right to affirmative notice of a child's expressed gender identity. Del. Valley Reg'l High Sch., 2024 WL 706797, at *7–9 (Aa9–Aa12). Like the minor in Anspach who voluntarily went to the health center asking for emergency contraception and was not prevented or dissuaded from contacting her parents, the districts' students are not compelled to come forward to discuss their gender identities with school officials, and, far from discouraging students to talk to their parents, the Original Policies instruct the districts to be "mindful of disputes between minor students and parents concerning the student's gender identity or expression" and to refer families to an array of "support resources." Marlboro Orig. Pol'y (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra8); Manalapan Orig. Pol'y 5657 (Manalapan

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In Willey v. Sweetwater County School District No. 1 Board of Trustees, No. 23-CV-069, 2023 WL 4297186, at *13-14 (D. Wyo. June 30, 2023) (Middletown Ra37), the court held that parents were unlikely to be able to establish that the school had a constitutional obligation to affirmatively disclose their child's gender identity, but fundamental parental rights were burdened "[t]o 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)." Here, the Attorney General has acknowledged that "schools would be obligated to respond truthfully to a parent or a guardian who contacted the school to request confirmation that their child had made such a request [to use a chosen name or pronouns] or statement [expressing another gender]." Tr. Ct. Op. at 9 n.2 (Da127); see also Del. Valley Reg'l High Sch., 2024 WL 706797, at *11 (distinguishing Willey and Regino from Tatel) (Aa14-15).

Ra8). Moreover, there is nothing in the Original Policies preventing parents from "mak[ing] decisions concerning their [child's] upbringing," J.S., 650 F.3d at 934, or "discussing gender identity issues with their children," Parents Defending Educ., 2023 WL 4848509, at *18 (Aa99–101). The policies do not mandate what parents teach their children about gender identity or in any way alter how parents address their children's gender identity at home, including what names or pronouns parents use for their children. In other words, "[t]here is no requirement [by the school districts] that the children . . . avail themselves of the services offered . . . and no prohibition against the [parents] participating in decisions of their minor [children] . . . . The [parents] remain free to exercise their traditional care, custody and control over their unemancipated children." Doe v. Irwin, 615 F. 2d at 1168.

Unable to point to coercive conduct, the school districts cannot prevail in defending the Mandatory Notification Policies as constitutionally compelled.

B. Respecting a student's request to use a certain name or pronouns does not implicate the rights of parents to direct their children's medical treatment.

Although not raised below or on appeal by the school districts, Amicus CAL argues that the Original Policies violated the Due Process Clause by infringing on parents' rights to consent to their children's medical treatment because "social transitioning constitutes psychological treatment." CAL Br. at

9. Indeed, CAL argues further that even the revised Mandatory Notification Policies are unconstitutional for failure to require parental consent before using a student's preferred name and pronoun. CAL Br. at 16 n.2. These arguments fail because they are based on the faulty premise that the districts are providing medical treatment to students by using their requested name and pronouns or allowing them to use a different restroom or join a different team or club.

This Court should reject CAL's attempt to redefine an ordinary part of the school day as medical treatment. Addressing someone in a way that honors their identity—by using their correct name, pronouncing it correctly, or using their chosen pronouns—is an act of decency and courtesy, not the practice of medicine. Likewise, granting a student's request to use a different restroom or to play on a different sports team is not medicine, but rather a recognition and affirmation of their expressed gender identity.

Social transition—which includes non-medical steps to align one's gender expression with one's gender identity (e.g., different clothing, hairstyle, name, or pronouns)—may be part of a medical provider's package of recommendations for alleviating the symptoms of gender dysphoria in youth with this diagnosis. Notably, all the cases CAL cites in support of the proposition that courts have recognized social transition as a form of psychological treatment involve individuals with gender dysphoria. See CAL Br. at 9–10. These cases recognize

that social transition may be medically indicated for some transgender youth diagnosed with gender dysphoria. But that does not transform the school districts' policies, or individual instances of honoring students' requested accommodations, into a form of medical treatment. Similarly, CAL's repeated references to puberty blockers and hormone replacement therapy, CAL Br. at 4–5, 13, 32—medical treatments that do require parental consent—have no bearing on whether schools notify parents of their children's requests to use a different bathroom or a different name and pronouns.

Having conversations about using a different name, restroom, or clothing requires no medical skill or training, treatment plan, or diagnosis. See Foote v. Town of Ludlow, No. 22-30041-MGM, 2022 WL 18356421, at *5 (D. Mass. Dec. 14, 2022), appeal docketed, No. 23-1069 (1st Cir. Jan. 17, 2023) (Aa138–39). The teachers and counselors having these conversations are not medical professionals, and the students are not their patients. See Parents United for Betters Schs., 148 F.3d at 269 (quoting with approval trial court holding that, while condom distribution is a "health service," "[i]mpact upon health . . . does not transform a health service into a medical treatment"). Indeed, under CAL's reasoning, using a student's chosen name and pronouns would have the absurd result of subjecting teachers, counselors, and others to criminal penalties. See

N.J.S.A. 2C:21-20 (imposing criminal penalties on unauthorized practice of medicine).

For these and other reasons, the District of New Jersey recently concluded that "recognition of [a student's] preferred gender identity" does not violate a parent's right to "direct [the student's] medical treatment." Del. Valley Reg'l High Sch., 2024 WL 706797, at *11 (Aa14–15). Where "the school merely addressed the Student by the Student's requested preferred name and pronoun," and did not pressure the student to make such a request, there is no interference with a parent's right to make medical decisions for the student. Ibid.

The cases CAL relies on to show a purported right to parental consent all involve invasive actions taken by medical professionals that are undoubtedly medical treatment—a far cry from the school districts' conduct here. See Mann v. Cnty. Of San Diego, 907 F.3d 1154, 1158–62 (9th Cir. 2018) (concluding that parents' rights were violated by unconsented physical examination of their minor children involving "a gynecological and rectal exam," "visual and tactile inspection of the children," and blood and urine tests); Wallis v. Spencer, 202 F.3d 1126, 1141–42 (9th Cir. 2000) (similar); Mario V. v. Armenta, No. 18-cv-00041-BLF, 2021 WL 1907790, at *1–2, 5 (N.D. Cal. May 12, 2021) (teacher performing finger-prick blood sugar tests of students without parental consent violated parents' and students' rights) (Aa160–63, 166–67). Moreover, CAL's

reliance on T.F. v. Kettle Moraine School District, No. 202-cv-1650, 2023 WL 6544917 (Wis. Cir. Oct. 3, 2023) (Aa146–59), is likewise misplaced: in T.F., the student received treatment at a mental health center related to gender identity, and the school consulted with the student's therapist to determine that it would use the student's requested name and pronouns over the parents' objection. Id. at *1–2 (Aa146–49).

In sum, recognizing students for who they are and using the pronouns they request (whether corresponding with sex assigned at birth or not) is part of the basic level of respect necessary for a safe and supportive learning environment. That the use of gendered names and pronouns and other accommodations may be medically indicated for some students does not mean that respecting every student's identity is a form of medical treatment.

C. The State's overriding interest in protecting the rights of transgender and gender-nonconforming students satisfies any constitutional standard.

New Jersey has a compelling interest in prohibiting discrimination on the basis of gender identity and expression in public schools. Any countervailing parental rights are "not without limits, and the State may '[a]ct[] to guard the general interest in [a] youth's well being.'" Doe ex rel. Doe v. Governor of N.J., 783 F.3d 150, 156 (3d Cir. 2015) (quoting Prince, 321 U.S. at 166) (alteration in original); see also V.C. v. M.J.B., 163 N.J. 200, 218 (2000) ("The right of

parents to the care and custody of their children is not absolute."). Public schools in particular retain significant discretion in shaping students' educational experience. Thus, "in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." C.N., 430 F.3d at 182.

The New Jersey Supreme Court applies strict scrutiny when the State seeks "to interfere with family and parental autonomy." Moriarty, 177 N.J. at 103–04. The Third Circuit likewise demands a "compelling interest" to justify governmental intrusion on fundamental parental rights. Gruenke, 225 F.3d at 305 (when a "school's policies might come into conflict with [parents'] fundamental right . . . to raise and nurture their child, . . . the primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest").

Because the State's actions in seeking to enjoin the Mandatory Notification Policies did not substantially intrude on constitutionally protected parental rights, they need only to be supported by a rational basis, which they are. See Lawrence v. Texas, 539 U.S. 558, 578 (2003) (O'Connor, J., concurring) (conduct at issue must be "rationally related to a legitimate state interest" when a fundamental right is not implicated). In fact, the State's interest in prohibiting school officials from disclosing a student's gender identity to their

parents over the student's objection is compelling enough to survive strict scrutiny, assuming the applicability of that standard.

As set forth in Section II.B.2.b. infra, disclosure of a student's gender nonconformity to their parents over their objection risks harm to the individual student's physical safety, mental health, and educational outcomes. It also disrupts a school's attempt to foster an educational environment that is inclusive and free of discrimination. In Moriarty, the New Jersey Supreme Court recognized that "avoidance of harm to the child" is a "sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit." 177 N.J. at 115. The "compelling interest in protecting the physical and psychological well-being of minors" extends to "a compelling state interest in not discriminating against transgender students" and "in protecting transgender students from discrimination." Doe ex rel. Doe v. Boyertown Area Sch. Dist., 276 F. Supp. 3d 324, 390 (E.D. Pa. 2017), aff'd, 897 F.3d 518, 528–29 (3d Cir. 2018) (school districts did not violate Title IX, 20 U.S.C. § 1681, by permitting transgender students to use restrooms consistent with their identity).

New Jersey has expressly recognized this compelling state interest by prohibiting discrimination on the basis of gender identity and expression in public schools. New Jersey Law Against Discrimination ("LAD"), N.J.S.A.

10:5-1 to -50. The State's compelling interests are advanced by the trial court's preliminary injunction against the Mandatory Notification Policies and reinstatement of the Original Policies, under which the school districts were "providing a safe, supportive, and inclusive learning environment for all students" and complying with the LAD and Title IX. Marlboro Orig. Pol'y 5657 (D2a54); Middletown Orig. Pol'y 5657 (Middletown Ra7); Manalapan Orig. Pol'y 5657 (Manalapan Ra7).

Notably, the preliminary injunction and the resulting reinstatement of the Original Policies are narrowly tailored to achieve the State's goals. While taking a student-centered approach, the Original Policies recognize that there are circumstances when parents will need to be notified over a student's objection, including "as allowed by law," and "[d]ue to a specific and compelling need, such as the health and safety of a student or an incident of bias-related crime." Marlboro Orig. Pol'y 5657 (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8–9). They also prepare school personnel to manage disagreements between parents and students on the schools' accommodation of the students' expressed gender identity. Marlboro Orig. Pol'y 5657 (D2a54–55); Middletown Orig. Pol'y 5657 (Middletown Ra8–9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8–9). In doing so, the Original Policies ensure that schools "provide a safe and supportive learning environment

that is free from discrimination and harassment for transgender students, including students going through a gender transition," while being "mindful of disputes between minor students and parents concerning the student's gender identity or expression." Marlboro Orig. Pol'y 5657 (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra8); Manalapan Orig. Pol'y 5657 (Manalapan Ra8). The preliminary injunction restored the status quo by reinstating these policies while the litigation proceeds—a remedy narrowly tailored to protecting the districts' gender-nonconforming students.

II. Deference to the Agency's Interpretation of the Law Against Discrimination Is Warranted Because Requiring Parental Notification Regarding a Student's Gender Identity Would Raise Serious Constitutional Questions That Should Be Avoided.

The State argues that the Mandatory Notification Policies violate the LAD's proscription of discrimination based on gender identity by mandating parental notification when a student asks to be called by a different name or pronouns, to use a different restroom, to play on a different sports team, or otherwise requests accommodations for gender-nonconformity. Middletown Pb14–22; Manalapan Pb14–22; Marlboro Pb14–22. Because the Division on Civil Rights has broad authority to enforce the LAD, its interpretation is entitled to "great deference, especially when its position is supported by the statutory language and is consistent with the history of the LAD." Lehmann v. Toys R Us, Inc., 132 N.J. 587, 625 (1993); see also Klumb v. Bd. of Educ. of

Manalapan-Englishtown Reg'l High Sch. Dist., 199 N.J. 14, 24 (2009) ("[I]nterpretations of the statute and cognate enactments by agencies empowered to enforce them are given substantial deference in the context of statutory interpretation.").

In this case, the agency's interpretation is entitled to even more than the usual deference because an alternative interpretation of the LAD, allowing the Mandatory Notification Policies to stand, would raise serious constitutional questions. The LAD is clear in banning discrimination "on account of . . . gender identity or expression" in public schools. N.J.S.A. 10:5-12(f), 10:5-5(l). But even if the statute were ambiguous, this Court would be obligated to give it a constitutional construction so long as it was susceptible to such a construction. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 365–66 (2007); Right to Choose v. Byrne, 91 N.J. 287, 311–12 (1982). The interpretation of the LAD advanced here by the Division on Civil Rights avoids a potential collision between the district policies and Article I, Paragraph 1, of the New Jersey Constitution, which offers independent and expansive protection for equal treatment for gender-nonconforming individuals.

A. Courts must interpret a statute to comport with the State Constitution so long as the statute is reasonably susceptible to such interpretation.

Generally, "[a] court is duty-bound to give to a statute a construction that will support its constitutionality." Whirlpool Props., Inc. v. Dir., Div. of Tax'n, 208 N.J. 141, 151 (2011). "[W]hen a statute is susceptible to two reasonable interpretations, one constitutional and one not," New Jersey courts apply the doctrine of constitutional avoidance. State v. Pomianek, 221 N.J. 66, 90–91 (2015) (citing State v. Johnson, 166 N.J. 523, 534 (2001)). This doctrine rests on the "assum[ption] that the Legislature would want [the court] to construe the statute in a way that conforms to the Constitution." Id. at 91 (citing Johnson, 166 N.J. at 540–41). The court may construe an ambiguous statute narrowly or broadly, depending on which interpretation aligns the statute with the Constitution. Compare State v. Carter, 247 N.J. 488, 520 (2021) (narrowly construing a statute requiring legible license plates), with Mueller v. Kean Univ., 474 N.J. Super. 272, 285–89 (App. Div. 2022) (broadly construing immunity granted by the Emergency Health Powers Act, N.J.S.A. 26:13-1 to -36).

B. The Mandatory Notification Policies raise serious constitutional questions by singling out gender-nonconforming students for disparate treatment.

1. The New Jersey Constitution's guarantee of equal protection is independent and robust.

Recognizing that "the original states, including New Jersey, and their Constitutions preceded the formation of the federal government and its Constitution," the New Jersey Supreme Court has long held that our Constitution affords independent protection to New Jersey residents. Right to Choose, 91 N.J. at 299. Because the New Jersey Constitution stands as an independent charter of rights, it can offer protections above the floor set by the United States Constitution. Id. at 300 ("Thus, in appropriate cases, the individual states may accord greater respect than the federal government to certain fundamental rights."); Sojourner A. v. N.J. Dep't of Hum. Servs., 177 N.J. 318, 325 (2003) ("'[T]here may be circumstances in which the [New Jersey] Constitution provides greater protections' than does the Federal Constitution . . . .") (alteration in original) (citation omitted).

In protecting individual rights to marry, raise children, seek an abortion, terminate life support, or make other kinds of deeply personal decisions, the New Jersey Supreme Court has relied on Article I, Paragraph 1, of the State Constitution. Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 618 (2000) (collecting cases); Lewis v. Harris, 188 N.J. 415, 442 (2006). This

provision guarantees to "[a]ll persons" the "natural and unalienable rights" of "enjoying and defending life and liberty" and "pursuing and obtaining safety and happiness." N.J. Const. art. I, ¶ 1. Although the provision "nowhere expressly states that every person shall be entitled to the equal protection of the laws, we have construed the expansive language of Article I, Paragraph 1 to embrace that fundamental guarantee." Lewis, 188 N.J. at 442; see also Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985) (explaining that Article 1, Paragraph 1 "protect[s] . . . against the unequal treatment of those who should be treated alike."); Sojourner A., 177 N.J. at 332 (same).

Departing from the rigid equal protection tiers that apply in federal analysis, the New Jersey Supreme Court has adopted a more flexible balancing test that "weigh[s] the governmental interest in the statutory classification against the interests of the affected class." Planned Parenthood v. Farmer, 165 N.J. at 630. The Court considers three factors: "the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction." Lewis, 188 N.J. at 443 (citations omitted). The more personal the right, the more the scales tip toward the individual and the greater the burden on the State to justify its action. Ibid. "Unless the public need justifies statutorily limiting the exercise of a claimed

right, the State's action is deemed arbitrary." Id. at 443–44 (citing Robinson v. Cahill, 62 N.J. 473, 491–92 (1973)).

Here, the students have a deeply personal right to express and live in accordance with their gender identity. Mandatory parental notification, without adequate regard for the needs and life circumstances of the individual student, can compromise their safety and impair their education. And the districts' proffered reasons for their policies fail to justify the potential harm to students.

2. The district policies raise serious equal protection issues by treating gender-nonconforming students differently from other students.

Each of the Mandatory Notification Policies requires parental notification or consent (for younger children in Manalapan) when a student seeks an accommodation at school for a gender identity that is inconsistent with their assigned sex at birth. The policies thus apply only to students who are gender nonconforming. As the trial court put it, "who but transgender, gender non-conforming, and non-binary students would request public and social accommodations or express a change in gender identity or expression?" Tr. Ct. Op. at 10 (Da128). Under the policies, cisgender students may decide at any time to lean more or less heavily into expressing their masculinity or femininity, and the school does not call their parents except in the unusual circumstance that a student's particular gender expression raises alarms that demand such an

intervention. For gender-nonconforming students, the presumption is reversed: the schools must notify their parents of their gender expression unless some showing of harm counsels against notification.

a. The nature of the right at stake

When this kind of differential treatment targets a group that is subject to severe and widespread discrimination or inhibits the exercise of defining, personal rights, the New Jersey Supreme Court has not hesitated to prohibit it as a violation of equal protection. Thus, in Right to Choose, the Court held that the State could not deny Medicaid funding for therapeutic abortions while funding "all other medically necessary care," including pregnancy-related care, for qualifying low-income beneficiaries. 91 N.J. at 310. Likewise, in Planned Parenthood of Central New Jersey v. Farmer, the Court struck down a parental notification law for abortion in part because the State had presented no "adequate justification for distinguishing between minors seeking an abortion and minors seeking medical and surgical care related to their pregnancies," for whom parental notice was not required. 165 N.J. at 642. When the Court considered challenges to the denial of marriage licenses to same-sex couples, it continued this focus on equal treatment, holding that "committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples." Lewis v. Harris, 188 N.J. at 457. After a

change in federal law deprived couples joined in civil unions of a host of federal benefits available to married couples, the Court declined to stay a trial court decision ordering the State to allow same-sex couples to marry in New Jersey. Garden State Equality v. Dow, 216 N.J. 314, 322–23, 330 (2013).[8]

The nature of the right at issue here weighs heavily in favor of the students the Division on Civil Rights seeks to protect. Gender-nonconforming students do better academically and face fewer mental health risks when their schools treat them in accordance with their gender identity. In Boyertown, the Third Circuit affirmed the denial of a preliminary injunction against a Pennsylvania school district policy that permitted transgender students to use the restrooms that matched their identity. 897 F.3d at 538. The court recognized, "[W]hen transgender students are addressed with gender appropriate pronouns and permitted to use facilities that conform to their gender identity, those students reflect the same, healthy psychological profile as their peers." Id. at 523

[8] Indeed, even when the rights at stake are of less overriding importance than the right to decide whether to end a pregnancy or to marry one's life-partner, the New Jersey courts have consistently enforced the state constitutional guarantee of equal treatment. E.g., Van Winkle v. N.J. Dep't of Corr., 370 N.J. Super. 40, 47–49 (App. Div. 2004) (prohibiting state prisons from denying work credits to a person serving a concurrent sentence out-of-state while permitting inmates to receive work credits for serving sentences in-state); Forstrom v. Byrne, 341 N.J. Super. 45, 48 (App. Div. 2001) (holding that, although the fundamental right to education was not implicated, school district was required to provide speech therapy to home-schooled student on the same basis as to others similarly situated).

(internal quotation marks and footnote omitted). While harassment at school is correlated with negative mental health outcomes, the "opposite is also true . . . : transgender students have better mental health outcomes when their gender identity is affirmed." Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 597 (4th Cir. 2020) (applying Title IX to invalidate Virginia school district policy that barred transgender students from appropriate restrooms and declined to reflect their gender identity in school records).

The record in this case supports the unsurprising finding that transgender students do better in school when they can be themselves and do worse when they are misgendered or mistreated. The 2019 National School Climate Survey, reflecting the experiences of LGBTQ students, reports that those in schools with higher numbers of supportive staff feel safer, miss fewer days of school, experience a greater sense of belonging, have more ambitious educational aspirations, and achieve higher grade point averages. Joseph G. Kosciw, Ph.D., et al., GLSEN, The 2019 National School Climate Survey (2020), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf (Da111).[9] Acceptance and support in school thus advance many aspects of students' personal and educational development.

[9] The 2021 survey confirms these findings. Joseph G. Kosciw, Ph.D., et al., GLSEN, The 2021 National School Climate Survey, at 66–69 (2022) ("2021

Gender-nonconforming students also benefit from policies, like the Original Policies, that allow the students to decide when and with whom to discuss their transgender or nonbinary status. Even for students whose families will be supportive—and there are many[10]—coming out is a deeply personal process that should be undertaken on the student's terms. Policies that out students against their will insert school personnel into parent-child conversations before families may be ready to have them on their own terms and make it harder for students who might actively want their school's assistance in broaching these topics with their parents.

Mandatory notification policies not only harm the parent-child relationship in families where parents may ultimately be affirming, but also

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National School Climate Survey"), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf.

[10] Hum. Rts. Campaign Found., 2023 LGBTQ+ Youth Report, Fig. 6 (Aug. 2023) ("2023 LGBTQ+ Youth Report") (trans and nonbinary youth who share their identities with their parents often find them supportive), https://reports.hrc.org/2023-lgbtq-youth-report#about-the-study; The Trevor Project, Research Brief: Behaviors of Supportive Parents and Caregivers for LGBTQ Youth at 2 (May 2022) (reporting frequency of supportive actions by parents of transgender, nonbinary, and gender-questioning youth), https://www.thetrevorproject.org/wp-content/uploads/2022/05/May-Research-Brief-Supportive-Caregiver-Behavior.pdf; The Trevor Project, U.S. Perspectives on Issues Impacting the LGBTQ+ Community, at 11–12 (June 2023) (reporting that more than half of parents state they would be "totally comfortable" if their children came out as transgender or nonbinary), https://www.thetrevorproject.org/wp-content/uploads/2023/06/2304052-THE-TREVOR-PROJECT_May-Adults-Survey-Presentation-PUBLIC-2.pdf.

create serious risks for students who would face rejection at home for expressing their gender identity. For those vulnerable students, the challenged district policies are harmful and dangerous. Infra Point II.B.2.b.

Gender-nonconforming students' right to be treated consistent with their gender identity has great meaning and lasting consequences for them. The right therefore weighs heavily in the equal protection balance.

b. The harm of the challenged policies

The Mandatory Notification Policies threaten to cause harm on an individual and schoolwide level. If students say they are not ready to disclose this personal information to their parents, but schools disregard this decision, then parental notification may harm the students' (1) physical safety, as this kind of notification exposes them to a high risk of familial rejection, leading to violence and homelessness, among other negative outcomes; (2) mental health, including increased risks of anxiety, depression, suicide, substance abuse, and self-injurious behaviors; and (3) educational outcomes, as discrimination against gender-nonconforming students is inversely correlated with academic success. In addition to harming individual students, the Mandatory Notification Policies will subvert schoolwide goals of creating open, safe, and inclusive environments where gender-nonconforming students, like all other students, are able to live in accordance with their gender identity.

i. Individual harm to students

Physical Safety

Disclosing transgender students' status to a parent without consent can endanger their physical safety. Every day, transgender and gender-nonconforming youth encounter alarmingly high rates of "discrimination, harassment, and violence because of their gender identity," including physical and sexual assault. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017). And whether a child is accepted or rejected by their immediate family is a strong safeguard, or risk, to their physical safety.

The 2023 LGBTQ+ Youth Report, which surveyed 13,000 LGBTQ youth from all fifty states, found that only four in ten (43.9%) transgender and gender-expansive youth are out to all their parents or guardians. 2023 LGBTQ+ Youth Report, Fig. 4a. Additionally, the 2015 U.S. Transgender Survey, with a sample of 27,715 respondents, reported that, among transgender people who were out to their immediate family, 40% had family members who did not support them or were "neutral" to their transgender status. Sandy E. James et al., Nat'l Ctr. for Transgender Equal., 2015 U.S. Transgender Survey, at 65 (Dec. 2016) ("2015 U.S. Transgender Survey"), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (Da91). One in ten reported that a member of their family had been physically violent toward them because they

were transgender. Ibid. And one half experienced at least one form of rejection from their immediate family because they were transgender. Ibid.

Additionally, family conflict is the primary cause of homelessness for LGBTQ youth. Nat'l Network for Youth, Prevalence of Youth Homelessness and LGBTQ+ Homelessness (2023), https://nn4youth.org/lgbtq-homeless-youth/. Transgender people whose families reject them are nearly twice as likely to have experienced homelessness (40%) as those who were not rejected (22%). 2015 U.S. Transgender Survey, at 65 (Da91). The 2015 U.S. Transgender Survey also reported that 15% of respondents either ran away from home or were kicked out of the house after coming out to their families. Ibid.

The students most in need of a safe and inclusive environment at school, precisely because they may not have that at home, are the students most likely to be harmed by a forced-outing policy.

Mental Health

Transgender students who are subjected to discriminatory policies and practices by their schools are more likely to experience negative mental health outcomes. The Third Circuit has stressed that "[w]hen transgender students face discrimination in schools, the risk to their wellbeing cannot be overstated—indeed, it can be life threatening." Boyertown, 897 F.3d at 529. Transgender and nonbinary youth report feeling disproportionately scared and stressed about

a policy that would require schools to tell their parents if they asked to use a different name or pronoun at school. The Trevor Project, Issues Impacting LGBTQ Youth: Polling Analysis, at 12 (Jan. 2022), https://www.thetrevorproject.org/wp-content/uploads/2022/01/TrevorProject_Public1.pdf (Da88). Another study highlighted that 42.3% of a sample of 5,612 respondents reported a suicide attempt and "26.3% reported misusing drugs or alcohol to cope with transgender discrimination." Augustus Klein & Sarit A. Golub, Family Rejection as a Predictor of Suicide Attempts and Substance Misuse Among Transgender and Gender Nonconforming Adults, 3 LGBT Health 193, 195–96 (2016) (Da99–100).

Misgendering students or otherwise refusing to affirm their gender identity "exacerbate[s] the risk of 'anxiety and depression, low self-esteem, engaging in self-injurious behaviors, suicide, substance use, homelessness, and eating disorders among other adverse outcomes." Boyertown, 897 F.3d at 523; see also Grimm, 972 F.3d at 597. Researchers have found that gender-nonconforming children who have not socially transitioned experience higher rates of anxiety and depression, and lower self-worth, when compared to children who have socially transitioned. Lily Durwood et al., Mental Health and Self Worth in Socially Transitioned Transgender Youth, 56 J. Am. Acad. Child

& Adolescent Psychiatry 116, 116 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5302003/.

These risks are amplified with increased reports of parental rejection. Klein, supra, at 194 (Da98). This is because "familial rejection in itself is a stressor" that impacts mental health, economic security, and resulting health behavior, as well as depriving transgender individuals "of the protective buffering effects that are usually derived from social support from close others." Ibid. Transgender individuals who experience high levels of family rejection are three-and-a-half times more likely to attempt suicide and two-and-a-half times more likely to misuse substances compared to those who experience little or no family rejection. Id. at 195 (Da99). And those who experience moderate levels of family rejection are two times more likely to attempt suicide and one-and-a-half times more likely to misuse substances. Ibid. Further, 65.5% of transgender youth who reported that their families never refer to them with correct pronouns screened positive for depression, and 72.1% screened positive for anxiety. 2023 LGBTQ+ Youth Report, Figs. 5a, 5b. As stated, this risk of familial rejection may be increased in these circumstances. And even in the absence of familial rejection, the district policies are discriminatory and will exacerbate these mental health harms.

Educational Outcomes

Discrimination against gender-nonconforming students in school can also lead to negative educational outcomes. Boyertown, 897 F.3d at 529; Grimm, 972 F.3d at 597. Students who experience victimization and discrimination based on their gender expression perform less well academically (2.76 v. 3.17 average GPA), are twice as likely to report that they do not plan on pursuing post-secondary education, and feel lower levels of belonging to their school community. 2021 National School Climate Survey, at 35–37. Additionally, nearly a third of LGBTQ+ youth reported missing a day of school in the past month because they felt unsafe or uncomfortable. Id. at 12.

Poor educational outcomes lead to lower rates of employment, lower household incomes, and higher rates of poverty. Stephanie M. Hernandez et al., Sexual Orientation, Gender Expression and Socioeconomic Status in the National Longitudinal Study of Adolescent to Adult Health, J. Epidem. Cmty. Health, at 7, (Nov. 2023), https://jech.bmj.com/content/jech/early/2023/11/28/jech-2022-220164.full.pdf (finding that gender-nonconforming individuals had lower educational attainment and higher household debt when compared to cisgender individuals). Thus, the discriminatory district policies also threaten to impair transgender students' educational outcomes and livelihoods.

ii. Harm to schools

In addition to causing individual harms, the district policies will also disrupt schools' attempts to foster an inclusive culture, to the detriment of all students. Schools create a safe and inclusive learning environment by accepting and engaging all students, and, in so doing, model respect as the standard for participating in civil society. Conversely, schools that treat some students as unworthy of respect or full acceptance can expect other students to take notice and follow suit, targeting peers whom they come to view as fair game. By singling out gender-nonconforming students under the challenged policies, the districts in effect mark them for further discrimination. Students who seek to avoid these consequences, or who refuse to risk disclosure to their parents, will be unable to participate fully in the school environment and their education, increasing their exposure to the harms described above.

iii. Inadequate safeguards

The safeguards that the Board Defendants point to in their policies cannot realistically prevent these harms. The Board Defendants assert that gender non-conforming students will be safe because the Mandatory Notification Policies preserve confidentiality when "documented" (Middletown) or "credible" (Manalapan) evidence exists, or when "there is reason to believe" (Marlboro), that physical or emotional harm will result from parental notification. Tr. Ct.

Op. at 3–6 (describing policies) (Da121–24); Middletown/Manalapan Db31–32. But these exceptions depend on students to predict accurately when disclosure to their parents might cause harm, to amass some sort of evidence of this risk, and to share such evidence with school personnel. Any break in this fragile chain will defeat the exception and place the student in harm's way.

Additionally, this safeguard comes into play only for students who persevere and ask their school to help them socially transition. These policies will deter some gender-nonconforming students from coming out in the first instance. The exception cannot remedy any harms to these students.

c. The failed justification for the district policies

The school districts offer two justifications for their policies. They argue that parental notification is 1) compelled by the Constitution, and 2) required by state and federal school records law. Neither of these reasons is sufficient to justify the harm the policies pose to gender-nonconforming students.

i. Parental notification over students' objection is not constitutionally compelled.

As explained above, the school districts have no constitutional obligation to affirmatively notify parents about students' gender identity over the students' objections. Supra Section I.

ii. State and federal school records laws do not compel parental notification.

The school districts cannot rely on state and federal school records laws to justify the challenged policies' mandatory parental notification provisions. First, the policies are triggered by conduct that has nothing to do with altering official school records. In Middletown and Manalapan, the triggers include a student's request to join a different sports team or use a different bathroom. Middletown Amend. Pol'y (Da152); Manalapan Amend. Pol'y (Da169–70). In Marlboro, notification is triggered by any behavior that indicates a "change in gender identity or expression," with the latter term defined to include all "external manifestations of gender," such as through "clothing, haircut, behavior, voice, and/or body characteristics." Marlboro Amend. Pol'y (D2a43, 45). Even when a student asks to use a new name or pronouns at school—the conduct that is the focus of the districts' argument about the school records law—the request is rarely directed to the school's official records, which in any case students have no independent right to access or alter. Instead, the student is generally asking teachers, coaches, other school personnel, and fellow students to use their chosen names and pronouns.

Second, the districts mischaracterize the school records laws. Parents are entitled to access and request alterations in such records, N.J.A.C. 6A:32-7.5(e)(1) to (3), 6A:32-7.7(b); 34 C.F.R. § 99.20(a), but nothing requires schools

to affirmatively notify parents about anything contained in the records. Nor do parents possess "the unequivocal right to full, complete and accurate information contained in a student record." See Middletown/Manalapan Db19; Marlboro Db16–17. Instead, parents have the right "to be supplied with full information, about the pupil, except as may be inconsistent with reasonable protection of the persons involved." N.J.S.A. 18A:36-19 (emphasis added).

The school records laws cannot justify the policies because these laws are largely irrelevant to the operation of the policies and pose no conflict with an alternative policy of presumptive nondisclosure. Indeed, the Original Policies restricted disclosure of "a student's transgender status except as allowed by law." Marlboro Orig. Pol'y (D2a55); Middletown Orig. Pol'y 5657 (Middletown Ra9); Manalapan Orig. Pol'y 5657 (Manalapan Ra8). The school records laws thus pose no obstacle to a presumptive nondisclosure policy that avoids conflict with the LAD, an equally binding state law, and raises no issues under the New Jersey Constitution.

* * * * * * * * *

Because implementation of the Mandatory Notification Policies would raise serious issues under the equal protection provision of the New Jersey Constitution, the Court should avoid the constitutional problem by affirming the trial court's decision. The State has established at least a likelihood of success

on the merits of its claim that the Law Against Discrimination prohibits the enforcement of school district policies that single out gender-nonconforming students for mandatory affirmative notice to their parents of how they express their gender identities at school, regardless of the students' objections. The State has also shown that gender-nonconforming students would face irreparable harm under the challenged policies, and the other preliminary injunction factors favor the State as well.

CONCLUSION

For these reasons, Amici respectfully urge this Court to affirm the decision of the trial court preliminarily enjoining enforcement of the Mandatory Notification Policies.

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