NO. _____

IN THE

Supreme Court of the United States

STEPHEN FOOTE, individually and as Guardian and next friend of B.F. and G.F., minors, and MARISSA SILVESTRI, individually and as Guardian and next friend of B.F. and G.F., minors,

Petitioners,

v.

LUDLOW SCHOOL COMMITTEE; TODD GAZDA, former Superintendent; LISA NEMETH, Interim Superintendent; STACY MONETTE, Principal, Baird Middle School; MARIE-CLAIRE FOLEY, school counselor, Baird Middle School; JORDAN FUNKE, former librarian, Baird Middle School; and TOWN OF LUDLOW,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners Stephen Foote and Marissa Silvestri repeatedly directed their public middle school not to interfere with the upbringing and mental healthcare plan for B.F., their eleven-year-old daughter. But over their objections, school officials followed district protocol and secretly facilitated B.F.'s social gender transition anyway. The school treated B.F. as though she were nonbinary, authorized her to use opposite-sex facilities, conducted regular private counseling sessions, and participated in her gender transition. That led B.F. to question the suitability of her parents' care plan—all without her parents' knowledge. After discovering the school's actions, Petitioners demanded that officials stop. But the school doubled down, claiming parental knowledge and involvement compromises their daughter's safety.

The First Circuit affirmed dismissal of Petitioners' parental-right claims because Respondents' secret transition of their daughter (1) took place in a public school, where parental rights are supposedly diminished, particularly over curricular and administrative matters, (2) was purportedly not "coercive" or "restraining" and therefore consistent with the minor child's choice, which superseded the parents' rights, and (3) did not involve her mental health. That decision deepened entrenched splits over the scope of parental rights.

The question presented is:

Whether a public school violates parents' constitutional rights when, without parental knowledge or consent, the school encourages a student to transition to a new "gender" or participates in that process.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioners are Stephen Foote and Marissa Silvestri, individually and as Guardian and next friend of B.F. and G.F.

Respondents are Ludlow School Committee; Todd Gazda, former Superintendent; Lisa Nemeth, Interim Superintendent; Stacy Monette, Principal of Baird Middle School; Marie-Claire Foley, school counselor at Baird Middle School; Jordan Funke, former librarian at Bair Middle School; and Town of Ludlow.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the First Circuit, No. 23-1069, *Foote* v. *Ludlow School Committee*, judgment entered February 18, 2025.

U.S. District Court for the District of Massachusetts, No. 22-30041-MGM, *Foote* v. *Ludlow School Committee*, motion to dismiss granted December 14, 2022.

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The First Circuit's decision affirming dismissal is reported at 128 F.4th 336 (1st Cir. 2025), and reprinted at App.1a–43a.

STATEMENT OF JURISDICTION

The First Circuit entered judgment on February 18, 2025. The lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. On March 5, 2025, Justice Jackson extended the time to file this petition until June 18, 2025. On May 27, 2025, Justice Jackson further extended the time to file this petition until July 18, 2025. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law …." U.S. Const. amend. XIV, § 1.

INTRODUCTION

Petitioners Stephen Foote and Marissa Silvestri depended on the Ludlow, Massachusetts public schools to educate their middle-school-age daughter and son. After learning that their daughter, B.F., was experiencing depression and questioning her sex, Petitioners hired a private therapist to help her. The parents informed the school district they were getting B.F. the mental-health assistance she needed, and that school officials were prohibited from having any private conversations with their daughter about these important matters.

School officials thought they knew better. They decided to socially transition B.F. against Petitioners' stated wishes. Officials regularly met with B.F. to assist with and encourage her social transition to a "genderqueer" identity. The transition included a name change, new pronouns, and bathrooms where middle school boys undressed. In regular online private chats with B.F., the school counselor promoted B.F.'s identification as "genderqueer" and her use of a male name and questioned Petitioners' choice of a mental-health counselor, all without saying anything to Petitioners. Indeed, school officials actively *concealed* their activities by using B.F.'s real name and pronouns when communicating with Petitioners but using her male name and nonbinary pronouns at school.

The school counselor instructed middle-school staff that they should not tell Petitioners about their daughter's use of a male name. But a concerned middle-school teacher eventually did disclose that fact. The school district promptly fired her.

After learning what the school was doing to their daughter, Petitioners begged district officials for help. Those efforts were futile. The middle-school principal intimated that the school knew what was best for Petitioners' children. The district superintendent approved of the staff's actions as consistent with district policy. And when the parents again pleaded with middle-school staff to stop, they were ignored. Later, at a public meeting, the superintendent deemed parental rights a "thinly veiled … camouflage" for "intolerance, prejudice and bigotry against LGBTQ individuals." And the school-board chair demeaned parents' concerns about secretly transitioning children as "'prejudice and bigotry.'"

For more than a century, this Court has safeguarded parents' right to make key decisions about their children's upbringing, education, and healthcare. *E.g.*, *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534–35 (1925); *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972); *H.L.* v. *Matheson*, 450 U.S. 398, 410 (1981); *Troxel* v. *Granville*, 530 U.S. 57, 70 (2000) (plurality opinion); cf. *Mahmoud* v. *Taylor*, __ S. Ct. __, 2025 WL 1773627 (2025) (making that point in a free-exercise context). Petitioners seek refuge in those decisions.

Petitioners do not have a religious objection to their school district's indoctrination and transition of their children without their knowledge. Theirs is a moral belief, backed by well-supported scientific opinion, that a so-called gender transition harms their children. But their constitutional rights to direct the upbringing of their children remain just as fundamental. The Court should grant the petition and make clear that parents' fundamental rights do not depend on whether they are religious.

The question presented implicates several issues that have divided the courts of appeal. The First Circuit rejected Petitioners' parental-right claim because Respondents' secret transition of their daughter (1) took place in a public school, where parental rights are supposedly diminished, particularly over "academic and administrative matters," (2) was purportedly not "coercive" or "restraining" because the child chose to go along with it, superseding the parents' rights, and (3) did not involve her mental health. Because these holdings sharply divide lower courts, only this Court can resolve the conflicts and overturn the First Circuit's flawed view that nonreligious parents' rights, in the school context, are limited to "choosing a specific educational program" and that parents decide only whether to "send their children to" a private, home, or "public school." App.28a.

The question this case presents is urgent. More than 1,000 public school districts have adopted secret transition policies, *Parents Protecting Our Children, UA* v. *Eau Claire Area School District*, 145 S. Ct. 14, 14 (2024) (Alito, J., dissenting from denial of certiorari), resulting in dozens of lawsuits and harming countless children. The fact that parents reject gender ideology for non-religious reasons does not leave them without constitutional protection. Certiorari is warranted.

STATEMENT OF THE CASE

I. Factual Background[1]

A. Ludlow imposes gender ideology on Petitioners' children in middle school, and both children start questioning their gender.

Petitioners Stephen Foote and Marissa Silvestri have two children who attended Baird Middle School in Ludlow, Massachusetts: a daughter, B.F., and a son, G.F. App.71a–72a. When B.F. was 11 and G.F. was 12, Petitioners learned that Ludlow was pushing beliefs concerning gender ideology behind the parents' backs and encouraging their children to question their own identity. App.81a, 91a.

For instance, a Ludlow official asked B.F. and G.F.—along with other incoming sixth graders—to announce their gender identity and preferred pronouns in biographic videos uploaded to the school network. App.81a. Ludlow officials also instructed B.F. and G.F. not to refer to students as "boys" and "girls." App.82a. And Ludlow employees, including Baird's nonbinary librarian, sent B.F. unsolicited suggestions through her school Google account to watch LGBTQ-themed videos on her school computer. App.82a–83a.

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[1] Because this case was dismissed at the pleadings stage, the following factual summary is derived from the amended complaint's allegations and reasonable inferences drawn therefrom. *Cunningham* v. *Cornell Univ.*, 145 S. Ct. 1020, 1025 n.2 (2025).

As a result, B.F. and G.F. both began to question their gender. App.83a–90a. While expressing feelings of insecurity, low self-esteem, poor self-image, and lack of popularity to a teacher—common feelings in pre-teens—B.F. began to raise questions about her gender identity and whether she was attracted to girls. App.83a–84a. G.F. also struggled with gender-identity issues, App.87a–88a, 90a, though those struggles are now behind him.

B. Petitioners learn that B.F. questions her gender, implement a care plan, and tell Ludlow to leave the matter with them.

After B.F. told a teacher she was depressed, questioned her gender, and didn't know how to ask her parents for help, the teacher offered to speak with her parents. B.F. agreed. App.84a. After confirming that B.F. had shared similar feelings with other staff, the teacher told Mrs. Silvestri that B.F. felt depressed, questioned her identity or self-image, and might be attracted to the same sex. *Ibid.* Mrs. Silvestri was grateful for the call. She had noticed something was troubling B.F., and she sympathized because she had also struggled with self-image as a preteen. App.84a–85a. Petitioners hired a private therapist to help B.F. with her mental-health struggles. App.85a.

Mrs. Silvestri emailed Ludlow that Petitioners were getting B.F. the mental-health help she needed. *Ibid.* Mrs. Silvestri instructed officials not to "have any private conversations" with B.F. regarding these matters, so Petitioners could address them "as a family and with the proper professionals." *Ibid.* Mrs. Silvestri sent this email to the Ludlow School Committee and superintendent, plus B.F.'s middle

school principal, teachers, and guidance counselors. Not one person responded. App.93a–94a.

C. Ludlow replaces Petitioners' care plan with a social transition, without parental knowledge or consent.

Unbeknownst to Petitioners, Ludlow rejected their care plan for B.F. and began socially transitioning her without her parents' knowledge. The school counselor and other officials met privately with B.F. regularly to discuss her questions about gender identity and encourage her social transition from female to "genderqueer" with a male name. App.86a, 95a–96a. Without telling Petitioners, school officials began to treat B.F. as "genderqueer," use the masculine name R**** to refer to her at school, prohibit "deadnam[ing]" her, and address her with so-called "nonbinary pronouns" like fae/faerae/aer, ve/ver, xe/xem, or ze/sir. App.88a. These social-transition changes involve significant mental-health decision-making affecting children's well-being. App.79a–80a.

School officials did not stop there. They changed B.F.'s official school name tags. App.89a. The school counselor sent B.F. to the nonbinary school librarian for additional private meetings promoting her social transition from female to "genderqueer" with a male name. *Ibid.* The librarian directed B.F. to Translate Gender, a nonprofit—with which the librarian is affiliated—that "is [t]rans-led," "[t]rans-centered," aimed at "youth," and advocates for children "self-determin[ing] their own genders and gender expressions." App.96a; *Homepage*, Translate Gender, https://bit.ly/4m SNHEj; *What We Do*, Translate Gender, https://bit.ly/4n17JN9.

Translate Gender trained 11-year-old B.F. with programs like "The Sex Education You Didn't Get in School," which is "queer centered and affirming." App.96a; Translate Gender, Facebook (Aug. 25, 2021), https://bit.ly/3SKPCNA. Meanwhile, the school counselor encouraged B.F. to use the privacy facilities of her choice, including bathrooms where middle-school boys undressed. App.91a–92a. Ludlow did all this against Mrs. Silvestri's explicit instructions and without Petitioners' knowledge or consent. App.82a, 86a, 90a.

Ludlow's interference with Petitioners' care plan for B.F. didn't stop there. In regular online private chats with B.F., the school counselor promoted B.F.'s identification as "genderqueer" and use of the male name R**** and questioned Petitioners' choice of a mental-health counselor, though the school counselor raised no such concern with B.F.'s parents. App.92a, 96a–97a.

The counselor's online messages implied that B.F. wasn't safe with her parents, Petitioners' care plan wasn't adequate, and B.F. needed help and support from school officials and others—*not* her parents or the mental-health care professional they chose. App.97a–98a. These private messages further disregarded Mrs. Silvestri's explicit instructions and interfered with her parental decision-making, App.98a, just as school policy required.

D. Petitioners discover Ludlow's parental exclusion policy, but officials refuse to talk or change course.

Ludlow concealed its social transition of B.F. by using her legal name and female pronouns when communicating with Petitioners. App.87a, 89a. The school counselor instructed staff that B.F.'s parents should not be told about her use of a male name. App.90a. The parents only learned of Ludlow's social transition of B.F. because of a private conversation with the teacher in which B.F. initially confided. *Ibid.* Ludlow fired that teacher for disclosing to B.F.'s parents that B.F. had announced to school staff that she was "genderqueer." App.100a; accord *Manchester* v. *Town of Ludlow*, No. 23-30117, 2025 WL 1208717, at *3 (D. Mass. Apr. 25, 2025) (teacher's case against the school).

Incredibly, when Petitioners had a virtual meeting with Baird Middle School principal Monette to discuss their children, the principal refused to speak with them. App.92a–93a. The principal intimated that the school—not Petitioners—knew what was best for their children on gender-identity issues and abruptly ended their meeting. App.93a.

Desperate, the parents turned to Ludlow's superintendent. Petitioners said they—not the school—should be the primary source of help and guidance for their children, and it was deplorable that Ludlow teachers, the counselor, and the librarian would secretly transition their children. App.93a. But the superintendent *approved* of school officials counseling children on gender-identity issues and assisting with social transition without the parents' knowledge.

App.93a–95a. The superintendent also endorsed the school counselor's intentional deception by instructing staff to use B.F.'s and G.F.'s transgender names and pronouns at school but their correct names and pronouns with Petitioners. App.89a–90a, 94a–95a.

Distraught, Petitioners again implored school officials to use their children's legal names and *not* to discuss gender-identity issues with their children. They received no response, and Ludlow continued to flout their instructions. App.95a–96a. The school counselor continued to meet regularly with B.F. to promote her social transition, and Ludlow allowed B.F. to alter her transgender name at least twice, using whatever name she preferred. App.86a, 96a. Petitioners only found out because teachers inadvertently sent emails to them related to B.F.'s school assignments that used a male first name, and one of B.F.'s teachers mailed a card addressed to R**** to Mr. Foote's home with a prize B.F. had earned. App.86a, 98a–99a.

The superintendent approved all these actions based on an unwritten parental exclusion policy under which (1) school officials ignore parents' direction to refrain from counseling their children on gender-identity issues, App.93a–95a, 103a, 105a–06a; (2) children of any age decide whether to receive gender-identity counseling and socially transition at school without their parents' consent, App.81a–82a, 94a, 103a–05a; (3) parents receive notice only if their children agree, App.77a–79a, 100a; and (4) staff intentionally deceive parents by using children's legal names and sex-based pronouns when speaking to parents and using children's transgender names and pronouns elsewhere, App.79a, 89a, 102a, 104a–06a.

The superintendent explained this protocol is based on a guidance document that DESE, the Massachusetts Department of Elementary and Secondary Education, issued to implement Mass. G.L. c. 75, § 5. App.73a–74a, 77a, 94a–95a. That statute bars gender-identity discrimination in public schools.

E. The superintendent and committee chair endorse the protocol at public meetings.

Ludlow's protocol burst into the open at a public meeting of the school committee. In a pre-filed comment, a 10th-grade student accused school officials of pushing gender ideology on 11- to 14-year-old students to convince them to change their gender and sexuality all while ignoring parents' objections. App.100a–01a. The superintendent's prepared response disputed nothing but defended Ludlow as promoting "safety" and "inclusion." App.150a–51a; accord App.101a. The superintendent said Ludlow "need[ed] to do more," not less, to inculcate gender ideology in kids. App.150a.

According to the superintendent, recognizing children "in the manner they wish to be identified" is paramount. App.151a. Government officials at public schools offer the "caring adults" and "safe environment" that children need to "discuss" their identities and explore other genders. App.151a; App.101a. The superintendent said that for many "students school **IS** their only safe place[,] and that safety evaporates when they leave" school to return home. App.151a.

To the superintendent, the alienation of fit parents from their children was a feature of the protocol, not a bug. He declared parental rights a "thinly veiled … camouflage" for "intolerance, prejudice and bigotry against LGBTQ individuals." App.150a. School officials must "stand up to [parents'] prejudice and bigotry and continue to create a safe, caring, supportive [and] inclusive environment" where children can "grow" apart from their families. App.151a; App.103a.

At a later public meeting, the school committee chair agreed. He backed the protocol as an "'inclusive polic[y],'" defended officials' actions as "'welcoming and supporting to the children,'" and dismissed parents' concerns about secretly transitioning their children as "'prejudice and bigotry.'" App.102a–03a.

Ludlow continues to implement the protocol in every school, at every grade level. App.78a, 110a–11a, 122a–23a, 135a–36a. School officials inculcate gender ideology, promote gender exploration in private conversations with children, and implement social transitions without parents' knowledge or consent. Officials continue to deceive parents unless their minor children allow the school to tell their parents. App.78a, 103a–04a.

II. Procedural History

A. District-court proceedings

Petitioners filed suit in the U.S. District Court for the District of Massachusetts, alleging Ludlow's actions violated their fundamental right to direct the upbringing and education of their children and the right to direct their children's mental-health care.

App.106a–143a. Petitioners' amended complaint requested declaratory and injunctive relief, and nominal and compensatory damages. App.145a–48a.

Ludlow moved to dismiss. Mot. to Dismiss at 8, 12–16. It argued that Petitioners sought discriminatory treatment of their children. *Id.* at 12, 16, 20–21. At oral argument, Ludlow said schools may ignore parents' instructions regarding their children's names, pronouns, and use of sex-specific restrooms the same way they disregard parents' textbook preferences. Tr. of Oral Arg. on Mot. to Dismiss at 35.

The district court applied a shocks-the-conscience standard and dismissed the complaint. App.57a–59a, 67a. Because the protocol "was consistent with Massachusetts law" and "society as a whole" was "grappling with" transgender-related issues, the court said Ludlow's actions weren't "extreme" enough "to shock the contemporary conscience." App.65a.

B. The First Circuit's decision

The First Circuit affirmed dismissal on different grounds. The court rightly concluded that Ludlow's policies are legislative, not executive, conduct, so the shocks-the-conscience test doesn't apply.[2] App.19a–21a. But then the court took a wrong turn, saying Petitioners failed to state a claim, for several reasons.

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[2] Accord *Regino* v. *Staley*, 133 F.4th 951, 959–60 & n.5 (9th Cir. 2025) (rejecting shocks-the-conscience test). Contra *Littlejohn* v. *School Bd. of Leon Cnty.*, 132 F.4th 1232, 1242–43 (11th Cir. 2025), en banc pet. filed (applying the shocks-the-conscience test).

First, the court of appeals held that parents' rights, in the school context, are limited to "choosing a specific educational program." App.28a (citation modified). Parents decide only whether to "send their children to" a private, home, or "public school." App.29a.

According to the First Circuit, once parents enroll their children in public school, their rights evaporate because *anything* a school does to children—no matter how personalized, private, and non-curricular—is an "academic" or "administrative function[ ]." App.31a. The First Circuit analogized personal decisions to "academic assignments" over which parents have no control. *Ibid.* Nor do parents have any say over "a student's pronouns in the classroom, decisions about bathroom access, [or] a guidance counselor speaking to a student" about gender transition. *Ibid.*

Second, while conceding officials' medical or mental-health intervention could implicate parents' rights, App.24a, the First Circuit limited those rights to "intrusions upon the bodily integrity of the child or other conduct with clinical significance—whether through a medical procedure, examination, or hospitalization." App.27a. The court ignored the school counselor's mental-health counseling of B.F. and her questioning of the counselor Petitioners chose, focusing solely on Ludlow using B.F.'s requested "name and pronouns," which the court said "requires no special training, skill, medication, or technology." *Ibid.* This reasoning allowed the court to say that Ludlow's secret social transition of B.F. and G.F. was outside the scope of Petitioners' parental rights. *Ibid.*

Third, the First Circuit cast aside Petitioners' parental rights because Ludlow didn't "coerc[e]" B.F. into counseling. App.33a. Nor did officials "misrepresent[ ]" information when Petitioners asked questions. App.34a. School officials simply "declined to discuss [B.F.'s] gender identity issues with the [p]arents." *Ibid.*

Plus, the court insisted that "parents have less authority over decision-making concerning their children" in public schools. App.37a. But as a consolation prize, the court offered, parents "remain free to strive to mold their child … through direct conversations, private educational institutions, religious programming, homeschooling, or other influential tools." *Ibid.*

Finally, the court determined that Ludlow's actions surpassed rational-basis review based on schools' "compelling interest" in "protect[ing] … transgender minors" from their fit parents. App.141a (quotation omitted). Suggesting a conflict "between the [constitutional] rights of the [p]arents and the rights of" their children under state law, the court concluded that children's speculative "worr[ies] about parental backlash" should prevail over parents' rights. App.40a–41a.

REASONS FOR GRANTING THE WRIT

The First Circuit held that the Constitution allows a public school to secretly treat Petitioners' daughter as someone other than a girl. This case is an ideal vehicle for this Court to resolve multiple circuit splits and make clear that parents have the right to be informed about and object to a public school's social transition of their children.

To begin, the First Circuit joined the Seventh and Ninth in holding that parents possess virtually no rights after the decision to enroll their children in public school. In all those circuits, public schools may socially transition or indoctrinate children under the guise of "curriculum" or "administration." In contrast, the Third Circuit has chosen the better course and afforded more protection to parental rights.

Next, the First Circuit joined the Massachusetts Supreme Judicial Court in requiring parents to show that school officials' actions were "coercive" or "restraining." This holding is consistent with other circuits that have allowed schools to pit children against their parents, turning this Court's parental-rights caselaw on its head. Yet the Ninth Circuit rejects any coercion requirement, joining other courts that have held children's rights do not supersede those of their parents.

The First Circuit also erases parental involvement in a child's mental health. Social transition is a non-neutral psychotherapeutic intervention that schools should not impose behind parents' backs. Yet that's precisely what the First Circuit allows.

Finally, as Members of this Court have already recognized, "[t]his case presents a question of great and growing national importance." *Eau Claire*, 145 S. Ct. at 14 (Alito, J., dissenting). "[M]ore than 1,000 districts have adopted [secret social transition] policies," *ibid.*, and cases challenging them are proliferating. The Court should grant the petition.

I. The First Circuit ignored this Nation's history and tradition and deepened circuit splits over parental rights in public schools.

A. This Court's precedent and our Nation's history and tradition recognize robust parental rights in education.

Courts deciding Fourteenth Amendment claims are guided by our Nation's "history and tradition." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 240 n.22 (2022). Parental rights are among the most deeply rooted in that history and tradition. Blackstone described the parent-child relationship as the "most universal relation in nature." 1 William Blackstone, Commentaries on the Laws of England *446, http://bit.ly/3TNe01g. At common law, a school official had only as much power over a child as a parent delegated. *Id.* at *453.

Early American sources, like Joseph Story, James Kent, and James Schouler, describe a robust parental right. Story recognized that parents were naturally "entrusted with the care of [their] children" because it is the parents that "will best execute the trust reposed in [them]." 2 Joseph Story, Commentaries on Equity Jurisprudence § 1343, at 576 (2d. ed., 1839). Kent agreed. 2 James Kent, Commentaries on American Law 159–60 (1827).

And Schouler noted the parent's critical role "in early life," when a child's character is formed. James Schouler, Treatise on the Law of Domestic Relations § 737 (Arthur W. Blakemore ed., Matthew Bender & Co. 1921) (1870). He viewed the relationship between parents and schools as a partnership. 2 James Kent, Commentaries on American Law *201–03 (5th ed. 1844), https://bit.ly/3FbwIfi.

Reconstruction-era courts recognized robust parental authority to control children's education—even in public schools—including opting out of objectionable curricula. *E.g.*, *Morrow* v. *Wood*, 35 Wisc. 59, 65–66 (1874) (geography); *Rulison* v. *Post*, 79 Ill. 567, 571 (1875) (book-keeping); *State* v. *School Dist. No. 1*, 48 N.W. 393, 394–95 (Neb. 1891) (grammar); *School Bd. Dist. No. 18* v. *Thompson*, 103 P. 578, 582 (Okla. 1909) (singing); *State* v. *Ferguson*, 144 N.W. 1039, 1040, 1044 (Neb. 1914) (domestic science); *Hardwick* v. *Board of Sch. Trs.*, 205 P. 49, 52, 54 (Cal. Dist. Ct. App. 1921) (dancing).

Our constitutional system long ago rejected any notion that a child is the "mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare" their children for life. *Yoder*, 406 U.S. at 233. This Court has "consistently" adopted this understanding, *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979), and "historically has reflected … concepts of the family as a unit with broad parental authority over minor children," *ibid.*; accord *Hodgson* v. *Minnesota*, 497 U.S. 417, 483 (1990) (Kennedy, J., partially concurring) ("The common law historically has given recognition to the right of parents, not merely to be notified of their children's actions, but to

speak and act on their behalf."). The "primary role of the parents in the upbringing of their children" is constitutionally protected, "established beyond debate as *an enduring American tradition*," especially in matters concerning "moral standards." *Yoder*, 406 U.S. 232–33 (emphasis added).

Ignoring this history and tradition, lower courts have diminished what "is perhaps the oldest of the fundamental liberty interests recognized by" this Court, *Troxel*, 530 U.S. at 65—a parent's constitutional rights to "bring up children," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), and "to direct the upbringing and education of children under their control," *Pierce*, 268 U.S. at 534–35. Parents do not forfeit those rights in exchange for a public education. See generally *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943).

B. The circuits are divided 4–1 over whether nonreligious parents' rights are limited to the initial enrollment decision.

Circuits are split over the scope of parental rights that nonreligious parents have in public schools. The First Circuit—along with the Ninth, Seventh, and Sixth—reject this Court's precedent, and our nation's history and tradition, by holding "that, once parents choose to send their children to public school," their rights are, "at the least, substantially diminished." App.29a–30a & n.19. In those circuits, nonreligious parents have virtually no rights after they enroll their children in government-run schools. The Third Circuit rejects that narrow view, recognizing that parental rights extend to public schools, especially on deeply personal or private familial matters.

Start with the Ninth Circuit. In *Fields* v. *Palmdale School District*, that court considered whether a school violated nonreligious parents' rights when it facilitated a third-party researcher's invasive and sexually explicit questioning of seven- to ten-year-olds on how frequently they thought about sex and touching others' private parts. 427 F.3d 1197, 1201 & n.3 (9th Cir. 2005), amended by 447 F.3d 1187 (9th Cir. 2006). Shockingly, the court held that parents "have no constitutional right … to prevent a public school from providing its students with *whatever information* it wishes to provide, sexual or otherwise," whenever and however "the school determines that it is appropriate to do so." *Id.* at 1206 (emphasis added). The court blamed the parents because they chose the school. *Id.* at 1207.

The Ninth Circuit then extended *Fields*, holding that parents "lack constitutionally protected rights to direct school administration more generally," including to prevent their children's forced exposure to opposite-sex nudity or compelled exposure of their own naked bodies to the opposite sex. *Parents for Priv.* v. *Barr*, 949 F.3d 1210, 1231 (9th Cir. 2020); accord, *e.g.*, *California Parents for the Equalization of Educ. Materials* v. *Torlakson*, 973 F.3d 1010, 1020 (9th Cir. 2020) ("As we said in *Fields*, the substantive due process right 'does not extend beyond the threshold of the school door.'") (citation modified).

The Seventh Circuit similarly holds that "the only federal constitutional right vis-à-vis the education of one's children" "is the right to choose the school." *Crowley* v. *McKinney*, 400 F.3d 965, 971 (7th Cir. 2005). Students and public "[s]chools have valid interests in limiting the parental presence." *Id.* at 969.

The Sixth Circuit has followed suit: "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." *Blau* v. *Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005)). And now, so has the First Circuit. App.29a–30a & n.19.

Splitting with the First, Sixth, Seventh, and Ninth Circuits, the Third Circuit holds "that '*in loco parentis*' does not mean 'displace parents.'" *Gruenke* v. *Seip*, 225 F.3d 290, 307 (3d Cir. 2000). Programs like "[s]chool-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution." *Ibid.*

The Third Circuit explicitly rejects the Ninth Circuit's *Fields* decision. In an opinion joined by then-Judge Alito, the court held that parents may challenge a public school's "actions that strike at the heart of parental decision-making authority on matters of the greatest importance." *C.N.* v. *Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005). The court also rejected the Ninth Circuit's view that this Court's parental-rights decisions "will now trigger only an inquiry into whether or not the parent chose to send their child to public school." *Id.* at 185 n.26. "[I]t is primarily the parents' right 'to inculcate moral standards,'" and parents can challenge public school action that "usurp[s]" the parental role. *Ibid.* (quoting *Gruenke*, 225 F.3d at 307). See also *John & Jane Parents 1* v. *Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 636 (4th Cir. 2023) (Niemeyer, J., dissenting),

cert. denied sub nom. *Jane Parents 1* v. *Montgomery Cnty. Bd. of Educ.*, 144 S. Ct. 2560 (2024) ("The issue of whether and how grade school and high school students choose to pursue gender transition is a family matter, not one to be addressed initially and exclusively by public schools without the knowledge and consent of parents."); *Lee* v. *Poudre Sch. Dist. R-1*, 135 F.4th 924, 937 (10th Cir. 2025) (McHugh, J., concurring) ("The [school] district's policy of helping students keep their parents in the dark about their gender identities turns this [Court's parental-rights caselaw] on its head.").

The decision below deepened this long-simmering conflict, holding that "once parents choose to send their children to public school," "they do not have a constitutional right to direct *how* a public school teaches their children." App.29a (citation modified). Only this Court can clarify that nonreligious parents do not relinquish their parental rights when they enroll their child in a public school. Cf. *Mahmoud*, 2025 WL 1773627, at *14 ([T]he right of parents to direct the religious upbringing of their children would be an empty promise if it did not follow [their] children into the public school classroom.").

C. Courts disagree over how broadly to define school authority over curriculum and administrative decisions.

Lower courts often justify their constrictive view of parental rights as deference to curriculum and classroom management. But courts disagree over how broadly to define "curriculum" and "administration" and whether some issues are so central to the parental role they should remain parental choices.

Straightforward decisions like "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" generally don't intrude on parental decision-making authority or involve sensitive issues of great familial importance. *Blau*, 401 F.3d at 395–96; *e.g.*, *Leebaert* v. *Harrington*, 332 F.3d 134, 139–43 (2d Cir. 2003) (mandatory health classes that did not discuss sensitive issues like family-life instruction); *Herndon* v. *Chapel-Hill Carrboro City Bd. of Educ.*, 89 F.3d 174, 176 (4th Cir. 1996) (student community-service requirements); *Littlefield* v. *Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001) (school uniform policy); *Swanson* v. *Gutherie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998) (part-time attendance).

But lower courts disagree when alleged curricular and classroom management decisions *do* intrude upon core parental territory. Some courts, like the First Circuit below, define curriculum or administrative decisions so broadly that schools have nearly unlimited authority to do and say what they please to school children, with no regard to parents.

The First Circuit here aligned itself with the Seventh and Ninth Circuits' approach. In their view, this Court's parental-rights caselaw "does not entitle [parents] to prohibit public schools from providing students with [whatever] information that the schools deem to be educationally appropriate," even when that includes posing invasive questions about sex to first graders. *Fields*, 447 F.3d at 1191.

And policies about locker-room and restroom access are matters of "school administration," rendering parents with no legal claim to raise concerning where—and with whom—their children dress and undress. *Parents for Priv.*, 949 F.3d at 1229–31 & n.16. Such broad school discretion means parental rights are irrelevant to anything that "takes place inside the school," *California Parents for the Equalization of Educ. Materials*, 973 F.3d at 1020, even regarding core familial matters like a child's sexual identity.

Other courts, including the Third and Eleventh Circuits, disagree. Topics that go to the heart of parental decision-making authority are not immune from parental involvement as mere matters of curriculum or classroom management. Instead, an "intimate decision" addressing "fundamental values" that "parents wish to instill in their children" remains with the family, not with state agents in public schools. *Arnold* v. *Board of Educ. of Escambia Cnty.*, 880 F.2d 305, 312 (11th Cir. 1989) (student obtaining an abortion); accord *Alfonso* v. *Fernandez*, 195 A.D.2d 46, 52 (N.Y. App. Div. 1993) ("Supplying condoms to students upon request has absolutely nothing to do with education, but rather is a health service occurring after the educational phase has ceased.").

School actions "that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution." *Gruenke*, 225 F.3d at 307; accord *Alfonso*, 195 A.D.2d at 57 (condom-distribution "policy intrudes on [parents'] rights by interfering with parental decision making in

a particularly sensitive area"). Public schools cannot "arrogat[e]" the parental role because "'[t]he child is not the mere creature of the State.'" *Gruenke*, 225 F.3d at 306–07 (quoting *Pierce*, 268 U.S. at 535).

If secret transition policies like the one challenged here are constitutional, then parental rights for non-religious parents *are* "shed … at the schoolhouse gate." Contra *Mahmoud*, 2025 WL 1773627, at *13 (citation modified). This Court's review is required.

II. The First Circuit deepened splits over a child's "rights" vis-à-vis her parents.

This Court has never suggested that parents must show "coercion" or "restraint" to establish that a school has violated their right to direct their child's education, care, and upbringing. Yet the First Circuit—aligning itself with Massachusetts' highest court—conjured such a principle from this Court's cases. These courts require parents to allege that a school *coerced* their children's conduct against the parents' wishes or otherwise restrained the parents' ability to exercise their parental role. This is a variation on a theme that other courts have adopted—namely, that children's "rights" supersede those of their parents.

Here, the First Circuit held that a school's unilateral actions to facilitate and participate in the gender transition of an 11-year-old girl—who the school knew was mentally fragile, questioning her gender identity, and undergoing therapy—"imposes no more compulsion to identify as genderqueer than providing a book about brick laying could coerce a student into becoming a mason." App.33a. The court's premise is

that no parental-right violation occurs so long as the child agrees with what the school is doing. Under that reasoning, a school would also have free rein to help or encourage children to become sexually active or have an abortion, and parents would be powerless to stop it.

Similarly, in *Curtis* v. *School Committee of Falmouth*, parents sought to opt out of a condom-distribution program in public schools and to be notified of their children's request for condoms. 652 N.E.2d 580 (Mass. 1995). The Supreme Judicial Court of Massachusetts held that "to constitute a constitutional violation, the State action at issue must be coercive or compulsory in nature." *Id.* at 586. There was "no coercive burden on the plaintiffs' parental liberties," the court reasoned, because "students are free to decline to participate in the program." *Ibid.* Although the program effectively encouraged minors to engage in sex, the court said the "program does not supplant the parents' role as advisor in the moral and religious development of their children." *Ibid*; accord, *e.g.*, *Decker* v. *Carroll Acad.*, No. 02A01-9709-CV-00242, 1999 WL 332705, at *8 (Tenn. Ct. App., May 26, 1999) (upholding distribution of birth-control information and supplies to minors without parental consent or notice because parents' rights apply only to state action that "is coercive or compulsory in nature").

A child doesn't have a veto over a fit parent's decision-making. Courts are supposed to "presum[e]" that fit parents "act in the best interests of their children." *Parham*, 442 U.S. at 602. "[S]o 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." *Troxel*, 530 U.S. at 68–69 (plurality opinion). "Simply because the decision of a parent is not agreeable to a child" does not "transfer the power to make that decision from the parents to some agency or officer of the state." *Parham*, 442 U.S. at 603.

Yet the First Circuit endorsed a policy that disregards that presumption wholesale. Respondents' asserted interest—"safety concerns"—presumes that parents who take a more cautious approach to their children's identity struggles put their children's "physical and psychological well-being" at risk. App.41a. That presumption reflects an unconstitutional inversion of the fit-parent doctrine. And by distinguishing this Court's precedents based in part on a "potential" conflict "between the [constitutional] rights of the [p]arents and the [state-law] rights of" their children, App.40a n.22, the court below also inverted the Supremacy Clause. U.S. Const. art. VI, cl. 2 (This Constitution … shall be the supreme Law of the Land").

The First Circuit's disregard of parents' decision-making is in deep tension with other circuits that require evidence of abuse or imminent harm before even the state's child-protective services may interfere with the parent-child relationship. *E.g.*, *Croft* v. *Westmoreland Cnty. Child. & Youth Servs.*, 103 F.3d 1123, 1126 (3d Cir. 1997) ("[A] state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of

abuse."); *Doe* v. *Heck*, 327 F.3d 492, 521 (7th Cir. 2003), as amended on denial of reh'g (May 15, 2003) (requiring "definite and articulable evidence giving rise to a reasonable suspicion that a child had been abused or was in imminent danger of abuse." (citation modified)); *Wallis* v. *Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000) (same); *Henry* v. *Sheriff of Tuscaloosa Cnty.*, 135 F.4th 1271, 1303 (11th Cir. 2025) (same).

The First Circuit's opinion also conflicts directly with other courts that eschew a coercion requirement. The Ninth Circuit, for example, does *not* condition parental rights claims on coercive or restraining conduct. In *Mann* v. *County of San Diego*, 907 F.3d 1154 (9th Cir. 2018), parents challenged the county's removal and medical examination of their children. The Ninth Circuit held that failing to notify or obtain the parents' consent for the examinations violated parental rights. "A parent's … right to notice and consent is not dependent on the particular procedures involved in the examination, or the environment in which the examinations occur, or whether the procedure is invasive, or whether the child demonstrably protests the examinations." *Id.* at 1162.

According to the Ninth Circuit, whether the state constrained the parents' actions—or compelled the child's actions—did not determine the parental rights analysis. Because "[t]he amount of trauma associated with" the state's action "is difficult to quantify and depends upon the child's developmental level, previous trauma exposure, and available supportive resources … a parent's right to notice and consent is an essential protection for the child and the parent." *Ibid.*

A recent decision confirms that the Ninth Circuit does not apply a coercion requirement in a case like this. *Regino* v. *Staley*, 133 F.4th 951 (9th Cir. 2025). In *Regino*, the court reinstated a complaint that alleged—just like this case—that a school secretly facilitated a student's gender transition in violation of parental rights. In detailed remand instructions about how to analyze the parental-right claim, the court said nothing about coercive or restraining conduct. *Id.* at 964–65.

A New York appellate court also rejected any coercion or restraint requirement in *Alfonso*, 195 A.D.2d at 56. Public schools' condom-distribution program "forced" parents "to surrender a parenting right—specifically, to influence and guide the sexual activity of their children without State interference." *Ibid.* "[B]y excluding parental involvement," the school "impermissibly trespasse[d] on the petitioners' parental rights." *Ibid.* It did not matter that "student participation in the condom availability program … is wholly voluntary, devoid of any penalty for non-participation." *Ibid.*

And a Florida appellate court held that the state's judicial bypass law—which allows minors to obtain abortions without parental involvement—violates the Fourteenth Amendment. *Doe* v. *Uthmeier*, 407 So. 3d 1281 (Fla. Dist. Ct. App. 2025). "At a minimum," the court said, "the Fourteenth Amendment demands notice and an opportunity to be heard before a presumptively fit parent can be deprived of his or her right to be informed of and make medical decisions" for the child. *Id.* at 1291. See also *Deanda* v. *Becerra*, 645 F. Supp. 3d 600, 627–28 (N.D. Tex. 2022), aff'd in part, rev'd in part on other grounds, 96 F.4th 750 (5th

Cir. 2024) (rejecting a "voluntary-compulsory distinction" as conflicting with "controlling precedent" and "the history of parental rights").

Government should not be allowed to subject a fit parent's fundamental rights to a child's veto. Nor should parents be forced to allege school "coercion" to protect their rights to direct the upbringing and care of their children. This Court's review is necessary.

III. The First Circuit's rejection of parents' rights to direct their children's mental-health decisions conflicts with this Court and the Third Circuit.

The First Circuit said that parental rights do not cover decisions about the psychotherapeutic intervention known as a social gender transition because, according to the court, that intervention does not involve "a medical procedure, examination, or hospitalization." App.27a. That departs from decisions of this Court and the Third Circuit.

In *Parham*, the Court recognized that parental decision-making extends to a child's "physical *or mental health*." 442 U.S. at 603 (emphasis added). And in *Gruenke*, as mentioned above, the Third Circuit acknowledged that "[s]chool-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution." 225 F.3d at 307 (expressing "considerable doubt" about the right of school counselors to withhold important mental-health information from parents).

The First Circuit's assertion that social transitions "do not involve clinical conduct at all," App.27a, blinks medical reality. Social transition "is an active [mental-health] intervention because it may have significant effects on the child or young person in terms of their psychological functioning and longer-term outcomes." The Cass Review, *Independent Review of Gender Identity Services for Children and Young People* 158 (Apr. 2024). For that reason, "embarking upon a social transition based solely upon the self-attestation of the youth without consultation with parents and appropriate professionals is unwise." *Mirabelli* v. *Olson*, 691 F. Supp. 3d 1197, 1208 (S.D. Cal. 2023).

Recall that this dispute began with B.F. feeling "depressed." The DSM-5 has an entire section on "depressive disorders." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 177 (5th ed. 2022). B.F. also felt unpopular with her peers. There's a DSM-5 subsection for "educational maladjustment and discord with teachers and classmates." *Id.* at 830. Ludlow responded to B.F.'s real mental-health issues with gender-ideology-infused counseling from a licensed school counselor. That's mental-health treatment. And it beggars belief to say that schools can evade parents' rights by rushing to socially transitioning a child.

The decision below enables state officials to exclude parents from critical decisions involving their children's mental health. Parents across the country need this Court's swift intervention, lest schools continue to mold their children's sexual identity without parental input. There's no time to waste.

IV. This case is an ideal vehicle to decide a question of great national importance.

A. Secret transition cases are proliferating.

The question presented here is "of great and growing national importance." *Eau Claire,* 145 S. Ct. at 14 (Alito, J., dissenting). At the time of the *Eau Claire* petition, there were "nearly 30 lawsuits with the same basic facts as this case." Pet. for Writ of Cert. at 13, *Parents Protecting Our Children, UA* v. *Eau Claire Area Sch. Dist.*, No. 23-1280 (June 5, 2024). Today, that number is 38. App.152a–155a. Allowing those decisions to percolate isn't just a matter of waiting for more data points; each case involves families enduring irreparable harm. Given that "more than 1,000 districts have adopted" policies like the one at issue here, *Eau Claire*, 145 S. Ct. at 14 (Alito, J., dissenting), incalculable numbers of families are adversely affected every day.

The availability of private schools or home-schooling "is no answer to" the First Circuit's dismissive treatment of Petitioners' parental rights. *Mahmoud*, 2025 WL 1773627, at *20. It "is both insulting and legally unsound to tell parents that they must abstain from public education" if they don't want their children socially transitioned "when alternatives can be prohibitively expensive and they already contribute to financing the public schools." *Id.* at *21. "[M]any parents have no choice but to send their children to a public school. As a result, the right of parents to direct the upbringing of their children would be an empty promise if it did not follow [their] children into the public school classroom." *Id.* at *14 (citation modified).

B. Review is necessary to protect the rights of nonreligious parents.

This Court's recent decision in *Mahmoud* establishes critical legal protection ensuring that religious parents receive adequate information and an opportunity to avoid conduct by school officials that violates their faith. But the opinion is grounded in parents' free-exercise rights and their ability to parent their children consistent with their religious beliefs. Applying similar principles to fundamental parental rights is the next logical step to protect parents who object to gender ideology for moral and scientific reasons rather than religious ones.

Our Constitution's guarantee of parental rights in a pluralistic society rings hollow for millions of Americans if it offers no protection to nonreligious parents whose children are encouraged to social transition by their public school without their parents' notice or consent—or over their parents' vociferous objections. This case vividly illustrates the concern, where federal courts have blessed school officials actively thwarting Petitioners' upbringing and care of their daughter, while manipulating the girl to believe that her parents do not have her best interests at heart.

This Court's decisive intervention was necessary in *Mahmoud* to protect religious parents' right to prevent indoctrination of their children on matters of religious concern. The Court's action is even more urgent here, where a school induces a student's sexual social transition without notice to—and over the express objection of—nonreligious parents.

Parental-rights jurisprudence in the lower courts is a mess. The Court should grant review and fix it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 2025

APPENDIX

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United States Court of Appeals
For the First Circuit

No. 23-1069

STEPHEN FOOTE, individually and as Guardian and next friend of B.F. and G.F., minors; MARISSA SILVESTRI, individually and as Guardian and next friend of B.F. and G.F., minors,

Plaintiffs, Appellants,

JONATHAN FELICIANO; SANDRA SALMERON,

Plaintiffs,

v.

LUDLOW SCHOOL COMMITTEE; TODD GAZDA, former Superintendent; LISA NEMETH, Interim Superintendent; STACY MONETTE, Principal, Baird Middle School; MARIE-CLAIRE FOLEY, school counselor, Baird Middle School; JORDAN FUNKE, former librarian, Baird Middle School; TOWN OF LUDLOW,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark G. Mastroianni, U.S. District Judge]

Before
Montecalvo, Thompson, and Rikelman,
Circuit Judges.*

Mary E. McAlister, with whom Vernadette R. Broyles, Child & Parental Rights Campaign, Inc., Andrew Beckwith, Samuel J. Whiting, and Massachusetts Family Institute were on brief, for appellants.

David S. Lawless, with whom Nancy Frankel Pelletier and Robinson Donovan, P.C. were on brief, for appellees.

Ilya Shapiro and Manhattan Institute on brief for amici curiae Manhattan Institute and Dr. Leor Sapir.

Adam C. Shelton and Goldwater Institute on brief for amicus curiae Goldwater Institute.

William A. Estrada and Parental Rights Foundation on brief for amicus curiae Parental Rights Foundation.

Steven W. Fitschen and National Legal Foundation on brief for amici curiae The Family Foundation; Illinois Family Institute; Concerned Women for America; National Legal Foundation; and Pacific Justice Institute.

Gene C. Schaerr, Annika Boone Barkdull, Schaerr Jaffe LLP, Jennifer C. Braceras, and Independent Women's Law Center on brief for amicus curiae Independent Women's Law Center.

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* Judge Lipez heard oral argument in this matter, but thereafter recused. He did not participate in the issuance of the panel's opinion in this case. Judge Montecalvo was substituted for Judge Lipez on the panel pursuant to Internal Operating Procedure VII(D)(4) by order dated August 26, 2024.

Katherine L. Anderson, David A. Cortman, Vincent M. Wagner, Tina Seideman, and Alliance Defending Freedom on brief for amicus curiae Alliance Defending Freedom.

J. Marc Wheat and Advancing American Freedom, Inc. on brief for amici curiae Advancing American Freedom, Inc.; Able Americans; American Cornerstone Institute; American Principles Project; American Values; Center for Political Renewal; Center for Urban Renewal And Education; Christians Engaged; Citizens United; Citizens United Foundation; Coalition for Jewish Values; Committee for Justice; Common Sense Club; Dr. James Dobson Family Institute; Eagle Forum; Faith and Freedom Coalition; Family Institute of Connecticut; Missouri Center-Right Coalition; My Faith Votes; National Association of Parents; National Center for Public Policy Research; National Religious Broadcasters; New Jersey Family Policy Center; Project 21; Religious Freedom Institute; Russell Kirk Center for Cultural Renewal; Tea Party Patriots Action, Inc.; The Family Foundation; The Justice Foundation; and Young America's Foundation.

Luke N. Berg and Wisconsin Institute for Law & Liberty on brief for amicus curiae Dr. Erica E. Anderson, Ph.D.

Gary M. Lawkowski and Dhillon Law Group, Inc. on brief for amicus curiae Center for American Liberty.

Austin Knudsen, Montana Attorney General, Christian B. Corrigan, Montana Solicitor General, and Peter M. Torstensen, Jr., Assistant Solicitor General, on brief for amici curiae State of Montana and 18 Other States.

Jeffrey M. Gutkin, Reece Trevor, Maureen P. Alger, Cooley LLP, Karen L. Loewy, Paul D. Castillo, and Lambda Legal Defense and Education Fund, Inc. on brief for amici curiae PFLAG, Inc.; Massachusetts Commission on LGBTQ Youth; Fenway Community Health Center, Inc.; The Trevor Project; Boston Alliance of Gay, Lesbian, Bisexual and Transgender Youth; Equality Maine; Girls Inc. of the Valley; Massachusetts Transgender Political Coalition; North Shore Alliance of Gay, Lesbian, Bisexual, and Transgender Youth, Inc.; OUT Maine; Out Now; Seacoast Outright; Thundermist Health Center; and We Thrive LGBTQ Community Center of Cape Cod and the Islands of Martha's Vineyard and Nantucket.

Jon W. Davidson, Harper S. Seldin, American Civil Liberties Union Foundation, Ruth A. Bourquin, Mary F. Brown, Alexandra Arnold, and American Civil Liberties Union Foundation of Massachusetts, Inc. on brief for amici curiae American Civil Liberties Union and American Civil Liberties Union of Massachusetts, Inc.

Mary L. Bonauto, Gary D. Buseck, Bennett H. Klein, Chris Erchull, and GLBTQ Legal Advocates & Defenders on brief for amicus curiae Massachusetts Association of School Superintendents.

Shannon Minter, National Center for Lesbian Rights, Arielle B. Kristan, Elizabeth E. Monnin-Browder, and Hirsch Roberts Weinstein LLP on brief for amici curiae Professors of Psychology & Human Development.

Andrea Joy Campbell, Attorney General of Massachusetts, Adam M. Cambier, Assistant Attorney General, and Cassandra J. Thomson, Assistant Attorney General, on brief for amici curiae

Massachusetts; California; Colorado; Connecticut; the District of Columbia; Hawai'i; Illinois; Maine; Maryland; Minnesota; New Jersey; New York; Oregon; Rhode Island; Vermont; and Washington.

February 18, 2025

PER CURIAM. Courts nationwide have faced all manner of important litigation involving matters of gender identity and gender expression, including use of folks' preferred pronouns. Today's case falls under that broad header. More specifically, it presents for our review challenging issues arising from the Ludlow School Committee's protocol ("the Protocol") requiring its staff to use a student's requested name and gender pronouns within the school without notifying the parents of those requests unless that student consents. Our appellants are the parents ("the Parents") of a Ludlow student who chose -- at school but not at home -- to go by a different name and to use different pronouns than those given to them at birth.[1] The Parents assert that Ludlow's practice of accommodating and concealing their child's requested name and pronouns while at school interferes with their parental rights as guaranteed by the United States Constitution.[2] Ludlow counters that its

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[1] Our opinion uses gender-neutral "they/them" pronouns to refer to the Student.

[2] The defendants include the Ludlow School Committee, the Ludlow Superintendent, various Ludlow educators, as well as the Town of Ludlow. For clarity, we refer to the defendants collectively, where appropriate, as "Ludlow."

Protocol is appropriate and necessary to ensure a safe and inclusive school learning environment for students.

In this litigation, the competing concerns of the Parents and Ludlow raise heretofore unanswered questions about the scope of parental rights protected by the Due Process Clause of the Fourteenth Amendment. But when all is said and done, we, like the district court, conclude that the Parents have failed to state a plausible claim that Ludlow's implementation of the Protocol as applied to their family violated their fundamental right to direct the upbringing of their child.

I. BACKGROUND

As usual, our appellate work begins with an overview of the facts that give rise to the issues now before us. As we jut through that procedural landscape, our recitation assumes the truth of all well-pled allegations in the complaint and draws all reasonable inferences in the Parents' favor. See Zell v. Ricci, 957 F.3d 1, 4 (1st Cir. 2020).

A. Student Experience at Baird Middle School

Baird Middle School is a public school in Ludlow, Massachusetts. Early in the 2020-21 school year, sixth-grade students at Baird, including eleven-year-old B.F. ("the Student"), were given an assignment by the school's librarian to create biographic videos about themselves. According to the Parents' complaint, the librarian, Jordan Funke, encouraged students to include their pronouns in their videos. The Parents' complaint does not state how the Student, designated the female sex at birth,

responded to this school assignment. But in the months that followed the assignment, the Student's school Google account started receiving "unsolicited LGBTQ-themed video suggestions" on their school-issued computer. After watching these clips, the Student began questioning whether they "might be attracted to girls" and whether they "ha[d] 'gender identity' issues."

By December 2020, the Student sought out their teacher, Bonnie Manchester, to have a meeting to discuss some personal issues. At that meeting, the Student indicated they were depressed and struggling with insecurity, low self-esteem, poor self-image, and a perceived lack of popularity. The Student told Manchester they needed help, but they were unsure of how to ask their parents about getting that help. Manchester offered to call the Student's parents and -- after reviewing the Student's situation with other teachers during a school planning meeting and hearing other teachers agree that the Student seemed depressed -- Manchester contacted the Parents.

Manchester told the Student's mother, appellant Marissa Silvestri, that the Student felt depressed, was experiencing self-image issues, and may have been attracted to members of the same sex. Silvestri "was grateful" Manchester reached out "so that [Silvestri] and" the Student's father, appellant Stephen Foote, "could address [the Student's] mental health issues" themselves. To that end, Silvestri sent the following email in December 2020 to Baird's principal, Stacy Monette; the then-Superintendent of Ludlow Public Schools, Todd Gazda; members of the Ludlow School Committee; and all the Student's teachers:

> It has been brought to the attention of both Stephen and myself that some of [the Student's] teachers are concerned with her mental health. I appreciate your concern and would like to let you know that her father and I will be getting her the professional help she needs at this time. With that being said, we request that you do not have any private conversations with [the Student] in regards to this matter. Please allow us to address this as a family and with the proper professionals.

Unbeknownst to the Parents, in a February 28, 2021 email sent to Baird's teachers and the school's counselor, Marie-Claire Foley, and to Superintendent Gazda, the Student announced, "I am genderqueer." According to the Student's email declaration, that meant that the Student would "use any pronouns (other than it/its)," and it also meant the Student preferenced a name change -- they asked to go by the name "R***" instead of "B***". Upon receipt of the email and after meeting privately with the Student, Counselor Foley learned that the Student was still in the process of explaining these identity developments to their parents. Consistent with the Student's request, Foley directed Baird staff to use the name "B***" and she/her pronouns when communicating with the Student's parents, but during school times, to address the Student as "R***".

Following this directive, some teachers immediately started referring to the Student as "R***" and changed nametags accordingly. Funke, the school librarian, spoke with the Student one-on-one about gender identity and provided the Student with LGBTQ-related resources. And Counselor Foley

told the Student that they could choose which bathroom to use -- boys', girls', or the gender-neutral facilities at the school.[3]

B. DESE Guidance and the Protocol

This is where Ludlow's Protocol comes into play. To explain it and its implementation, though, it behooves us to interrupt our narrative in order to provide the gentle reader with some important background on how the Protocol came to be.

In 2012, the Commonwealth's Department of Elementary and Secondary Education ("DESE") issued a non-binding guidance document regarding gender-identity issues ("DESE Guidance").[4] The DESE Guidance was published to help school districts comply with Massachusetts's then newly enacted statutory prohibition against discrimination based on gender identity in public schools. See Mass. Gen.

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[3] The Student's twelve-year-old sibling attended Baird Middle School at the same time as the Student. Around the same time as the above-described events were playing out, the Student's sibling also started using a name and pronouns differing from those provided to the sibling at birth. Though the Parents allege that Ludlow applied the Protocol with respect to both of their children, the operative complaint provides scant relevant details specific to the Student's sibling. We therefore conclude that a claim was not stated for the Student's sibling and focus our coming analysis solely on the Protocol as applied to the Student.

[4] A pause here to note that the Parents' complaint quotes portions of the DESE Guidance. We may take judicial notice of other parts of the document. See, e.g., Gent v. CUNA Mut. Ins. Soc'y, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (taking judicial notice of relevant facts provided on a government website that were "not subject to reasonable dispute").

Laws ch. 76, § 5 (effective July 1, 2012).[5] The Guidance contains policy suggestions for schools navigating issues related to gender discrimination. For example, when a student consistently asserts a particular gender identity, the DESE Guidance recommends that the school accept that student's stated gender. This approach aligns with the Commonwealth's statutory recognition that a person's gender identity may be based on their "identity, appearance or behavior," rather than that person's "physiology or assigned sex at birth." Mass. Gen. Laws ch. 4, § 7.

The DESE Guidance also addresses potential conflict between parents and students. Noting that "[s]ome transgender and gender nonconforming students are not openly so at home for reasons such as safety concerns or lack of acceptance," the DESE Guidance suggests that "[s]chool personnel should speak with [a] student first before discussing [that] student's gender nonconformity or transgender status with the student's parent or guardian." Consistent with that suggested deference to the student, the document directs "school personnel [to] discuss with the student how the school should refer to the student, e.g., appropriate pronoun use, in written

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[5] In 2011, the Massachusetts legislature approved amendments to several antidiscrimination statutes to add gender identity as a protected classification, along with race, color, sex, religion, national origin, and sexual orientation. See 2011 Mass. Acts 866. Among the amended statutes is a provision prohibiting discrimination against protected classes in public schools. See Mass. Gen. Laws ch. 76, § 5. In July 2012, DESE in turn included gender identity as a protected class in certain antidiscrimination regulations. See 603 Mass. Code Regs. 26.00.

communication to the student's parent or guardian." These recommendations reflect the general Commonwealth philosophy stated in the DESE Guidance that "the person best situated to determine a student's gender identity is that student."

Now, to Ludlow and Baird Middle School, where the School Committee and some individual defendants (like Superintendent Gazda) used the DESE Guidance to establish and implement the Protocol. The Protocol is an unwritten policy that allows students of any age "to determine whether their parents will be notified about decisions related to affirming [their own] discordant gender identity." In other words, Ludlow's Protocol is one of nondisclosure, instructing teachers not to inform parents about their child's expressions of gender without that student's consent. And as relevant here, Superintendent Gazda asserted that the district's actions with respect to the Student complied with the DESE Guidance and laws and regulations of Massachusetts.

With that explanation of the Protocol in the backdrop, let's get back to how things unfolded at Baird Middle School.

C. The Parents Discover Ludlow's Protocol

In early March, soon after the Student sent their February 28 email to school staff, the Parents learned about the Student's alternate school name from Manchester, the teacher in whom the Student had initially confided. This discovery prompted the Parents to speak with Principal Monette and Superintendent Gazda in March 2021. In these conversations, the Parents expressed concern that

Ludlow educators had disregarded Silvestri's December 2020 email, which had provided "specific instructions that school staff not engage with [the Parents'] children regarding mental health issues." As the Parents' complaint tells it, the school's recognition of the Student's chosen name and pronouns constituted a "psychosocial" mental health treatment because "social transitioning"[6] -- including the assertion of chosen names and pronouns -- is "recognized as a medical/mental health treatment for children with gender dysphoria."[7]

Superintendent Gazda, in response, defended the educators who did not disclose information about the Student's gender identity to the Parents. Under the laws and regulations of Massachusetts, said Gazda, Counselor Foley and other Baird staff treated the Student appropriately.

Baird educators continued to affirm the Student's chosen gender and name. For instance, the Parents noticed in April 2021 that one of the Baird teachers had mailed a card to the Student and addressed it to R.F., the Student's newly adopted name, rather than to B.F. And, throughout April and May 2021, Counselor Foley corresponded with the Student via text messages and online chat about their gender identity, and further encouraged the Student to meet

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[6] According to the Parents, a "social transition" involves "changes that bring the child's outer appearance and lived experience into alignment with the child's core gender." For example, "changes in clothing, name, pronouns, and hairstyle" may indicate a child's social transition.

[7] Although the Parents mention gender dysphoria in passing, they do not define the phrase or otherwise discuss it.

with her weekly to discuss any gender-related concerns. In one chat message conversation, Foley asked the Student if their parents "were providing B.F. with appropriate care." In another discussion, Foley asked if the Student was comfortable discussing issues with the non-school counselor chosen by their parents.

Superintendent Gazda voiced his support for Ludlow's "gender-affirming" practices at a May 2021 School Committee meeting, explaining that the district's policies fostered inclusion and sought to make schools safe for all children. He added that, under his leadership, Ludlow would "continue to help . . . children 'express who they are' despite parents' wishes to the contrary." He emphasized that for many students, "school is their only safe place, and that safety evaporates when they leave the confines of our buildings." Gazda reiterated his view that the school's approach adhered to Massachusetts's non-discrimination laws and educational guidelines.[8] Gazda explained that the district's actions complied with the DESE Guidance (that guidance document we mentioned a few pages ago).

D. How The Case Got Here

In time, the Parents sued the Town of Ludlow and the Ludlow School Committee as well as Todd Gazda, Stacy Monette, Marie-Claire Foley, and Jordan Funke in federal court, asserting constitutional claims under 42 U.S.C. § 1983. Their operative

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[8] In a June 2021 School Committee meeting, Committee Chairman Michael Kelliher repeated Gazda's sentiment that Ludlow's actions were "in compliance" with the relevant laws.

complaint chiefly alleges that the defendants' conduct restricted their fundamental parental rights protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution, including: (1) the right to direct the education and upbringing of their children (Count I); (2) the right to make medical and mental health decisions for their children (Count II); and (3) the right to familial privacy (Count III).[9]

In response, the defendants moved to dismiss the action under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. In a thoughtful rescript, the district court granted the defendants' motion, and in doing so, made several determinations. In short, as to Count II, it held that the Parents had failed to allege that Ludlow's conduct involved medical treatment. See Foote v. Town of Ludlow, Civ. No. 22-30041-MGM, 2022 WL 18356421, at *5 (D. Mass. Dec. 14, 2022). As for the remaining claims, the court concluded more broadly that the Parents had not alleged the sort of "conscience-shocking" conduct required by Supreme Court precedent to establish a substantive due process violation. Id. at *8. The court went on to hold that even if the Parents could state a substantive due process claim, the individual educators would be entitled to qualified immunity. Id. The Parents dissatisfied, this appeal followed and here we are.

We review the district court's Rule 12(b)(6) dismissal of the Parents' complaint de novo. See Burt v. Bd. of Trs. of Univ. of R.I., 84 F.4th 42, 50 (1st Cir.

[9] The Parents do not mount a challenge to the DESE Guidance in this litigation.

2023). In undertaking this task, we remind that "[w]e are not bound by the district court's reasoning but, rather, may affirm . . . on any ground made manifest by the record." Id.

II. DISCUSSION

Out of the starting gate, we reasonably begin by getting our constitutional law bearings on the Fourteenth Amendment Due Process Clause doctrine at play here. That doctrinal provision declares that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. And as our judicial superiors repeatedly tell us, it uncontrovertibly protects against governmental infringement of both procedural and substantive rights. Elaborating on those safeguards, the Supreme Court has held for nearly one hundred years that the Due Process Clause's explicit promise of "liberty" ensures certain fundamental rights. Pertinently among those substantive liberty interests is the right of parents to make decisions concerning "the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion); see also Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (the right to "direct the upbringing and education of children"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (the right to "bring up children"). Such fundamental rights, urge the Parents, are the big-picture items at stake in today's proceedings.

Ordinarily, to determine whether some government conduct has violated substantive due process rights, courts must undertake, as our precedent dictates, a layered inquiry. It begins by asking whether the challenged government conduct

"is legislative or executive in nature." DePoutot v. Raffaelly, 424 F.3d 112, 118 (1st Cir. 2005). We ask that question because the answer to it directs which analytical pathway we must follow and which level of scrutiny we will apply to determine if the Parents' due process rights have been violated.[10]

Let's begin.

A. Executive or Legislative Conduct

Categorizing government conduct as executive or legislative is not necessarily an easy task, particularly when the boundary between the two is not always well-defined and when some government conduct can even straddle the line. As has been observed, sorting these close calls requires an eye for function, not form. See Hancock v. Cnty. of Rensselaer, 882 F.3d 58, 65 n.2 (2d Cir. 2018). In that vein, sometimes the inquiry is simple. In most cases where a substantive due process challenge is brought, we see that statutes and governmental policies are typically deemed legislative; indeed, statutes are plainly legislative. See Cook v. Gates, 528 F.3d 42, 56-60 (1st Cir. 2008) (analyzing substantive due process challenge to "Don't Ask, Don't Tell" statute without reference to the shock-the-conscience test). On the executive-conduct front, individual acts of government officials are often and ordinarily executive in nature, untethered from any policy. See Rochin v. California, 342 U.S. 165, 166, 172 (1952) (treating as executive action the forced pumping of a

[10] Rational basis applies where plaintiffs have failed to identify a fundamental right or when, even if plaintiffs have done so, the challenged governmental action does not restrict that right.

suspect's stomach by police officers, which shocked the conscience); Martínez v. Cui, 608 F.3d 54, 63-64 (1st Cir. 2010) (applying the conscience-shocking test when a state employee was alleged to have committed a sexual assault). Although administrative regulations and executive orders are both forms of executive policymaking, they have nonetheless been classified as legislative in nature when they are broadly applicable. See Nicholas v. Pa. State Univ., 227 F.3d 133, 139 n.1 (3d Cir. 2000) (Alito, J.). Same has been deemed true for concerted actions by multiple government employees if taken "pursuant to broad governmental policies" -- such actions are closer to legislative conduct. Abdi v. Wray, 942 F.3d 1019, 1027-28 (10th Cir. 2019) (emphasis omitted) (declining to apply the shock-the-conscience test when a plaintiff challenged the FBI's "No-Fly List," an executive policy akin to a legislative act).

Challenges to executive versus legislative conduct garner different judicial examinations. For a substantive due process challenge to an executive action to proceed, the conduct must first satisfy the shock-the-conscience test. See Martínez, 608 F.3d at 64-65. That test asks "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." González-Fuentes, 607 F.3d at 880 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998)); see also DePoutot, 424 F.3d at 119.[11]

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[11] To round things out for the curious reader, Lewis taught that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," 523 U.S. at 845 (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)) (alteration in original), and "only the most egregious official

If executive conduct does not shock the conscience, the plaintiff has failed to state a constitutional violation and the inquiry ends. See González-Fuentes, 607 F.3d at 880 n.13. Only if the executive conduct does shock the conscience will the analysis move on to the substantive due process framework's next stage (whether the conduct restricts a protected fundamental right). See id.

On the other hand, legislative conduct (like a statute, a regulation, or a governmental policy of any kind) need not be conscience-shocking for further judicial inquiry to occur; rather, courts proceed directly to the next layered step of the substantive due process framework (asking whether a fundamental right is involved and whether the government conduct restricts that fundamental right) before moving on. See Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

The general executive versus legislative parameters noted, we get back to our case and what transpired below. When the defendants' motion to dismiss came before the district court, the court did not undertake this initial "executive or legislative" inquiry. Instead, it followed the parties' lead and treated the Protocol as an executive action, thus examining whether Ludlow's actions "were so egregious as to shock the conscience," Harron v. Town of Franklin, 660 F.3d 531, 536 (1st Cir. 2011) (quoting Pagán v. Calderón, 448 F.3d 16, 32 (1st Cir. 2006)), i.e., using the standard applied in substantive due

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conduct can be said to be 'arbitrary in the constitutional sense,'" id. at 846 (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)).

process cases challenging only individual actions by particular government officials, unmoored from any government policy, see Rochin, 342 U.S. at 172; Martínez, 608 F.3d at 63-64. The court then reasoned that Ludlow's conduct was not "so extreme, egregious, or outrageously offensive as to shock the contemporary conscience," Foote, 2022 WL 18356421, at *8 (quoting DePoutot, 424 F.3d at 119), and it therefore held the Parents had failed to state a viable substantive due process claim.[12]

But by our lights, the district court, in following the parties' lead, jumped the gun in not analyzing the type of government conduct involved. Though all roads, in the end, still lead to Rome, in our de novo review, we conclude the shock-the-conscience test was not the appropriate legal standard to utilize here in examining the Parents' claims because the Parents are challenging a school policy, which, after our careful scrutiny of the policy involved, we conclude is legislative, not executive conduct. Here's why that is so.

In our assessment of the precedent, as between legislative and executive conduct, the Protocol (the chief target of the Parents' complaint) better fits into the legislative bucket. We so conclude because it is a policy which applies broadly to all students in the Ludlow School District and is administered by

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[12] To be clear, technically, we note that the district court applied the shocks-the-conscience test only to Counts I and III. Foote, 2022 WL 18356421, at *5-8. Before it deployed the shocks-the-conscience test, the court dismissed Count II because the Parents hadn't adequately stated sufficient facts to support it (more on that later). Id. at *5.

multiple governmental actors. See Nicholas, 227 F.3d at 139 n.1. And although the Parents also challenge some individual actions of Ludlow educators -- for example, the complaint objects to teachers discussing gender identity with students, providing gender-identity resources to some students, and allowing transgender students to use the bathroom of their choosing -- those discrete decisions by individual educators were taken to "actively implement and reinforce the Protocol," as alleged by the Parents. See Abdi, 942 F.3d at 1027-28. In applying the Protocol to their interactions with students, those educators did not exercise the sort of "instant judgment" typically associated with executive conduct. See, e.g., Lewis, 523 U.S. at 837, 853 (aggressive maneuver by law enforcement officers to apprehend a suspect during a high-speed chase). So again, the Parents' complaint, at bottom, is better viewed as a challenge to legislative conduct.[13]

Accordingly, with the "legislative conduct" box ticked, we proceed to the next phase of our

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[13] By the way, we do not treat the Parents' request that the district court apply the shock-the-conscience test as a waiver because parties may not waive or stipulate to the appropriate legal test. See TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995) ("Issues of law are the province of courts, not of parties to a lawsuit, individuals whose legal conclusions may be tainted by self-interest. Courts, accordingly, 'are not bound to accept as controlling, stipulations as to questions of law.'" (quoting Sanford's Est. v. Comm'r, 308 U.S. 39, 51 (1939))); see also Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

substantive due process analysis and ask whether the Parents have adequately alleged that Ludlow's conduct restricted a fundamental right.[14] See Glucksberg, 521 U.S. at 722.

B. A Fundamental Right

The Parents say yes: They claim Ludlow's conduct restricted their parental right to control the upbringing, custody, education, and medical treatment of their child.[15] Our job, in resolving this

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[14] As we embark on this enquiry, recall that the substantive due process analysis involves a series of queries. We'll unpack all of this in more detail in the pages to come, but here's our 50,000-foot view of the basic progression we glean from the precedent. First, we ask whether a party has adequately alleged a right recognized as fundamental. Then, we assess whether the government conduct at issue is alleged to have restricted that right. The work does not stop there -- because regardless of how that second question is answered, the conduct still must withstand the appropriate level of constitutional scrutiny. Indeed, if the answer is yes, the conduct is alleged to have restricted a fundamental right, then we examine whether the restriction satisfies the appropriate level of heightened scrutiny; if the answer is no, then we determine whether the government conduct survives rational basis review.

[15] The Parents' complaint distinguishes between the parental right to direct the education and upbringing of their children (Count I), the parental right to direct the medical treatment of their children (Count II), and the parental right to family privacy (Count III). But the Parents do not explain how those three rights differ, or how those differences would alter our analysis. Indeed, the Parents' briefing generally refers to those rights as one and the same. That approach makes sense because, at bottom, the Parents challenge Ludlow's conduct as restricting their fundamental right to direct the care, custody, and upbringing of their children as recognized in Meyer, Pierce, and Troxel.

contention, is twofold: We must first determine whether the Parents have identified a right recognized as fundamental, and, if so, we must examine whether the Parents have sufficiently pled that Ludlow's conduct did, in fact, restrict that right. This section attempts to do just that, starting with the claimed right itself.

Our guiding light in this realm is a trio of Supreme Court parental right cases: Meyer v. Nebraska, 262 U.S. 390; Pierce v. Society of Sisters, 268 U.S. 510; and Troxel v. Granville, 530 U.S. 57. Those cases define the parental right broadly as a fundamental right to direct the care, custody, and upbringing of one's children. These rights are "perhaps the oldest of the fundamental liberty interests recognized by th[e] Court." Troxel, 530 U.S. at 65 (collecting cases). The Supreme Court made clear more than a century ago that the Due Process Clause gives parents the right to "bring up children" and "to control the education of their own." Meyer, 262 U.S. at 399, 401 (invalidating a ban on foreign-language instruction).

When we drill down on the Supreme Court's teachings, we observe that the Supreme Court's parental rights cases have never described an asserted right by reference to the specific conduct at issue. Meyer did not define the parents' asserted liberty interest as the right to allow their child to learn German before the eighth grade. See id. at 397, 403 (striking down a Nebraska statute prohibiting the teaching of foreign languages to students before completing the eighth grade). Nor did Pierce describe

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Thus, we collectively refer to the rights at issue as "parental rights under the Due Process Clause."

the parental interest at stake as the right to send one's child to religious school. See 268 U.S. at 534-35 (invalidating Oregon's compulsory public education statute). And Troxel did not define the right at issue as the right to prevent a grandparent from visiting with one's grandchild. See 530 U.S. at 72-73 (rejecting application of a Washington statute that allowed any person to petition for visitation rights with a child, at any time, with the only requirement being that the visitation serve the best interest of the child).

Rather, in each of those decisions, the Court instead considered whether the conduct at issue fell within the broader, well-established parental right to direct the upbringing of one's child. See Meyer, 262 U.S. at 399-403; Pierce, 268 U.S. at 534-35; Troxel, 530 U.S. at 65-67.

We necessarily follow that approach in the instant matter and thus decline to define the right at issue with microscopic granularity. See Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history (and) solid recognition of the basic values that underlie our society.'" (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring))). So, with that guidance in mind, we conclude that the Parents have identified a fundamental right in their complaint with sufficient specificity. See Troxel, 530 U.S. at 67.

But as noted earlier, our inquiry does not end there. Notwithstanding the Parents' adequately pled rights, we must still determine whether the Parents

have sufficiently alleged Ludlow engaged in conduct that actually restricted those fundamental rights.

Here, the Parents argue that Ludlow's conduct restricted their substantive due process rights in three ways: (1) Ludlow performed "medical treatment" on the Student through accepting the Student's social transition without parental consent; (2) Ludlow facilitated the Student's social transition to alternate genders via curricular and administrative decisions without parental consent; and (3) Ludlow implemented the Protocol, which deprived the Parents of information about the Student's expression of gender. We address each in turn, evaluating whether the Parents' claims are plausibly alleged in line with the broad principles set forth by the Supreme Court's substantive due process canon.

(1) Medical Treatment

We begin with the Parents' allegation that Ludlow's conduct restricted their fundamental right to direct medical treatment for their child. To repeat, parents do have a "fundamental right to make decisions concerning the care, custody, and control of" their children. Troxel, 530 U.S. at 72. That right includes the parental right "to seek and follow medical advice" concerning one's children. Parham v. J.R., 442 U.S. 584, 602 (1979). Ludlow, the Parents allege, "socially transitioned" their child to a new gender identity by accommodating their child's request to use a new name and pronouns at school. And, the Parents contend, because "'social transitioning' . . . is recognized as a medical/mental health treatment for children with gender dysphoria,"

Ludlow was "implementing a psychosocial treatment" on their child. The Parents conclude that, because Ludlow educators performed a "psychosocial treatment" without parental knowledge or consent, Ludlow usurped the Parents' fundamental right to direct medical treatment for their child.

The district court dismissed this claim (Count II) because the Parents provided only "conclusory statements describing the use of preferred names and pronouns as mental health treatment." Foote, 2022 WL 18356421, at *5. The Parents, for example, failed to allege that Ludlow's use of the Student's requested pronouns involved a "treatment plan" of any sort. Id. The district court, setting aside the conclusory allegations in the Parents' complaint, held that the Parents had not adequately pled that Ludlow "usurped their right to make medical and mental health treatment decisions for their children." Id.

We agree with the district court.[16] Although the Parents described the decisions made by Ludlow educators as "mental health treatment," their labeling, without more, cannot transform the alleged conduct into a medical intervention. The Parents allege, for example, that Ludlow educators spoke in private with their child to promote exploring and experimenting with alternative or discordant gender identities and facilitate their child's gender-affirming

[16] The district court properly separated the factual allegations from the legal conclusions in the Parents' complaint. See Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1, 12 (1st Cir. 2011) (instructing courts to disregard "statements in the complaint that merely offer 'legal conclusions couched as fact'" (alterations and ellipses omitted) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009))). We do the same.

social transitioning, which, the Parents say, constitutes mental health treatment. Am. Compl. ¶¶ 46, 52, 53, 78. But on this appellate record, we are unconvinced that merely alleging Ludlow's use of gender-affirming pronouns or a gender-affirming name suffices to state a claim that the school provided medical treatment to the Student. In fact, while the Supreme Court has "never specifically defined the scope of a parent's right to direct her child's medical care," PJ ex rel. Jensen v. Wagner, 603 F.3d 1182, 1197 (10th Cir. 2010), the Parents fail to state a claim because their allegations as stated do not suffice to describe medical treatment at all. The leading Supreme Court decision on parental control of medical care, Parham, involved a child's institutionalization at a mental health hospital. See 442 U.S. at 615.[17] The Sixth Circuit's decision in Kanuszewski v. Michigan Department of Health and Human Services suggested that a state actor's retention of blood samples from children without parental consent violated substantive due process. See 927 F.3d 396, 420 (6th Cir. 2019). And the Tenth Circuit, in Dubbs v. Head Start, Inc., suggested that a government-funded preschool program violated parents' right to direct their children's medical care where a nurse performed physical examinations and blood tests on children without parental notice or consent. See 336 F.3d 1194, 1203-04 (10th Cir. 2003).

[17] Although Parham primarily addressed a procedural due process claim, the Court's analysis relied on canonical cases establishing the substantive due process rights of parents, such as Meyer and Pierce. See Parham, 442 U.S. at 602-04.

Each of those cases involved intrusions upon the bodily integrity of the child or other conduct with clinical significance -- whether through a medical procedure, examination, or hospitalization. Thus, although precedent indicates that parents have the right to direct their children's medical treatment, whether that treatment is complex or more routine, the allegations here do not involve clinical conduct at all. Solely as pled here, we do not believe that using the Student's chosen name and pronouns -- something people routinely do with one another, and which requires no special training, skill, medication, or technology -- without more, can be reasonably viewed as evidencing some indicia of medicalization. Indeed, when we view the complaint in the light most favorable to the Parents, we conclude their bare contention that Ludlow's practice constituted medical treatment that restricted their parental right to control their child's medical care is not plausible.[18] As the Supreme Court reminds us, we need not abandon our "judicial experience and common sense" in our scrutiny of allegations pled. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). Hence, the district court correctly dismissed Count II of the Parents' complaint.

(2) Curricular and Administrative Decisions

The Parents also claim that the actions of Ludlow's teachers and staff restricted their parental rights by "facilitat[ing]" the Student's gender-affirming social transition. They cite librarian Funke's request that

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[18] We need not opine on whether, under certain circumstances, acceding to a student's use of a chosen name and pronouns could ever constitute medical treatment.

students state their pronouns as part of an academic, biographic video assignment, the teachers' use of the Student's requested name and pronouns at school, counselor Foley's permitting the Student to use the bathroom of their choice, and Foley's discussion of gender identity-related concerns with the Student. The Parents allege that these actions, taken without their knowledge or consent, restricted their fundamental right to direct the upbringing of their child.

The measures the Parents cite, however, all involve decisions by Ludlow's staff about how to reasonably meet diverse student needs within the school setting. The Supreme Court has never suggested that parents have the right to control a school's curricular or administrative decisions. Rather, the Court's parental rights cases more essentially provide "that the state cannot prevent parents from choosing a specific educational program." Parker v. Hurley, 514 F.3d 87, 101 (1st Cir. 2008) (quoting Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 533 (1st Cir. 1995), abrogated on other grounds by DePoutot, 424 F.3d at 118 n.4). Meyer, for example, struck down a Nebraska statute prohibiting the teaching of foreign languages in part because the law interfered with the parental right to procure such instruction for their children. See 262 U.S. at 401. And Pierce invalidated an Oregon law requiring parents to send their children to public school between the ages of eight and sixteen. See 268 U.S. at 534-35. In both cases, the state had barred parents from enrolling their children in a particular educational track. Yet neither Meyer nor Pierce undermines "the state's power to prescribe a curriculum for institutions which it supports."

Meyer, 262 U.S. at 402; see also Pierce, 268 U.S. at 534 ("No question is raised concerning the power of the state reasonably to regulate all schools . . . [and] to require . . . that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.").

We have consistently applied these principles in rejecting parental control over curricular and administrative decisions. In Parker, for example, the plaintiff parents claimed a right to "be given prior notice by the school and the opportunity to exempt their young children from exposure to books they f[ound] religiously repugnant." 514 F.3d at 90. Two books at issue "portray[ed] diverse families, including families in which both parents [were] of the same gender," while another book "depict[ed] and celebrate[d] a gay marriage." Id. In rejecting the parents' substantive due process claim, we noted that no federal court had ever held that the Due Process Clause "permitted parents to demand an exemption for their children from exposure to certain books used in public schools." Id. at 102. We concluded that, once parents choose to send their children to public school, "they do not have a constitutional right to 'direct how a public school teaches their child.'" Id. (quoting Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 395 (6th Cir. 2005)).[19]

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[19] This principle has been recognized in most circuits for decades. See, e.g., Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005), amended by 447 F.3d 1187 (9th Cir. 2006) ("[O]nce parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially

Likewise, in Brown, we considered a high school's failure to notify parents of their ability to exempt their children from a sex education presentation. 68 F.3d at 529-30. Those parents sued, claiming the school's action -- well, inaction -- restricted their substantive due process right to direct the upbringing of their children and educate them according to their own views. Id. at 532. In rejecting the parents' claim, we explained that Meyer and Pierce protect against "the state proscribing parents from educating their children," not situations where parents seek to "prescrib[e] what the state [should] teach their children." Id. at 534 (emphases added). In so doing,

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diminished."); Crowley v. McKinney, 400 F.3d 965, 971 (7th Cir. 2005) (noting "the only federal constitutional right vis-à-vis the education of one's children that the [Supreme Court's] cases as yet recognize . . . is the right to choose . . . among different types of school with different curricula, educational philosophies, and sponsorship (e.g., secular versus sectarian). It is not a right to participate in the school's management . . . ."); 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 [their] child will and will not be taught."); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 291 (5th Cir. 2001) ("While Parents may have a fundamental right in the upbringing and education of their children, this right does not cover the Parents' objection to a public school Uniform Policy."); Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699 (10th Cir. 1998) ("[P]arents 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."); Herndon ex rel. Herndon v. Chapel Hill–Carrboro City Bd. of Educ., 89 F.3d 174, 177-79 (4th Cir. 1996) (holding that a requirement for high school students to perform community service does not violate the parental right to control their child's education).

we emphasized that schools need not "cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter." Id.

The Parents' objections here are no different. To the extent the Parents oppose certain academic assignments, the use of a student's pronouns in the classroom, decisions about bathroom access, and a guidance counselor speaking to a student, none of those concerns restrict parental rights under the Due Process Clause. Rather, the Parents are challenging how Baird Middle School chooses to maintain what it considers a desirable and fruitful pedagogical environment. Though the parents in Parker and Brown specifically challenged curricula, our rejection of those claims recognized the broad discretion of schools to manage academic and administrative functions. See, e.g., Parker, 514 F.3d at 102; Brown, 68 F.3d at 534. Indeed, "[w]hether 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 . . . dress code[s], these issues of public education are generally 'committed to the control of state and local authorities.'" Blau, 401 F.3d at 395-96 (quoting Goss v. Lopez, 419 U.S. 565, 578 (1975)). So it is here.

Because public schools need not offer students an educational experience tailored to the preferences of their parents, see Brown, 68 F.3d at 534, the Due Process Clause gives the Parents no right to veto the curricular and administrative decisions identified in the complaint.

(3) The Protocol

We come now to the Parents' challenge to Ludlow's nondisclosure Protocol. As alleged by the Parents' complaint, the Protocol provides that "parents are not to be informed of their child's transgender status and gender-affirming social transition to a discordant gender identity unless the child, of any age, consents." The Protocol, the Parents argue, restricted their right to direct their child's upbringing in that it deceived them and, in doing so, deprived them of information about the Student. But, as we'll unpack, the Parents' challenge here fails.

For starters, Ludlow's Protocol of deference to a student's decision about whether to disclose their gender identity to their parents lacks the "coercive" or "restraining" conduct that other courts have found to restrict parental rights in this context. J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 934 (3d Cir. 2011) (quoting Anspach ex rel. Anspach v. City of Phila., Dep't of Pub. Health, 503 F.3d 256, 266 (3d Cir. 2007)). In Arnold v. Board of Education of Escambia County, for example, the Eleventh Circuit held that school officials violated parental rights by coercing a minor into having an abortion and concealing the decision from her parents. 880 F.2d 305, 312-13 (11th Cir. 1989), overruled on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intel. and Coordination Unit, 507 U.S. 163 (1993). There, a school counselor demanded that the student have an abortion, and school officials provided the money and transportation necessary for the procedure. Id. at 309, 313. And, unlike Ludlow's deference to the Student, school officials in Arnold

"coerced the minors to refrain from consulting with their parents." Id. at 312.

Here, by contrast, there are no allegations of coercive conduct towards the Student. The Parents object to Ludlow employees sharing resources about gender expression and to the messages from Counselor Foley to the Student asking if the Parents and the Parents' counselor were providing adequate care for the Student. But providing educational resources about LGBTQ-related issues to a child who has shown interest imposes no more compulsion to identify as genderqueer than providing a book about brick laying could coerce a student into becoming a mason. See Anspach, 503 F.3d at 266 (rejecting assertion that "the atmosphere at the Center was sufficiently coercive"). Nor are the chat messages coercive, even when viewed in a light most favorable to the Parents. Those messages cannot reasonably be viewed as strongarm statements; rather, they are essentially questions from a school counselor trying to assess the well-being of a student.

The Parents, however, also claim that Ludlow "deliberately deceive[d] parents . . . by continuing to refer to their child by [their] birth name and pronouns in the presence of the parents, [while using] the child's preferred alternative name and pronouns at all other times." Viewed in the light most favorable to the Parents, this allegation arguably challenges a restraining act by Ludlow -- that is, deceptive communication to the Parents about a child's expression of gender in school. Cf. Snyder, 650 F.3d at 934 (noting that "manipulative" conduct by the government could interfere with parental rights

under the Due Process Clause (quoting Anspach, 503 F.3d at 265)).

This theory of affirmative misrepresentation is unavailing here. The complaint contains only general allegations that, under the Protocol, Ludlow educators were directed to "intentionally misinform[] and lie[]" to the Parents about the Student's requested name and pronouns. But, and as the Parents contradictorily state in their complaint, when a teacher mailed a card to the Student at home, it was addressed to "R.F.", the Student's newly identified name, not "B.F.," the Student's assigned-at-birth name. And no allegation suggests that, when the Parents tried to speak with school officials about the Student, the officials misrepresented the name the Student had chosen for in-school use. Rather, the officials (beyond Manchester's communications with the Parents) just declined to discuss the Student's gender identity issues with the Parents.

Beyond this theory of affirmative deception, the Parents also mount a challenge to the withholding of information about a student's expression of gender while at school. But this nondisclosure angle similarly does not state a constitutional deprivation. That is because it is clear to us from precedent that in attempting to establish a constitutional deprivation of this sort, it is not enough for the Parents to allege that the nondisclosure Protocol makes their parenting more challenging. The guarantee of substantive due process limits "the State's power to act" by forbidding governments from "depriv[ing] individuals of life, liberty, or property without 'due process of law.'" See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (rejecting substantive due

process claim based on social workers' failure to protect a child from abuse). Yet the Supreme Court has made clear that the Due Process Clause "cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." Id.

As other circuits have concluded, this limiting principle applies to parental rights. See, e.g., Anspach, 503 F.3d at 262; Doe v. Irwin, 615 F.2d 1162, 1168 (6th Cir. 1980). In Anspach, the parents of a sixteen-year-old girl sued a city-run health center that provided their daughter with emergency contraception medication, alleging that the facility violated their substantive due process right to family relations. 503 F.3d at 259-61. The center, according to the parents, not only "failed to encourage [the minor] to consult with her parents before deciding whether to take emergency contraception," but even "intended to influence [the minor] to refrain from discussing with her parents her possible pregnancy." Id. at 262. And, more broadly, the parents alleged "that the [c]enter's policies were aimed at preventing parents from learning of their minor daughter's possible pregnancies." Id. at 261.

The Third Circuit rejected the parents' claim because 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. In elaborating, the court observed that the "real problem" alleged by the parents was "not that the state actors interfered with the [plaintiffs] as parents; rather, it [wa]s that the state actors did not assist [the plaintiffs] as parents or affirmatively foster the parent/child relationship." Id. at 266.

A cognizable parental rights claim under the Due Process Clause, the Third Circuit explained, generally requires restraining conduct by the government, not mere nondisclosure of information. Id. at 266. The court held that the health center engaged in no such conduct because it did not "prevent[] [the minor] from calling her parents before she took the pills she had requested." Id. at 264. "Although [the parents'] moral and religious sensibilities may have been offended by their daughter seeking out and using emergency contraception, her decision was voluntary." Id. at 268. Thus, because the Due Process Clause "does not protect parental sensibilities, nor guarantee that a child will follow their parents' moral directives," the parents' constitutional rights were not restricted. Id.

The Sixth Circuit adopted a similar view of parental rights under the Due Process Clause in Doe v. Irwin. There, parents of minor children sued a publicly funded family planning clinic, alleging that the clinic's distribution of contraceptives to minors without parental notice violated their parental rights. 615 F.2d at 1163. The district court, which enjoined that practice, held that the clinic interfered with the parents' fundamental rights because the parents were "prevented from being made aware of the actions of a state-run agency which facilitate[d] a situation inimical to the values the parents [we]re attempting to teach their children." Id. at 1166. The Sixth Circuit reversed, explaining that the Supreme Court's parental rights cases -- such as Meyer and Pierce -- each involved situations where "the state was either requiring or prohibiting some activity." Id. at 1168. The clinic, in contrast, never "require[d] that the

children of the plaintiffs avail themselves of the services offered." Id. Nor did the clinic prohibit the parents from "participating in decisions of their minor children on issues of sexual activity and birth control." Id. In fact, the parents remained "free to exercise their traditional care, custody and control over their unemancipated children." Id. The bottom line was that "the practice of not notifying [parents] of their children's voluntary decisions" did not deprive the parents of a protected liberty interest. Id.

Here, too, the challenged governmental action (the Protocol) merely instructs teachers not to offer information -- a student's gender identity -- without a student's consent. In the instant matter, the Parents remain free to strive to mold their child according to the Parents' own beliefs, whether through direct conversations, private educational institutions, religious programming, homeschooling, or other influential tools. See Anspach, 503 F.3d at 266.

The Parents disagree that these alternatives suffice to protect their rights. They allege that the Protocol impermissibly infringes on their ability to use these methods to guide the upbringing of the Student because they are denied important information about the Student's gender. But the Protocol operates only in the school setting, where -- as we have explained -- parents have less authority over decision-making concerning their children. Outside school, parents can obtain information about their children's relationship to gender in many ways, including communicating with their children and making meaningful observations of the universe of circumstances that influence their children's preferences, such as in clothing, extracurricular

activities, movies, television, music, internet activity, and more.

To be sure, knowing that the Student had requested the use of an alternative name and pronouns in school might inform how the Parents respond to and direct their child's gender expressions outside of school. In all likelihood, the Student's lack of consent to share their in-school gender choices with their Parents might mean they would be cautious outside of school to avoid signals that might disclose those choices. Indeed, we are sympathetic to the Parents' interest in having as much information as possible about their child's well-being and behavior in school revealed to them. Nonetheless, as we have explained, our survey of Due Process Clause jurisprudence suggests that this canon does not require governments to assist parents in exercising their fundamental right to direct the upbringing of their children, and the Parents' objections to the Protocol here in large part take issue with that principle as we understand it to be.

In any event, as the complaint makes clear, the Parents did learn from school staff about the Student's use of a different name and pronouns within days of those changes and discussed those changes with school leadership. In this as-applied challenge, we conclude that the allegations in the Parents' complaint about how the Protocol was implemented with respect to the Student did not

restrict any fundamental parental right protected by the Due Process Clause.[20]

C. Applying Constitutional Scrutiny

Let's regroup: We've concluded that the Parents have not plausibly alleged that Ludlow's conduct restricted a fundamental right. Be that as it may, the conduct still must withstand constitutional scrutiny. Namely, in view of our no-restricted-fundamental-right conclusion, the conduct must survive rational basis review.[21] See, e.g., González-Droz v. González–Colón, 660 F.3d 1, 9 (1st Cir. 2011) (explaining that rational basis review applies when a plaintiff fails to allege that state conduct has infringed a fundamental right). Under that deferential standard, we presume the challenged conduct is valid so long as it "is rationally related to a legitimate state interest." Id. (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)). In performing rational basis review, we consider only whether the state could have reasonably concluded that the challenged conduct "might advance its legitimate interests," id.

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[20] In our determinations in this dispute, we emphasize that our analysis here is not intended to categorically preclude parental challenges to policies of public schools under the Due Process Clause. But see Parents for Priv. v. Barr, 949 F.3d 1210, 1232 (9th Cir. 2020).

[21] As we undertake this analysis, we focus on the Protocol itself, not on the actions taken to implement the Protocol. If the Protocol is constitutional, then simply acting in accordance with it cannot independently be unconstitutional. See, e.g., Timothy M. Tymkovich et al., A Workable Substantive Due Process, 95 Notre Dame L. Rev. 1961, 2003 (2020) ("If the policy is constitutional, then acting in accordance with it cannot 'shock the conscience.'").

at 10, and, ordinarily, the "reasoning [that] in fact underlay the legislative decision" is "constitutionally irrelevant," Kittery Motorcycle, Inc. v. Rowe, 320 F.3d 42, 49 n.8 (1st Cir. 2003) (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980)). However, "some objectives -- such as a 'bare desire to harm a politically unpopular group' -- are not legitimate state interests." Cleburne, 473 U.S. at 446-47 (quoting U.S. Dept. of Agric. V. Moreno, 413 U.S. 528, 534 (1973))); see also Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (noting, in the context of the Equal Protection Clause, that "a more searching form of rational basis review" may apply where "a law exhibits such a desire to harm a politically unpopular group").[22]

Ludlow asserts an interest in cultivating a safe, inclusive, and educationally conducive environment for students, which allows students to thrive and thus learn. The Parents insist Ludlow "exceeded the bounds of legitimate pedagogical concerns and usurped the role of [the Parents] . . . to direct the upbringing of their children." But in reasonable due deference to Ludlow's articulated policy rationale and based on its asserted interest, we conclude Ludlow's conduct is rationally related to its legitimate stated

[22] A quick note. There is potential tension between the rights of the Parents and the rights of the Student that makes this case different from previous parental rights cases decided by the Supreme Court. Like, for example, the Student's right not to be discriminated against on the basis of sex, which is one of the stated rationales for the DESE Guidance. Because this case centers on the state interest and does not take up the rights of the Student, though, our coming analysis is confined to a discussion of the former.

interest, and thus the Protocol survives rational basis review.

State actors have "a compelling interest in protecting the physical and psychological well-being of minors." Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). That interest is at its apex when a school board seeks to protect children who are particularly vulnerable, such as transgender minors. See Doe ex rel. Doe v. Boyertown Area Sch. Dist., 897 F.3d 518, 528-29 (3d Cir. 2018) (holding that a school district had a compelling interest in protecting the physical and mental well-being of transgender children). Here, we refer to the Commonwealth's investigative findings (articulated, without refute, in the motion to dismiss) which suggest that though many parents are supportive of their children's expression of gender, it is not uncommon for students exploring their gender identity to fear parental backlash against their choices. See DESE Guidance ("Some transgender and gender nonconforming students are not openly so at home for reasons such as safety concerns or lack of acceptance.").

The Protocol plausibly creates a space for students to express their identity without worrying about parental backlash. By cultivating an environment where students may feel safe in expressing their gender identity, the Protocol endeavors to remove psychological barriers for transgender students and equalizes educational opportunities. See, e.g., Boyertown, 897 F.3d at 523 ("[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."

(internal quotation marks omitted)); Grimm, 972 F.3d at 597 (explaining that "transgender students have better mental health outcomes when their gender identity is affirmed").

In sum, the Protocol bears a rational relationship to the legitimate objective of promoting a safe and inclusive environment for students. Rational basis review requires nothing more.

III. FINAL WORDS

Here's where all of this leaves us.

As this opinion has endeavored to illuminate, we acknowledge the fundamental importance of the rights asserted by the Parents to be informed of, and to direct, significant aspects of their child's life -- including their socialization, education, and health. Be that as it may -- as this opinion has also made effort to explicate -- parental rights are not unlimited. Parents may not invoke the Due Process Clause to create a preferred educational experience for their child in public school. As per our understanding of Supreme Court precedent, our pluralistic society assigns those curricular and administrative decisions to the expertise of school officials, charged with the responsibility of educating children. And the Protocol of nondisclosure as to a student's at-school gender expression without the student's consent does not restrict parental rights in a way courts have recognized as a violation of the guarantees of substantive due process.

All told, the Parents have failed to state a claim that Ludlow's Protocol as applied to their family violated their constitutional right to direct the

upbringing of their child. We therefore affirm the district court's grant of the motion to dismiss.[23]

Costs to appellees.

[23] Having affirmed the dismissal of the Parents' complaint on substantive grounds, we need not address whether the individual defendants are entitled to qualified immunity.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

STEPHEN FOOTE., et al.,	*	
	*	
Plaintiffs,	*	
	*	Civil Action No.
v.	*	22-30041-MGM
	*	
TOWN OF LUDLOW,	*	
LUDLOW SCHOOL	*	
COMMITTEE, et al.,	*	
	*	
Defendants.	*	

ORDER ON DEFENDANTS' MOTION TO DISMISS
(Dkt. No. 25)

December 14, 2022

MASTROIANNI, U.S.D.J.

I. INTRODUCTION

Stephen Foote and Marissa Silvestri ("Plaintiffs") have alleged that during the 2020-2021 school year, staff employed by Ludlow Public Schools (1) spoke about gender identity with two of their children, who were then eleven and twelve years old and students at Baird Middle School; (2) complied with the children's requests to use alternative names and pronouns; and (3) did not share information with Plaintiffs about the children's expressed preferences regarding their names and pronouns. Plaintiffs allege these actions, and inactions, violated their

fundamental, parental rights protected by the Fourteenth Amendment to the United States Constitution. They filed this action pursuant to 42 U.S.C. § 1983 to seek redress for their alleged injuries.

Plaintiffs assert three claims against the Town of Ludlow; the Ludlow School Committee; Lisa Nemeth, Interim Superintendent; Todd Gazda, former Superintendent; Stacy Monette, Principal of Baird Middle School; Marie-Claire Foley, school counselor at Baird Middle School; and Jordan Funke, former librarian at Baird Middle School (collectively "Defendants"). First, they allege Defendants violated their fundamental parental right to direct the education and upbringing of their children. Second, they allege Defendants violated their fundamental parental right to direct the medical and mental health decision-making for their children. Finally, they assert Defendants violated their fundamental right to familial privacy.

Defendants have moved for dismissal of Plaintiffs' claims.[1] The court grants Defendants' motion for the reasons that follow.

II. MOTION TO DISMISS STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting

[1] The court has also received and reviewed amici curiae memoranda submitted by GLBTQ Legal Advocates and Defenders and the Massachusetts Association of School Superintendents in support of Defendants and the Family Institute of Connecticut in support of Plaintiffs.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)); Fed. R. Civ. P. 12(b)(6). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. The court accepts all well-pleaded factual allegations and draws all reasonable inferences in Plaintiffs' favor, but "do[es] not credit legal labels or conclusory statements." *Cheng v. Neumann*, 51 F.4th 438, 443 (1st Cir. 2022). Dismissal is appropriate if the complaint fails to establish at least one "material element necessary to sustain recovery under some actionable legal theory." *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 6 (1st Cir. 2005) (internal citation omitted).

III. FACTUAL ALLEGATIONS[2]

During the 2020-2021 school year, Plaintiffs' children B.F. and G.F. were eleven and twelve years old and were students at Baird Middle School in Ludlow, Massachusetts. Early in the school year, school librarian Jordan Funke gave students in B.F.'s sixth grade class an assignment to make biographical videos. Funke invited students to include their gender identity and preferred pronouns in their videos. The students also received instruction about language

[2] Plaintiffs' Amended Complaint included a section entitled "Factual Allegations" that contained a mix of "nonconclusory, non-speculative factual allegations" together with conclusory statements about the legal significance of various factual allegations. *Cheng*, 51 F.4th at 443. The court summarizes the factual allegations, which the court must credit at this stage, but omits the legal conclusions promoted by Plaintiffs. *Id.*

that is inclusive of students with different gender identities.

In December 2020, B.F. spoke with a teacher and asked for help talking to Plaintiffs about concerns about depression, low self-esteem, poor self-image, and possible same-sex attraction. The teacher spoke with Silvestri, B.F.'s mother, and shared B.F.'s concerns with her. Shortly after that conversation, Silvestri sent an email to B.F.'s other teachers, Stacy Monette, Todd Gazda, and several members of the Ludlow School Committee. In her email, she stated that Plaintiffs were aware of the teacher's concerns about B.F.'s mental health, they would be getting B.F. professional help, and requested that no one receiving the email "have any private conversations with B.[F.] in regards to this matter." (Dkt. No. 22, Am. Compl. ¶ 70.)

On February 28, 2021, B.F. sent an email to Gazda, Marie-Claire Foley, and several teachers. In that email, B.F. identified as genderqueer and announced a new preferred name, one typically used by members of the opposite sex, and a list of preferred pronouns. Foley met with B.F. and, after their meeting, sent an email stating that B.F. was "still in the process of telling" Plaintiffs about B.F.'s gender identity and instructed school staff that they should not use B.F.'s new preferred name and pronouns when communicating with B.F.'s parents. Foley's position was consistent with a policy sanctioned by the School Committee, pursuant to which school personnel would only share information about a student's expressed gender identity with the student's parents if the student consented to such communication. After

Foley sent her email, teachers at Baird Middle School began using B.F.'s new preferred name and pronouns.

In early March, the same teacher who had spoken with Silvestri in December informed Plaintiffs about B.F.'s email, despite the policy and B.F.'s request that Plaintiffs not be told. On March 8, 2021, Foley sent another email to school staff in which she reiterated that B.F. had expressly requested that Plaintiffs not be told about B.F.'s new first name. Several days later, Foley gave B.F. permission to use boys' bathrooms, girls' bathrooms, or gender-neutral bathrooms. Around this same time, G.F. also began using a different preferred name and school staff did not inform Plaintiffs.

On March 18, 2021, Monette met with Plaintiffs. During their meeting, Plaintiffs asserted that Defendants had disregarded their parental rights by not complying with Silvestri's December 2020 request that staff not engage with B.F. regarding mental health issues and by failing to notify them about their children's use of alternate names and pronouns. Plaintiffs also conveyed to Monette their belief that school staff were acting improperly by affirming B.F.'s and G.F.'s self-asserted gender identities. Monette refused to discuss the issues raised by Plaintiffs and ended the meeting abruptly.

Plaintiffs met with Gazda on March 21, 2021. During that meeting, they expressed concerns about negative consequences their children might experience as a result of being able to use names and pronouns associated with the opposite sex. They objected to the way school staff had disregarded their instructions and supported the children's use of

different names and pronouns at school. Plaintiffs also told Gazda that they believed school staff violated their rights with respect to their children's student records by concealing information about their children from them.

In response, Gazda told Plaintiffs that school staff acted appropriately and consistently with policies approved by the School Committee when they began using the children's new names and pronouns without consulting with or notifying Plaintiffs. Gazda also asserted that school staff had not violated the Massachusetts regulation protecting parents' "rights of confidentiality, inspection, amendment, and destruction of student records" for students under the age of fourteen and not yet in ninth grade. 603 C.M.R. § 23.01. Gazda took the same positions when he met with Plaintiffs again on March 26, 2021.

Foley met with B.F. weekly throughout the spring of 2021. They discussed B.F.'s gender identity and mental health issues. During their conversations, Foley consistently affirmed B.F.'s gender identity. On some occasions, Foley expressed concern about whether Plaintiffs were providing appropriate care for B.F. and whether B.F. had sufficient support to stay safe. She asked whether B.F. was as comfortable discussing issues with the counselor chosen by Plaintiffs as with her and encouraged B.F. to speak with another counselor to increase sources of support. Foley did not communicate with Plaintiffs about B.F.'s gender identity or any other issues they discussed. B.F. also talked about gender identity with Funke. Funke was affiliated with an organization that shares resources related to gender and gender

identity and Funke encouraged B.F. to visit the organization's website.

Later in the spring, Gazda publicly defended the Ludlow Public Schools policy. During School Committee meetings on May 25, 2021 and June 8, 2021, Gazda expressed support for the policy that instructed school staff to respect students' expressed gender identities and follow a student's preferences about whether to share information about the student's gender identity with the student's parents. He described the types of "parental rights" concerns raised by Plaintiffs as thinly-veiled intolerance and asserted that for some students who are transgender or gender nonconforming, school is the only safe place to express who they are.

IV. STATE LAWS, REGULATIONS, AND GUIDANCE REGARDING GENDER IDENTITY

States enjoy a general power to regulate the schools they support. *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008). This includes the power to prescribe a curriculum designed to promote tolerance and provide a safe learning environment for all students. *Id.* While parents do not have to send their children to public school, those who make that choice "do not have a constitutional right to direct *how* a public school teaches their child." *Id.* (internal quotation marks omitted) (emphasis in original).

The Commonwealth of Massachusetts recognizes gender identity as a personal characteristic deserving of protection from discrimination. Since July 1, 2012, Massachusetts law has provided that "[n]o person shall be excluded from or discriminated against . . . in obtaining the advantages, privileges and courses of

study of [a] public school on account of . . . gender identity." Mass. Gen. Laws ch. 76, § 5. As defined under Massachusetts law, "gender identity" means "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." Mass. Gen. Laws ch. 4, § 7.

A person's "gender-related identity may be shown by providing . . . any . . . evidence that the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose." *Id.*; *see also* 603 C.M.R. § 26.01. Neither the statute defining gender identity, nor the statute prohibiting schools from discriminating based on gender identity, limit the age at which a person can assert a gender identity that "is different from that traditionally associated with the person's physiology or assigned sex at birth." *Id.* Similarly, a separate provision of Massachusetts law related to minors and gender identity does not distinguish between children of different ages and, instead, provides a blanket prohibition against health care providers engaging in any practice, with any patient under the age of eighteen, "that attempts or purports to impose change of an individual's . . . gender identity." Gen. Laws ch. 112, § 275.

The regulations implementing the anti-discrimination statute applicable to schools state that "[a]ll public school systems shall, through their curricula, encourage respect for the human and civil rights of all individuals regardless of . . . gender identity." 603 C.M.R. § 26.05. School committees are

also required to "establish policies and procedures . . . that insure that all obstacles to equal access to school programs for all students regardless of . . . gender identity, are removed." 603 C.M.R. § 26.07(1). Although these laws and regulations were adopted before there was universal support for the values they protect, none were written to provide exceptions to permit parents to override a school's decision to support students who identify as transgender or gender nonconforming.

Additional, non-binding guidance for schools has been provided by the Massachusetts Department of Elementary and Secondary Education (DESE). The DESE Guidance provides that "[t]he responsibility for determining a student's gender identity rests with the student, or in the case of young students not yet able to advocate for themselves, with the parent." DESE, GUIDANCE FOR MASSACHUSETTS PUBLIC SCHOOLS CREATING A SAFE AND SUPPORTIVE SCHOOL ENVIRONMENT (hereafter "DESE Guidance"), https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html#5. Schools are advised that "[t]here is no threshold medical or mental health diagnosis or treatment requirement that any student must meet in order to have his or her gender identity recognized and respected by a school." *Id.* The DESE Guidance also encourages schools to "engage the student, and in the case of a younger student, the parent, with respect to name and pronoun use." *Id.* Other than describing younger students as unable to advocate for themselves, the DESE Guidance does not advise schools to treat students of certain ages or grades differently from older students.

The DESE Guidance advises that not all transgender and gender nonconforming students are open about their gender identities with their families for reasons that can include safety concerns and lack of acceptance. *Id.* When students self-identify to a school as transgender or gender nonconforming, the DESE Guidance advises that "[s]chool personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent or guardian" and "discuss with the student how the school should refer to the student, e.g., appropriate pronoun use, in written communication to the student's parent or guardian." *Id.* The provisions of the DESE Guidance related to communications with a student's family do not distinguish between older and younger students.

V. DISCUSSION

Plaintiffs have alleged Defendants' conduct violated three different fundamental parental rights protected under the substantive due process clause of the Fourteenth Amendment: (1) the right to direct the education and upbringing of their children (Count I), (2) the right to make medical and mental health decisions for their children (Count II), and (3) the right to family integrity (Count III). Defendants have moved for dismissal, pursuant to Fed. R. Civ. P. 12(b)(6), of all three of Plaintiffs' claims, as to all Defendants. They assert that even when the court credits the well-pleaded factual allegations, Plaintiffs' Amended Complaint fails to identify a substantive due process claim cognizable under 42 U.S.C. § 1983. Defendants also argue that any claims asserted against the individual defendants should be

dismissed pursuant to the doctrine of qualified immunity.

The court begins its analysis by assuming the truth of Plaintiffs' factual allegations and identifying any statements in the complaint that merely offer legal conclusions couched as fact, since such conclusory statements are not entitled to the presumption of truth. *See Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 12 (1st Cir. 2011). Many factual allegations set forth in Plaintiffs' Amended Complaint are followed by statements that draw a conclusion about the nature or significance of the alleged fact. For example, the Amended Complaint contains factual allegations about Defendants' responses to B.F.'s and G.F.'s requests to use their preferred names and pronouns followed by brief descriptors identifying the actions as "social transitioning," "mental health treatment" and, in one instance, as "psychosocial treatment." (*See e.g.* Dkt. No. 22, Am. Compl. ¶¶ 42, 43, 45, 46, 56, 74, 78, 84.) At the hearing on Defendants' Motion to Dismiss, Plaintiffs were equivocal as to whether Defendants' actions constituted actual mental health treatment or if either of their children had an actual existing mental health condition related to gender identity. While Plaintiffs maintained that Defendants were providing mental health treatment when they "permit[ted] [B.F. and G.F.] to be identified as either nonbinary or the opposite sex of what their bodies are," the Amended Complaint alleges insufficient facts for the court to conclude that the conduct at issue constituted mental health treatment. (Dkt. No. 48, Tr. Oct. 17, 2022 Hr'g, 14.) Although "social transitioning," "mental health treatment," and "psychosocial treatment" all appear to be terms of art,

Plaintiffs have not provided the context necessary for the court to infer the alleged conduct had clinical significance, as the Amended Complaint describes the terms in a conclusory manner and contains no allegations that either minor had a diagnosed mental health condition related to gender identity.

"Being transgender is . . . not a psychiatric condition, and implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020), as amended (Aug. 28, 2020) (internal quotation marks omitted). Gender dysphoria is a recognized mental health disorder, but Plaintiffs have not alleged either child has been diagnosed with gender dysphoria, or even that Defendants erroneously believed the children suffered from gender dysphoria. *Id.* at 594-95. Plaintiffs have not alleged Defendants' actions were undertaken as part of a treatment plan for gender dysphoria or explained how referring to a person by their preferred name and pronouns, which requires no special training or skill, has clinical significance when there is no treatment plan or diagnosis in place. Similarly, there are no non-conclusory allegations that social transitioning was actually occurring or includes supportive actions taken by third parties, as opposed to actions a person takes to understand or align their external gender presentation with their gender identity. Addressing a person using their preferred name and pronouns simply accords the person the basic level of respect expected in a civil society generally, and, more specifically, in Massachusetts public schools where discrimination on the basis of gender identity is not permitted. *See*

Mass. Gen. Laws ch. 76, § 5. This is true regardless of an individual's age, provided the individual does not have a fraudulent purpose for using a new preferred name or pronouns. *Id.*

In the absence of supporting factual allegations, such as a relevant medically-recognized diagnosis and treatment plan, the court disregards Plaintiffs' conclusory statements describing the use of preferred names and pronouns as mental health treatment. Plaintiffs have failed to adequately allege that Defendants provided medical or mental health treatment to B.F. and G.F. simply by honoring their requests to use preferred names and pronouns at school. Accordingly, Plaintiffs have not adequately stated a claim that Defendants usurped their right to make medical and mental health treatment decisions for their children. Count II is, therefore, dismissed.

The court next considers whether the factual allegations are sufficient to state the substantive due process claims asserted in Counts I and III. The substantive due process guarantees of the Fourteenth Amendment protect individuals from arbitrary government actions that interfere with "those fundamental rights . . . which are . . . deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotation marks omitted). The Due Process Clause protects against egregious abuses by government actors, but does not "impos[e] liability whenever someone cloaked with state authority causes harm" or guarantee that officials will use care when acting on behalf of the state. *County of Sacramento v. Lewis*, 523 U.S. 833, 848-49 (1998). The vehicle for enforcing the substantive rights guaranteed under the

Fourteenth Amendment is 42 U.S.C. § 1983, which "affords a private right of action in favor of persons whose federally assured rights are abridged by state actors." *Kando v. Rhode Island State Bd. of Elections*, 880 F.3d 53, 58 (1st Cir. 2018).

"To be cognizable, a substantive due process claim under 42 U.S.C. § 1983 must allege facts so extreme and egregious as to shock the contemporary conscience." *Abdisamad v. City of Lewiston*, 960 F.3d 56, 59-60 (1st Cir. 2020) (internal quotation marks omitted); *see also Martinez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010) ("[T]he shocks-the-conscience test . . . governs *all* substantive due process claims based on executive, as opposed to legislative, action."). "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Lewis*, 523 U.S. at 849.

At the motion to dismiss phase, substantive due process claims "must be carefully scrutinized to determine if the alleged facts support the conclusion that the state has violated an individual's constitutional rights." *Rivera v. Rhode Island*, 402 F.3d 27, 33 (1st Cir. 2005). Courts in the First Circuit take a "two-tiered approach" to substantive due process claims based on the behavior of state actors. *Martinez*, 608 F.3d at 64. Under this approach, a plaintiff must establish both conscience-shocking behavior by the defendant and "that a protected right was offended" by the defendant's conduct. *Id.* at 65. Generally, courts first determine whether the alleged conduct was sufficiently egregious because it is "[o]nly after 'show[ing] a constitutionally significant level of culpability' [that] a plaintiff [may] 'turn to establish-

ing that a protected right was offended.'"[3] *Abdisamad*, 960 F.3d at 60 (quoting *Martinez*, 608 F.3d at 65).

During the hearing on Defendants' Motion to Dismiss, the court asked Plaintiffs to identify the specific allegations of conscience-shocking conduct supporting their claims. Plaintiffs argued generally that Defendants' adoption and implementation of a policy of withholding information about a student's gender identity deprived Plaintiffs of their rights to make decisions about the upbringing of their children and intentionally undermined the parent/child relationship in a manner that shocks the conscience. The court understands this conduct, as alleged, to be offered in support of Plaintiffs' claims in Counts I and III.

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[3] Prior to *Abdisamad*, the First Circuit stated that while courts have "typically looked first to whether the acts alleged were conscience-shocking," the two-tiered process need not be applied rigidly. *Harron v. Town of Franklin*, 660 F.3d 531, 536 (1st Cir. 2011). However, as the Supreme Court explained in *Lewis*, courts do not need to determine whether "to recogniz[e] a substantive due process right to be free of [the alleged] executive action" unless they first determine the "necessary condition of egregious behavior" has been satisfied. *Lewis*, 523 U.S. at 847 n.8. There is no reason to depart from the typical analytical framework in this case given the relatively vague manner in which Plaintiffs have described the asserted fundamental liberty interests allegedly violated by Defendants and connected those interests to historically-established fundamental rights and liberties. *See Glucksberg*, 521 U.S. at 721 (1997); *see also Martinez*, 608 F.3d at 65 n.9 (describing the two-tiered approach as beginning with the level of culpability, while also observing "some tension between how *Lewis* and *Glucksberg* described the order in which courts should proceed to identify whether a plaintiff has identified a protected right").

There is no precise definition for conscience-shocking behavior that can be applied mechanistically to Plaintiffs' allegations. *See DePoutot v. Raffaelly*, 424 F.3d 112, 118 (1st Cir. 2005). However, a "stunning" level of arbitrariness that goes beyond "[m]ere violations of state law" is required. *Pagán v. Calderón*, 448 F.3d 16, 32 (1st Cir. 2006) (internal quotation marks omitted). Bad faith may help tip the scale, but "the contemporary conscience is much more likely" to be shocked by conduct that was "intended to injure in some way unjustifiable by any government interest." *DePoutot*, 424 F.3d at 119 (internal quotation marks omitted). The nature of the right violated and the government's competing interests, if any, may inform the determination of whether particular behavior shocks the conscience. *See Martinez*, 608 F.3d at 66. "Indeed, '[a] hallmark of successful challenges is an extreme lack of proportionality, as the test is primarily concerned with violations of personal rights so severe[,] so disproportionate to the need presented, and so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'" *Harron v. Town of Franklin*, 660 F.3d 531, 536 (1st Cir. 2011) (quoting *González-Fuentes v. Molina*, 607 F.3d 864, 881 (1st Cir. 2010)) (alterations in original).

Often, "an exact analysis of circumstances" is needed "before any abuse of power [can be] condemned as conscience shocking." *Lewis*, 523 U.S. at 850. Here, the circumstances certainly include the facts Plaintiffs have alleged about the conduct of various defendants. These include: inviting students

to provide their preferred pronouns as part of a personal biography project; sharing information about gender identity with B.F.; failing to respond to Silvestri's December 2020 email; engaging in supportive discussions with B.F. about gender identity; facilitating B.F.'s and G.F.'s use of their preferred names and pronouns while at school; deciding not to notify Plaintiffs when B.F. and G.F. began using different preferred names and pronouns; and publicly describing the views of individuals, including parents, who oppose Ludlow Public School policies for supporting transgender and gender nonconforming students, as intolerant and hateful. The relevant circumstances also include Massachusetts laws and regulations regarding gender identity, which establish a significant government interest in providing students with a school environment in which they may safely express their gender identities,[4] regardless of their ages or the preferences of their parents. Plaintiffs have not challenged the constitutionality of these laws.

Plaintiffs have framed their claims in the context of their rights as parents to make decisions for their children without state interference. Defendants have framed their actions in the context of obligations under Massachusetts law to provide a nondiscriminatory environment to all their students. At the hearing on Defendants' motion, Plaintiffs acknowledged that Defendants were not permitted to discriminate on the basis of gender identity, but

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[4] Provided, of course, that there was no evidence that a student had asserted a particular gender identity for an improper purpose. *See* Mass. Gen. Laws ch. 4, § 7.

asserted that Defendants' adoption and implementation of a policy of withholding information about their children's gender identity from parents went beyond what the law required and intentionally undermined the parent/child relationship in a manner that shocks the conscience.

On its face, the Massachusetts non-discrimination statute does not require such a policy and it is disconcerting that school administrators or a school committee adopted and implemented a policy requiring school staff to actively hide information from parents about something of importance regarding their child. Indeed, in an earlier case, this court recognized that deception by school officials could shock the conscience where the conduct obscured risks to a person's bodily integrity and was not justified by any government interest. *See Hootstein v. Amherst-Pelham Reg. Sch. Comm.*, 361 F. Supp. 3d 94, 112 (D. Mass. 2019). In that case, the plaintiff alleged school officials made deceptive statements about the safety of school drinking water that obscured the risks he faced when he drank water at the school and the deception violated his right to bodily integrity.[5] *Id.* Here, the court must consider the specific facts of this case—including the government interest, if any, served by Defendants' conduct—to determine whether Plaintiffs have met their burden of identifying conscience-shocking conduct.

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[5] The plaintiff in *Hootstein* was a grandparent proceeding pro se and only his own bodily integrity claim survived the motion to dismiss because, as a pro se litigant, he could not bring claims on behalf of others.

In December 2020, B.F. talked with a teacher about mental health concerns and possible same-sex attraction and expressed relief and gratitude when the teacher offered to talk with Plaintiffs about those concerns. The teacher then contacted B.F.'s mother (Silvestri), who responded by sending an email to B.F.'s teachers, Monette, Gazda, and members of the School Committee, in which she stated that Plaintiffs were getting B.F. professional help and requested that school staff not have any further private conversations with B.F. related to the concerns the teacher and B.F. had discussed. Two months later, B.F. identified as genderqueer, announced a new preferred name and list of preferred pronouns and, in contrast to December, did not ask for help talking with Plaintiffs. Instead, B.F. asked school staff to wait to use the new name and pronouns with Plaintiffs until after B.F. told Plaintiffs about them. Despite B.F.'s request and the alleged policy, the same teacher who talked with Silvestri in December 2020 informed Silvestri about Plaintiff's gender identity. This contact with B.F.'s parents was made in violation of school policy and without administrative approval. Upon learning that B.F. was using a new name and pronouns at school, Plaintiffs met with Monette. They asserted school staff were acting illegally by allowing their children to use preferred names and pronouns without parental permission. Following that meeting, Defendants deferred to the preferences of B.F. and G.F. and did not share any information about their gender identities with Plaintiffs.

Massachusetts has identified a strong government interest in providing all students, regardless of age, with a school environment safe from discrimination

based on gender identity. Under Massachusetts law, a person may establish their gender identity with "any . . . evidence that the gender-related identity is sincerely held as part of [the] person's core identity," except that "gender-related identity shall not be asserted for any improper purpose." Mass. Gen. Laws ch. 4, § 7; *see also* 603 C.M.R. § 26.01. There is no statutory limitation on the age at which an individual may assert a gender identity "different from that traditionally associated with the person's physiology or assigned sex at birth," and no exception that would allow a parent's beliefs to supersede a minor's sincerely held beliefs. *Id.*; *see also* Mass. Gen. Laws ch. 112, § 275 (barring gender conversion therapy for all minors).

Though non-binding, the DESE Guidance related to gender identity also provides relevant context for Defendants' actions. The DESE Guidance emphasizes the importance of creating a safe and supportive environment for students and encourages schools to work with students to develop plans for use of preferred names and pronouns. "[I]n the case of a younger student," DESE advises schools to create a plan with input from parents, but DESE has not defined younger students, other than by describing them as "not yet able to advocate for themselves." DESE Guidance, https://www.doe.mass.edu/sfs/lgbtq/genderidentity.html#5. The DESE Guidance also encourages schools to consult with students who assert a different gender identity at school before disclosing information about a student's gender identity to the student's family.

Plaintiffs assert the Ludlow Public Schools adopted and implemented a policy that went beyond the DESE

Guidance and rigidly prohibited any communication with parents about a student's gender identity unless the student consented and this policy shocked the conscience, at least when applied to students in middle school. The court agrees that the policy, as described by Plaintiffs, was based on a flawed interpretation of the DESE Guidance and ignored the plain language advising that parents be informed after the student is advised that such communication will occur. *See id.* ("School personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent or guardian."). Students and parents would almost certainly be better served by a more thoughtful policy that facilitated a supportive and safe disclosure by the student, with support and education available for students and parents, as needed and when accepted. Such a policy should also consider the many complicated and emotional issues and scenarios that may arise when this type of information is shared. Beliefs, understanding, and opinions surrounding this subject may evolve in a positive way with the benefit of information and honest dialogue. But, currently, the topic may also evoke negative or harmful reactions, which also must be considered. This is especially true when, as in this case, the students are old enough to independently assert their transgender or gender nonconforming identity, but still many years away from adulthood. Unlike the alleged Ludlow Public Schools policy, a policy that facilitates communication between students and parents would be consistent with the DESE Guidance and its recommendation to avoid

surprising students when informing parents about the matter.

However, even if Defendants' policy was imperfect and contrary to the non-binding DESE Guidance, the alleged policy was consistent with Massachusetts law and the goal of providing transgender and gender nonconforming students with a safe school environment. This case involves a difficult and developing issue; schools, and society as a whole, are currently grappling with this issue, especially as it relates to children and parents. *See Martinez*, 608 F.3d at 66 ("[W]hether behavior is conscience-shocking may be informed . . . by the nature of the right violated."). While the court is apprehensive about the alleged policy and actions of the Ludlow Public Schools with regard to parental notification, it cannot conclude the decision to withhold information about B.F. and G.F. from Plaintiffs was "so extreme, egregious, or outrageously offensive as to shock the contemporary conscience," given the difficulties this issue presents and the competing interests involved. *DePoutot*, 424 F.3d at 119. As conscience-shocking conduct is a necessary element for a substantive due process claim, the court ends its analysis here, without assessing whether Plaintiffs have adequately identified their protected rights and established they were offended under these facts. *See Abdisamad*, 960 F.3d at 60.

Finally, having determined that Plaintiffs' Amended Complaint should be dismissed on substantive grounds, it is not necessary for the court to address Defendants' arguments regarding qualified immunity. However, the court briefly notes that had Plaintiffs' Amended Complaint survived the

substantive analysis, qualified immunity would warrant dismissal of the claims asserted against all individual defendants. *See id.* ("Individual government officials may be sued 'for federal constitutional or statutory violations under § 1983,' though 'they are generally shielded from civil damages liability under the principle of qualified immunity.'"). Qualified immunity shields individual government actors from liability unless the plaintiff can demonstrate both that the "the defendant violated the plaintiff's constitutional rights" and that "the right at issue was 'clearly established' at the time of the alleged violation." *Est. of Rahim by Rahim v. Doe*, 51 F.4th 402, 410 (1st Cir. 2022).

To satisfy the "clearly established" prong, a "plaintiff must 'identify either controlling authority or a consensus of persuasive authority sufficient to put [a state actor] on notice that his conduct fell short of the constitutional norm.'" *Id.* (quoting *Conlogue v. Hamilton*, 906 F.3d 150, 155 (1st Cir. 2018)). While "there need not be a case directly on point," a plaintiff must be able to identify "precedents existing at the time of the incident [that] establish[ed] the applicable legal rule with sufficient clarity and specificity" that the defendant was on notice that their conduct would violate the rule. *McKenney v. Mangino*, 873 F.3d 75, 82-83 (1st Cir. 2017) (internal quotation marks omitted). Here, Plaintiffs would have to identify authority addressing sufficiently similar facts occurring where similar state laws applied. That authority would either need to be binding in Massachusetts or demonstrate a consensus among persuasive authorities such that the individual defendants should have known their actions violated

Plaintiffs' parental rights protected by substantive due process.

Having reviewed all the cases cited by Plaintiffs, the court finds they do not meet this burden. First, the court observes that legal protections for gender identity are a recent development and a broad awareness of issues surrounding the topic of gender identity is still growing. Second, as discussed above, Defendants did not provide mental healthcare to Plaintiffs' children when supporting their use of preferred names and pronouns. Finally, consistent with principles established in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), Plaintiffs' right to direct the upbringing of their children allows them to "choose between public and private schools," but does not give them a right "to interfere with the general power of the state to regulate education." *Parker*, 514 F.3d at 102. Here, the individual defendants' respective decisions not to share information with Plaintiffs about their children's gender identities complied with a Ludlow Public Schools policy which, though not required by, was consistent with Massachusetts laws that have not been challenged by Plaintiffs.

VI. CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss (Dkt. No. 25) is ALLOWED. Plaintiffs' Amended Complaint (Dkt. No. 22) is dismissed and this case may now be closed.

It is so Ordered.

/s/ Mark G. Mastroianni
MARK G. MASTROIANNI
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
SPRINGFIELD DIVISION

STEPHEN FOOTE, individually, and as Guardian and next friend of B.F. and G.F. minors, MARISSA SILVESTRI, individually and as Guardian and next friend of B.F. and G.F., minors, JONATHAN FELICIANO, SANDRA SALMERON, Plaintiffs, v. TOWN OF LUDLOW, LUDLOW SCHOOL COMMITTEE, LISA NEMETH, individually and in her official capacity as Interim Superintendent of Ludlow Public Schools, TODD GAZDA, individually, and in his official capacity as former Superintendent of Ludlow Public Schools, STACY MONETTE, individually and in her official capacity as Principal of Baird Middle School,	Case No. 3:22-cv-30041-MGM AMENDED COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY JUDGMENT, AND DAMAGES JURY TRIAL REQUESTED

MARIE-CLAIRE FOLEY, individually and in her official capacity as school counselor for Baird Middle School JORDAN FUNKE, individually and in her official capacity as former librarian at Baird Middle School,	)
Defendants.	)

Plaintiffs, Stephen Foote, individually, and as Guardian and next friend of B.F. and G.F., minors, Marissa Silvestri, individually and as Guardian and next friend of B.F. and G.F., minors, Jonathan Feliciano, and Sandra Salmeron, by and through their attorneys of record, file their First Amended Complaint against Town of Ludlow, Ludlow School Committee, Lisa Nemeth, Todd Gazda, Stacy Monette, Marie-Claire Foley, and Jordan Funke, Defendants, and in support thereof, allege as follows:

INTRODUCTION

1. Defendants have exceeded the bounds of legitimate pedagogical concerns and usurped the role of Plaintiffs Stephen Foote and Marissa Silvestri, Jonathan Feliciano and Sandra Salmeron, to direct the upbringing of their children, make medical and mental health decisions for their children, and to promote and preserve family privacy and integrity.

2. Defendants' protocol and practice of concealing from parents information related to their children's gender identity and efforts to affirm a

discordant student gender identity at school violate parents' fundamental rights under the United States Constitution and violate children's reciprocal rights to the care and custody of their parents, familial privacy, and integrity. As to Plaintiffs Jonathan Feliciano and Sandra Salmeron, it also violates their fundamental right to free exercise of religion under the United States Constitution.

3. Plaintiffs Stephen Foote and Marissa Silvestri are seeking injunctive and declaratory relief and damages under 42 U.S.C. §1983 on behalf of themselves and their minor children, B.F. and G.F., for violation of their constitutional rights. Plaintiffs Jonathan Feliciano and Sandra Salmeron are seeking injunctive and declaratory relief and damages under 42 U.S.C. §1983 for violation of their constitutional rights. Plaintiffs also seek costs and attorneys' fees pursuant to 42 U.S.C. §1988.

JURISDICTION AND VENUE

4. This action is filed pursuant to 42 U.S.C. § 1983 seeking redress of injuries suffered by Plaintiffs from deprivation, under color of state law, of rights secured by the First and Fourteenth Amendments to the United States Constitution, by the laws of the United States and the laws of the Commonwealth of Massachusetts. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 and 1343(a). Jurisdiction is also proper under 28 U.S.C. § 1332(a)(1) in that the amount in controversy exceeds $75,000 and is between citizens of different states.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and other applicable law because the events and omissions giving rise to the claims in this

action arose in the Town of Ludlow, Massachusetts which is situated within the district and divisional boundaries of the Springfield Division of the U.S. District Court for the District of Massachusetts. Venue is also proper in this Court because Defendants reside or have their principal place of business in this District.

6. This Court is authorized to grant declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, implemented through Federal Rule of Civil Procedure 57, and to issue injunctive relief under Federal Rule of Civil Procedure 65.

7. An actual controversy exists between the parties involving substantial constitutional issues, in that Plaintiffs allege that Defendants' policies, procedures, directives and actions taken in accordance with them violate the United States Constitution and have infringed Plaintiffs' rights, while Defendants will allege that their policies, procedures, directives, and actions comport with the U.S. Constitution and Massachusetts law.

8. This Court is authorized to grant Plaintiffs' prayer for relief regarding costs, including a reasonable attorney's fee, under 42 U.S.C. § 1988.

PARTIES

9. Stephen Foote is a resident of the Town of Ludlow and is the father of B.F. and G.F., minor children who are students in Ludlow Public Schools.

10. Marissa Silvestri is a resident of Connecticut and is the mother of B.F. and G.F., minor children who are students in Ludlow Public Schools.

11. B.F. is the daughter of Stephen Foote and Marissa Silvestri and at all times relevant to the claims set forth herein was and is a student in Ludlow Public Schools.

12. G.F. is the son of Stephen Foote and Marissa Silvestri and at all times relevant to the claims set forth herein was and is a student in Ludlow Public Schools.

13. Jonathan Feliciano is a resident of the Town of Ludlow, the husband of Sandra Salmeron, and is the father of two children who attend Ludlow Public Schools.

14. Sandra Salmeron is the wife of Jonathan Feliciano, a resident of the Town of Ludlow, and the mother of two children who attend Ludlow Public Schools.

15. Defendant Town of Ludlow ("Town"), with a principal address of 488 Chapin Street Ludlow, MA 01056 is a body corporate under G.L. c. 40 §1, with the authority to sue and be sued under G.L. c. 40 §2.

16. Defendant Ludlow School Committee, with a principal address of 205 Fuller Street Ludlow, MA 01056, is the governing board with final policymaking authority over the Town's public school system. G.L. c. 71 § 37.

17. Defendant Lisa Nemeth is the Interim Superintendent of Ludlow Public Schools. Pursuant to G.L. c. 71 § 59 Superintendent Nemeth is required to manage the school district in a fashion consistent with the United States Constitution, state law and the policy determinations of the School Committee. She is sued in her individual and official capacities.

18. Defendant Todd Gazda was at all times relevant herein the Superintendent of Ludlow Public Schools until July 2021. Pursuant to G.L. c. 71 §59 until July 2021, Defendant Gazda was required to manage the school district in a fashion consistent with United States Constitution, state law and the policy determinations of the School Committee. He is sued in his individual and official capacities.

19. Defendant Stacy Monette was at all times relevant to Plaintiffs' claims Principal at Baird Middle School, which is part of Ludlow Public Schools. She is sued in her individual and official capacities.

20. Defendant Marie-Claire Foley is, and at all relevant times was, School Counselor at Baird Middle School, which is part of Ludlow Public Schools. She is sued in her individual and official capacities.

21. Defendant Jordan Funke was at all times relevant to Plaintiffs' claims, until May 2021, librarian at Baird Middle School, which is part of Ludlow Public Schools. She is sued in her individual and official capacities.

FACTUAL ALLEGATIONS

Development of statewide guidance for school policies related to transgender students

22. In June 2012, the Massachusetts Board of Elementary and Secondary Education (Board) revised the Access to Equal Education Opportunity Regulations, 603 CMR 26.00, to include gender identity as a protected class to conform to the Legislature's revision of Massachusetts' student anti-discrimination provision in Mass. G.L. c. 76, §5.

23. The Board directed the Department of Elementary and Secondary Education ("DESE") to provide guidance to school districts to assist in implementing the revised regulations.

24. In response to the Board's directive, DESE published "Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment," ("Guidance") offering suggestions for school policies and procedures to address the changes in laws and regulations.

25. The Guidance document has not been adopted as a regulation nor enacted as a statute and therefore does not mandate particular policies or have the force of law.

26. On March 26, 2013, then-DESE Commissioner Mitchell Chester stated at a public meeting that the Guidance is not a mandate, but advice offered to school administrators and staff.

27. In the Guidance, DESE suggests that:

> Consistent with the statutory standard, a school should accept a student's assertion of his or her gender identity when there is "consistent and uniform assertion of the gender-related identity, or any other evidence that the gender-related identity is sincerely held as part of a person's core identity." If a student's gender-related identity, appearance, or behavior meets this standard, the only circumstance in which a school may question a student's asserted gender identity is where school personnel have a credible basis for believing that the student's gender-related identity is being asserted for

some improper purpose. https://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html

28. The Guidance further suggests:

> Some transgender and gender nonconforming students are not openly so at home for reasons such as safety concerns or lack of acceptance. School personnel **should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent or guardian**. For the same reasons, school personnel should discuss with the student how the school should refer to the student, *e.g.*, appropriate pronoun use, in written communication to the student's parent or guardian. *Id.* (emphasis added).

29. In the Guidance, DESE states that in the case of "young students" parents should be consulted regarding issues of disclosure of the students' assertion of a discordant gender identity. *Id.* The Guidance does not define "young students."

30. DESE's Guidance also says:

> Transgender and gender nonconforming students may decide to discuss and express their gender identity openly and may decide when, with whom, and how much to share private information. A student who is 14 years of age or older, or who has entered the ninth grade, may consent to disclosure of information from his or her student record. **If a student is under 14 and is not yet in the ninth grade, the student's parent (alone) has the authority**

to decide on disclosures and other student record matters.

Id. (emphasis added) (citing Section 23.01 of Title 603 of the Code of Massachusetts Regulations (603 CMR§23.01).

31. Information regarding a student's sex, name change for gender identity purposes, gender transition, medical or mental health treatment related to gender identity, or any other information of a similar nature, regardless of its form, is part of the individual's student record, subject to 603 CMR §23.01.

32. Pursuant to 603 CMR §23.01 consent to disclosure of information regarding a student's sex, name change for gender identity purposes, gender transition, and/or medical or mental health treatment related to gender identity lies exclusively with parents until the student is in ninth grade or age 14, unless a local school committee has adopted an alternative policy.

Defendants' Re-interpretation of DESE Guidance And Development of Protocol to Conceal Information From Parents.

33. Plaintiffs are informed and believe and based thereon allege that the School Committee has not adopted a formal written policy superseding 603 CMR §23.01 to provide students under the age of 14 or below grade 9 with the sole authority to give or withhold consent to disclosure of information regarding sex, name change for gender identity purposes, gender transition or medical or mental health treatment related to gender identity.

34. Plaintiffs are informed and believe and based thereon allege that the School Committee, acting as final policymaker for the Town, has re-interpreted the DESE guidance as a mandate requiring that staff shall not speak with parents regarding gender identity issues at all unless the child consents, instead of suggesting that school personnel should speak with a student first before discussing gender identity issues with parents.

35. Plaintiffs are informed and believe and based thereon allege that the School Committee, acting as final policymaker for the Town, has used its reinterpretation of the DESE Guidance to give children of any age the authority to determine whether their parents will be notified about decisions related to affirming the child's discordant gender identity, which is a mental health issue, thereby usurping Plaintiffs' fundamental parental rights to direct the upbringing and mental health care of their children.

36. Plaintiffs are informed and believe and based thereon allege that the School Committee and individual Defendants have used the School Committee sanctioned re-interpretation of DESE Guidance to establish and implement a protocol (hereinafter sometimes "Protocol") that parents are not to be informed of their child's transgender status and gender-affirming social transition to a discordant gender identity unless the child, of any age, consents.

37. Plaintiffs are informed and believe and based thereon allege that until July 2021 Defendant Gazda as Superintendent of Ludlow Public Schools implemented the Protocol throughout Ludlow Public

Schools so that administrators, teachers, counselors and other staff at all schools would conceal from parents information regarding their child's transgender status and social transition to a discordant gender identity, including adoption of alternative names and pronouns, unless the child consented.

38. Plaintiffs are informed and believe and based thereon allege that from July 2021 to the present Defendant Nemeth, as Interim Superintendent of Ludlow Public Schools, has continued to implement the Protocol throughout Ludlow Public Schools so that administrators, teachers, counselors and other staff at all schools conceal from parents information regarding their child's transgender status and social transition to a discordant gender identity, including adoption of alternative names and pronouns, unless the child consents.

39. Plaintiffs are informed and believe and based thereon allege that Defendant Stacy Monette in her role as Principal implemented the Protocol at Baird Middle School so that administrators, teachers, counselors, and other staff conceal from parents, including Plaintiffs, information regarding their child's transgender status and social transition to a discordant gender identity, including adoption of alternative names and pronouns, unless the child consents.

40. Plaintiffs are informed and believe and based thereon allege that the Protocol continues to be implemented in all schools in Ludlow Public Schools, meaning that District staff are directed to deliberately and intentionally conceal from parents,

including all Plaintiffs, information regarding their child's (regardless of age) transgender status and social transition to a discordant gender identity, including adoption of alternative names and pronouns, unless the child consents.

41. Plaintiffs are informed and believe and based thereon allege that the Protocol further provides that District staff are to deliberately deceive parents, including all Plaintiffs, by continuing to refer to their child by his or her birth name and pronouns in the presence of the parents, but to use the child's preferred alternative name and pronouns at all other times.

42. Plaintiffs are informed and believe and based thereon allege that throughout the time that they have sanctioned and implemented the Protocol, Defendants have known or have reason to know that "social transitioning," including assertion of an alternate name and pronouns, is recognized as a medical/mental health treatment for children with gender dysphoria[1]:

> For young transgender children, the treatment of gender dysphoria consists of social transition, which involves changes that bring the child's outer appearance and lived experience into alignment with the child's core gender. Changes often associated with a social transition include changes in clothing, name, pronouns, and hairstyle. *Adams v. The Sch. Bd. of St. Johns*

[1] By describing gender affirmation as a medical/mental health treatment for gender dysphoria, plaintiffs are not waiving any claims to challenge the medical or scientific validity of such therapies.

Cty, Fla., No. 3:17-cv-00739, (M.D.Fla. June 28, 2017), Diane Ehrensaft Exp. Rep. 10-11 ECF 137-2.

"Social role transition is a critical component of the treatment for Gender Dysphoria" for adults and children. *G.G. v. Gloucester Cty Sch. Bd.*, No. 4:15-cv-54 (E.D.Va. June 11, 2015) Randi Ettner Correct Exp. Decl. 5, ECF 58-2

43. By engaging in "social transitioning" with children, as provided in the Protocol, Defendants are "implementing a psychosocial treatment..."[2] without the knowledge or consent of parents.

44. Defendants know or should know that under Massachusetts law, parents must consent to medical treatment, including mental health treatment, of their children under age 18 unless the child is emancipated, married, in the armed forces, pregnant or contracted a sexually transmitted disease, none of which applies to Plaintiffs' children. M.G.L. ch. 231, §85P, M.G.L. ch. 112 §12F.

45. By approving and implementing the Protocol, Defendants are acting contrary to law by deliberately concealing from Plaintiffs that their minor children are receiving mental health care, *i.e.* social transitioning to a discordant gender identity, at school without the parents' knowledge or consent.

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[2] Kenneth Zucker, *The Myth of Persistence: Response to "A Critical Commentary on Follow-Up Studies & 'Desistance' Theories about Transgender & Gender Non-Conforming Children" by Temple Newhook et al.*, 19:2 INTERNATIONAL JOURNAL OF TRANSGENDERISM 231 (2018), https://www.researchgate.net/publication/325443416.

46. Plaintiffs are informed and believe and based thereon allege that as part of implementing the Protocol, the School Committee acting as final policymaker for the Town has sanctioned, and individual Defendants have implemented customs, practices and procedures that introduce and promote the concept of gender-affirming social transitioning, *i.e.*, mental health treatment, and experimentation with discordant gender identities to children without the knowledge or consent of their parents.

47. Among the customs, practices and procedures implemented by individual Defendants was Defendant Funke's practice of directing incoming sixth grade students at Baird Middle School to create biographic videos in which they were to state their "gender identity" and preferred pronouns and upload the videos onto school owned platforms.

48. The videorecording and identification of a gender identity (an aspect of mental health) was done without the knowledge and consent of parents.

49. Plaintiffs Foote and Silvestri became aware after the fact that their 11-year-old daughter, B.F. was given that video and identification assignment.

50. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that their son G.F. was also given the video and identification assignment by Defendant Funke without their knowledge and consent.

51. It remains unknown to Plaintiffs Foote and Silvestri how these videos of their children, made without their consent, were used or who has been allowed to view them.

52. Plaintiffs are informed and believe and based thereon allege that Defendant Funke, acting in accordance with the Committee's approved Protocol and with the knowledge and consent of other individual Defendants, engaged in other customs, practices and procedures aimed at promoting exploration and experimentation of discordant gender identities and engaging in gender-affirming social transitioning, concepts which involve mental health issues, to Plaintiffs' children and other Baird Middle School students without notice to or consent of parents, including Plaintiffs.

53. Plaintiffs are informed and believe and based thereon allege that Defendant Funke regularly communicated privately with their children one-on-one to discuss their gender identity (mental health) issues, provide materials promoting exploration of alternate gender identities, and otherwise encourage children to experiment with alternate gender identities without notifying parents or obtaining parental consent.

54. Plaintiffs are informed and believe and based thereon allege that Defendant Funke instructed their children not to use the terms "boys" and "girls," but to use alternative terms rooted in gender identity ideology, which were posted on the walls of the library and circulated to students as a handout.

55. Plaintiffs were not informed of Defendant Funke's efforts to compel their children to speak falsely (in accordance with the ideology being promoted by Defendant Funke) and to conceal important information from their parents.

56. Plaintiffs are informed and believe and based thereon allege that other teachers, counselors and staff, with the knowledge and consent of Defendants in accordance with the Committee's Protocol, engaged in other customs, practices and procedures to introduce and promote the concepts of experimenting with discordant gender identities and engaging in gender-affirming social transitioning (which involves mental health treatment), to their children and other students without notice to or consent of parents, including Plaintiffs.

57. Because Defendants' Protocol requires secrecy, full information regarding the customs, practices and procedures utilized by school staff to introduce and facilitate gender-affirming social transitioning to Plaintiffs' children (and others) has been concealed from Plaintiffs.

Defendants' Implementation of the Protocol with Plaintiffs' Children

58. On or about December 14, 2020, B.F., then an 11-year-old sixth grade student at Baird Middle School, asked to meet with her teacher Bonnie Manchester virtually after school to discuss some issues.

59. On December 15, 2020, B.F. met virtually with Ms. Manchester and told her that she was experiencing insecurity, low self-esteem, poor self-image, and a perceived lack of popularity.

60. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that prior to the meeting with Ms. Manchester B.F. had received

unsolicited LGBTQ-themed video suggestions on her school Google account on her school-issued computer

61. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that after viewing these suggested videos B.F. began questioning whether she might be attracted to girls and whether she might have "gender identity" issues.

62. B.F. told Ms. Manchester that she was depressed and needed help but was not sure how to ask her parents about getting help.

63. Ms. Manchester offered to call B.F.'s parents and B.F. agreed. B.F. told Ms. Manchester that she was relieved and grateful that Ms. Manchester was calling her parents because B.F. was unsure how to broach the subject.

64. On December 16, 2020, during a planning meeting, Ms. Manchester and other teachers said that they had observed that B.F. seemed to be depressed and agreed that B.F.'s parents should be contacted. Ms. Manchester agreed to contact them since she had already discussed doing so with B.F.

65. On December 17, 2020, Ms. Manchester contacted Mrs. Silvestri and informed her of the conversation with B.F. and concerns about B.F. feeling depressed.

66. Ms. Manchester also told Mrs. Silvestri that B.F. had said that she might be attracted to the same sex and was having issues with self-image.

67. Mrs. Silverstri responded that she had recently observed that there was something troubling

B.F. and that she had struggled with self-image issues at B.F.'s age.

68. Mrs. Silvestri was grateful that Ms. Manchester had contacted her so that she and the children's father, not the school, could address B.F.'s mental health issues.

69. Mrs. Silvestri and Mr. Foote retained a private therapist to work with B.F. soon after the call with Ms. Manchester.

70. On December 21, 2020, Mrs. Silvestri sent the following email to B.F.'s teachers, Defendant Monette, Defendant Gazda, and the members of Defendant School Committee:

> It has been brought to the attention of both Stephen and myself that some of B's teachers are concerned with her mental health. I appreciate your concern and would like to let you know that her father and I will be getting her the professional help she needs at this time. With that being said, we request that you do not have any private conversations with B. in regards to this matter. Please allow us to address this as a family and with the proper professionals.

71. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that Defendants Gazda and Monette and Baird Middle School teachers who had received the email disregarded the parents' instructions and Defendants Gazda and Monette failed and refused to direct Baird Middle School staff to respect Plaintiffs' instructions regarding their 11-year-old daughter's mental health care.

72. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that prior to June 2021 Defendant Gazda, and since June 2021 Defendant Nemeth, along with Defendant Monette and Baird Middle School teachers who received the email, have and are continuing to disregard the parents' instructions, as evidenced by the fact that Plaintiffs are now aware that B.F. has changed her preferred name at least twice since December 2020 without Plaintiffs' knowledge or consent. To this date staff continue to address B.F. by whatever iteration of her name she has indicated she prefers.

73. Teachers at Baird Middle School have inadvertently revealed that they are continuing to disregard the parents' instructions by sending email communications related to school assignments for B.F., but referencing a child with a first name other than "B."

74. Plaintiffs Foote and Silvestri have learned that, in reckless disregard of their parental rights to make mental health decisions for their children and in direct contravention to their explicit instructions, Baird Middle School staff, and in particular Defendant Foley, have engaged in regular private meetings and conversations with B.F. in which B.F. has talked about having a discordant gender identity and requested to be affirmed in that identity and called by a male name "R," *i.e.*, engage in gender-affirming social transitioning (mental health treatment). In addition, Baird Middle School staff and Defendant Foley in particular intentionally concealed that information from Plaintiffs in accordance with the Protocol.

75. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that Defendants Funke and Monette and other Baird Middle School staff have also disregarded and are continuing to disregard the parents' instructions and the parents' right to make mental health decisions for their son G.F.

76. G.F. has been diagnosed with ADHD and has in place an Accommodation Plan under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et. seq*. ("504 Plan").

77. Defendants knew or should have known of G.F.'s status as a 504 Plan recipient and that such status meant that G.F. had underlying mental health issues which required parental notice and input.

78. Plaintiffs Foote and Silverstri are informed and believe and based thereon allege that Defendants Funke and Monette and other Baird Middle School staff, knowing that G.F. had underlying mental health issues requiring parental notice and input, engaged in private meetings and conversations with G.F. on multiple occasions to promote experimenting with alternative genders and facilitate his gender-affirming social transitioning, *i.e.* offer mental health treatment.

79. Said Baird Middle School staff did not notify Plaintiffs of these private meetings and conversations, but followed the Protocol to conceal the gender-affirming social transitioning of G.F. from Plaintiffs Foote and Silvestri in the same manner as they concealed the gender-affirming social transitioning of B.F.

80. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that Defendants have stated in writing in G.F.'s student health record that G.F.'s discordant gender identity and alternate name are to be concealed from his parents and that staff are to intentionally deceive parents by using "G.F." in their presence and G.F.'s alternate name at all other times.

Plaintiffs Discover Defendants' Subterfuge

81. Unbeknownst to Plaintiffs, on February 28, 2021, B.F. sent the following email to Defendant Foley, Defendant Gazda, and teachers at Baird Middle School, including Ms. Manchester:

> Hello everyone, If you are reading this you are either my teacher or guidance counselor. I have an announcement to make and I trust you guys with this information. I am genderqueer. Basically, it means I use any pronouns (other than it/its). This also means I have a name change. My new name will be R****. Please call me by that name. If you deadname me or use any pronouns I am not comfortable with I will politely tell you. I am telling you this because I feel like I can trust you. A list of pronouns you can use are: she/her he/him they/them fae/faerae/aer ve/ver xe/xem ze/zir. I have added a link so you can look at how to say them. Please only use the ones I have listed and not the other ones. I do not like them. Thank you. R*** F***.

82. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that the text of the email sent by B.F. resembles sample emails found

on internet sites that promote gender ideology and offer resources to children and adolescents.

83. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that on March 1, 2021, Defendant Foley sent an email after meeting privately with B.F., in direct contradiction to their explicit instructions, and wrote: "R**** [B****] is still in the process of telling his [sic] parents and is requesting that school staff refer to him [sic] as B**** and use she/her pronouns with her parents and in written emails/letters home."

84. In so doing, Defendant Foley was, in keeping with the School Committee sanctioned Protocol, directing Baird Middle School staff to deliberately and intentionally deceive Plaintiffs Foote and Silvestri by actively concealing the fact that school staff were engaging in gender-affirming social transitioning (mental health treatment) of their daughter by affirming an alternative name and identity.

85. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that on March 1, 2021 some teachers at Baird Middle School immediately began to refer to B.F. as "R" and to change name tags to reflect that name without notifying B.F.'s parents, in keeping with the Protocol.

86. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that on or about March 1, 2021, Defendant Foley referred B.F. to Defendant Funke for further private meetings and conversations to promote and facilitate B.F.'s gender-affirming social transitioning (mental health treatment) without notifying Plaintiffs.

87. Mr. Foote and Mrs. Silvestri only learned about B.F.'s February 28, 2021 email to her teachers and counselors after a conversation with Ms. Manchester.

88. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that on March 8, 2021, after the conversation between Plaintiffs and Ms. Manchester, Ms. Foley sent an email to the entire staff at Baird Middle School informing them of B.F.'s request to be called "R***" and explicitly instructing staff that her parents were not to be told.

89. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that on and before March 4, 2021 G.F.'s teachers at Baird Middle School were also complying with and implementing the Protocol with regard to G.F. and facilitating G.F.'s gender-affirming social transitioning without the knowledge or consent of Mr. Foote and Mrs. Silvestri.

90. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that on March 10, 2021 during a planning meeting, Ms. Manchester and other Baird Middle School teachers discussed B.F.'s email and discussed that they were also calling B.F.'s brother G.F. by his preferred name "S."

91. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that during the planning meeting on March 10, 2021 Ms. Foley told the teachers present that "the law" says that school staff do not have to tell parents about their children's requests to change their name or otherwise be socially affirmed in an asserted transgender identity.

92. Massachusetts law provides that parents exercise access to, and have exclusive control over, information in their child's student record until the child reaches age 14 or enters the ninth grade. *See* 603 CMR §23.07(2).

93. At the time that Ms. Foley claimed that "the law" does not require informing parents regarding their child's gender identity, B.F. was 11 years old and G.F. was 12 years old, meaning that their parents, Plaintiffs Foote and Silvestri, had the right to access and control over the information in their records, including their assertions of discordant gender identities, under Massachusetts law.

94. Even the DESE Guidance, which Defendants know is not a law, does not proscribe notifying parents regarding their children's discordant gender identities, but merely suggests speaking with students before speaking with parents about the issue.

95. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that on March 11, 2021, Defendant Foley, without notification to or consent from Mr. Foote or Mrs. Silvestri, initiated a private conversation with B.F. through an online chat inquiring about issues related to her gender identity, *i.e.*, mental health.

96. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that on March 11, 2021, Defendant Foley, without notification to or consent from Mr. Foote or Mrs. Silvestri privately informed B.F. that she could use any bathroom that she preferred, including the boys' bathroom, girls' bathroom, or one of three gender neutral bathrooms

at the school. Defendant Foley offered to show B.F. where the gender neutral bathrooms were located.

97. Therefore, as of March 11, 2021, Mr. Foote's and Mrs. Silvestri's 11-year-old daughter was being told that she could use the boys' privacy facilities at school, where she would be exposed to middle school boys in various states of undress and vice-versa, without Mr. Foote and Mrs. Silvestri being informed or consenting to same.

98. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that on March 11, 2021, Defendant Foley told B.F. in an online chat that B.F. was "brave and awesome" for telling her teachers and guidance counselor that she was "genderqueer" and wanted to be referred to by the name "R."

99. On March 18, 2021, Plaintiffs Foote and Silvestri met with Defendant Monette to discuss the Defendants' disregard of the Plaintiffs' parental rights and of the Plaintiffs' specific instructions that school staff not engage with their children regarding mental health issues, which they were addressing with the help of a mental health professional, in keeping with their fundamental parental rights to direct the mental health care of their children.

100. Mr. Foote and Mrs. Silvestri attempted to discuss the issues related to their children with Defendant Monette and to convey that Defendants were acting improperly and illegally in disregarding their parental rights and failing to notify them regarding their children's assertion of discordant gender identities and names.

101. Defendant Monette refused to discuss the issues with Mr. Foote and Mrs. Silvestri, but intimated that the school knew better than did the parents about what was best for B.F. and G.F. with regard to the gender identity issue and abruptly ended the meeting.

102. On March 21, 2021, Mrs. Silvestri informed Defendant Gazda that she and Mr. Foote objected to the staff's deliberate disregard of their rights as parents to make decisions regarding their children's mental health and upbringing evident in concealing information regarding the gender-affirming social transitioning of their children.

103. Mrs. Silvestri said that their children telling teachers and fellow students "that they want to be called by a different name (of the opposite sex) is something that will follow the children through school and not be forgotten by classmates."

104. Mrs. Silvestri told Mr. Gazda that parents, not the school, should be the primary source of help and guidance to navigate their children through such decisions with long-term effects, and the school's exclusion of her and Mr. Foote from that decision-making was unacceptable.

105. Mrs. Silvestri reminded Mr. Gazda that no one to whom their original December 20, 2020 email was addressed responded. Instead, the parents were ignored by teachers, guidance counselors, Ms. Monette, Mr. Gazda, and the School Committee, who utterly disregarded the parents' explicit instructions to not engage in conversations with their children related to their mental health to permit the parents

to exercise their primary authority to oversee their children's mental health care.

106. Mr. Gazda acknowledged that he and the School Committee had received the parents' December 20, 2020 email, but that neither he nor anyone from the School Committee had responded.

107. Mr. Gazda expressly asserted that Ms. Foley acted appropriately in concealing information from Plaintiffs when B.F. sent the February 28, 2021 email to Baird Middle School teachers and Ms. Foley.

108. Mr. Gazda stated that Ms. Foley properly followed DESE Guidance that "School personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent or guardian" when she forwarded the B.F.'s February 28, 2021 email to other staff and told staff that parents were not to be told.

109. Mr. Gazda's statement that directing school staff to conceal information from parents was a proper action by Ms. Foley evidences that Mr. Gazda was aware of and approved the School Committee's sanctioned Protocol granting children of any age the power to determine whether their parents will be informed about the child's gender-affirming social transitioning (mental health treatment).

110. Mr. Gazda further evidenced his knowledge and acceptance of the Protocol when he told Mrs. Silvestri that Defendant Foley's directive to staff that Plaintiffs not be informed of their daughter's preferred alternate pronouns and be intentionally misinformed and lied to in conversations concerning

their daughter was an appropriate response in light of the DESE Guidance suggesting that staff speak to children first.

111. Mr. Gazda further claimed that concealing information regarding Plaintiffs' 11-year-old daughter's asserted discordant gender identity and alternate names and pronouns did not violate 603 CMR §23.01 because no "disclosure" was made, presumably meaning that there was no disclosure to a third party.

112. Mr. Gazda did not explain how a regulation that granted Plaintiffs access and control of their children's records could be utilized to deny them access to information in those records.

113. Mr. Gazda reiterated his conclusions during a meeting with Mr. Foote and Mrs. Silvestri on March 26, 2021, but still did not explain how DESE suggestions about speaking with students about gender identity issues before speaking with parents could be interpreted to mean that minor students had absolute veto power over their parents being informed about their child's social transitioning.

114. At the March 26, 2021 meeting, Mr. Foote and Mrs. Silvestri again demanded that school staff not talk to their children about discordant gender identities and that school staff use the children's proper names, but they received no response.

115. Plaintiffs Foote and Silverstri are informed and believe and based thereon allege that Ms. Foley, Ms. Funke and perhaps other staff members at Baird Middle School continued to knowingly, intentionally, and recklessly disregard Mr. Foote's and Mrs.

Silvestri's explicit instructions not to engage with their children regarding alternative genders, preferred names, and mental health issues by surreptitiously setting up meetings to discuss B.F.'s and G.F.'s assertion discordant gender identities without the knowledge and consent of their parents.

116. Plaintiffs Foote and Silverstri are informed and believe and based thereon allege that, without the knowledge or consent of the Plaintiffs, Ms. Funke directed 11-year-old B.F. to translategender.org, an organization with which Funke is affiliated that "works to generate community accountability individuals to self-determine their own genders and gender expressions."

117. Plaintiffs Foote and Silverstri are informed and believe and based thereon allege that Ms. Funke used translategender.org to groom 11-year-old B.F. through promotion of materials and events, including workshops entitled "Green, Yellow, Red, Stoplights For Mental Health," and "The Sex Education You Didn't Get in School," without the knowledge or consent of her parents.

118. Plaintiffs Foote and Silverstri are informed and believe and based thereon allege that after they had repeated their request to Principal Monette and Superintendent Gazda that Baird Middle School staff cease talking with their children regarding gender issues, Ms. Foley encouraged B.F. to meet privately with her weekly to discuss B.F.'s gender issues and mental health and to promote and facilitate B.F.'s social transition.

119. Plaintiffs Foote and Silverstri are informed and believe and based thereon allege that on March

30, 2021, Ms. Foley told B.F. that she was worried about B.F. based on a conversation with B.F. the day before.

120. Ms. Foley said that she wanted B.F. to speak to another counselor, "I can't be the only person that you talk to because we don't have enough time together and I can't be there to keep you safe," thereby signaling to B.F. that her parents were not "safe."

121. Despite claiming to be concerned about B.F.'s safety, Ms. Foley did not contact B.F.'s parents to share her concerns, further evidencing that Ms. Foley was implying that B.F.'s parents were "unsafe."

122. Plaintiffs Foote and Silverstri are informed and believe and based thereon allege that when B.F. informed Ms. Foley that she was seeing a counselor chosen by her parents, Ms. Foley questioned whether B.F. was as comfortable discussing issues with that counselor as she was discussing issues with Ms. Foley.

123. Ms. Foley's question sent a message to B.F. that her parents' choice might not be in her best interest.

124. Ms. Foley further stated that she believed that B.F. needed to get help and support, sending the message to B.F. that her parents could not be trusted to provide help and support.

125. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that Ms. Foley continued to question whether B.F.'s parents were providing B.F. with appropriate care in online chats in which she asked B.F. whether the counselor chosen by her parents was providing adequate care, and in

stating that she was "behind" B.F., sending the message that B.F. needed further or different care than was being offered by her parents.

126. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that on April 7, 2021, Ms. Foley again questioned whether B.F.'s parents were properly caring for B.F. in an online chat in which Ms. Foley asked B.F. whether B.F. could keep herself safe when she was feeling down.

127. Plaintiffs Foote and Silvestri are informed and believe and based thereon allege that throughout April and May 2021, Ms. Foley continued to surreptitiously correspond with B.F. via online chats and text messages and continued to affirm and applaud B.F.'s assertion of alternate genders and alternate names, intentionally disregarding B.F.'s parents' rights to direct their daughter's mental health care and their explicit instructions that Baird Middle School staff was not to engage in such conversations with their children.

128. Ms. Foley's continuing surreptitious meetings with B.F. and repeated questioning of Plaintiffs' decisions regarding B.F.'s care has interfered with and is interfering with Plaintiffs' exercise of their right to direct B.F.'s mental health care as well as disrupting the parent-child relationship.

129. On April 23, 2021, Mr. Foote received a card in the mail addressed to "R F****," congratulating "R. F****," Mr. Foote's daughter B.F., for winning a bumper sticker contest put on by one of her teachers. The teacher enclosed an Amazon Gift Card with "Congratulations R" written on it, demonstrating

Defendants' continuing adherence to the Protocol and blatant disregard for Plaintiffs' parental rights.

130. Defendants' conduct in encouraging young students to conceal important information from their parents and undermining parental authority explicitly and implicitly by openly questioning their parents' decisions violates Plaintiffs' fundamental parental rights to direct the upbringing of their children, make mental health decisions for their children and protect family integrity and privacy.

131. As to Plaintiffs Feliciano and Salmeron, Defendants' conduct also infringes on their sincerely held religious beliefs which include respect for parental authority, truthfulness, and adherence to a Biblical understanding of male and female, commandment to honor one's parents, and standards of behavior, all of which are disregarded in the Protocol.

132. Because the intent of the Protocol is to conceal information from parents, Plaintiffs Feliciano and Salmeron are deliberately hindered from ascertaining whether their children are being secretly socially transitioned, *i.e.*, being provided mental health treatment, without their knowledge or consent.

133. Defendants and other staff in Ludlow Public Schools acting under the authority and direction of Defendants Gazda, Nemeth, Monette, and the School Committee acting as final policymaker for the Town have intentionally acted in reckless disregard of Plaintiffs' rights to direct the upbringing and mental health care of their children and in direct contravention of Plaintiffs Foote and Silverstri's explicit instructions to Defendant Gazda, Defendant

Monette, the School Committee, and other Ludlow Public Schools staff.

Defendants' Public Ratification of the Protocol and Derogation of Parental Rights

134. Members of Defendant School Committee and Mr. Gazda have publicly acknowledged and ratified the existence and continuing implementation of the Protocol and its intentional and purposeful concealment of children's mental health information from parents.

135. Plaintiffs are informed and believe and based thereon allege that Ms. Monette terminated Ms. Manchester for failing to comply with the Protocol and respecting the rights of B.F.'s parents by providing them information regarding their 11-year-old daughter's assertion of a discordant gender identity, further demonstrating that the Protocol was an established procedure sanctioned by the School Committee acting as final policymaker for the Town and implemented by District leadership.

136. On May 25, 2021 during a School Committee public meeting, a tenth grade student in Ludlow Public Schools submitted a public comment via email, which was the only participation vehicle that the School Committee provided for the public meeting that was held in an empty meeting room.

137. In the email read aloud during the meeting, the writer said that staff members were pushing extreme ideas to children 11 to 14 years old as part of an agenda aimed at "trying to convince children to change who they are and change their sexuality and gender at an age that many of them do not yet fully

understand the concepts of sexuality and gender." The writer further stated that the School Committee and staff were ignoring parents' rights.

138. After the email was read, Mr. Gazda read a prepared rebuttal. Mr. Gazda did not dispute the District's actions alleged in the statement, but instead defended the conduct, saying the District's actions were about "inclusion" and making schools "safe" for children.

139. Mr. Gazda's statements imply that children are not "safe" with their parents.

140. Mr. Gazda also stated publicly what he had told Plaintiffs privately, *i.e.*, that the District's actions (*e.g.*, the Protocol) are "in compliance" with the laws and regulations of Massachusetts and DESE Guidance.

141. Mr. Gazda further stated publicly, without refutation from the School Committee, that parents' concerns about the concealment of information amounted to "intolerance of LGBTQ people thinly veiled" behind a "camouflage of parental rights."

142. Mr. Gazda further stated that schools, not homes, are the true "safe space" for children because schools supply "caring adults" where students can discuss problems and find support for their "true identities," implying that children do not receive such care from their parents. He said, "For many students school is their only safe place, and that safety evaporates when they leave the confines of our buildings," sending the message that safety is not to be found in their parents' homes.

143. Mr. Gazda said that the middle school would absolutely continue to help the children "express who they are" despite parents' wishes to the contrary.

144. Defendant School Committee, acting as final policymaker for the Town, has condoned and facilitated the continued implementation of the Protocol, and in particular the intentional and blatant disregard for parental rights reflected in concealing information from parents regarding their children's gender-affirming social transitioning and in actively deceiving parents by directing staff to use children's given names and pronouns when speaking with parents but using the child's asserted preference for alternative names and pronouns at all other times.

145. Defendant School Committee's action and inaction have evidenced its adoption of the Protocol as *de facto* policy in public statements, including those at the June 8, 2021 public meeting.

146. After an emailed public comment from a group of parents was read during the June 8, 2021 meeting, then Committee Chairman Michael Kelliher repeated Defendant Gazda's claim that the District's actions were "in compliance" with state and federal laws. Mr. Kelliher defended the actions of district staff as "simply doing their jobs" of "being welcoming and supporting to the children."

147. Expressing disdain and disregard for the rights of Ludlow Public School parents, Mr. Kelliher said that parents who were making their concerns known to the Committee were opposing "inclusive policies of the Ludlow Public Schools" and were "under the spell" of "outside groups."

148. At the June 8, 2021 School Committee meeting Mr. Gazda further evidenced Defendants' disdain and disregard for parental and religious exercise rights by characterizing parents' concerns about not being notified and their decisions not being honored regarding their children's upbringing and gender identity issues as "prejudice and bigotry."

149. No committee member has disagreed with or corrected Mr. Gazda's and Mr. Kelliher's public statements or otherwise refuted that the District's accepted Protocol, *i.e. de facto* policy, was to conceal critical information regarding their children's upbringing and mental health from parents and to disregard parents' instructions regarding their children's assertion of a discordant gender identity.

150. As parents of children who attend Ludlow Public Schools, all of the Plaintiffs are subjects of Defendants' Protocol, actions, disdain, and attendant reckless disregard for their fundamental rights.

151. So long as the Protocol remains in effect and is being implemented by Defendants, Plaintiffs continue to suffer deprivation of their fundamental parental rights to direct the upbringing of their children and particularly to direct the mental health care of their children.

152. So long as the Protocol remains in place, Plaintiffs' children are subject to surreptitious meetings, conversations, counseling sessions, online chats, and other communications with Ludlow Public Schools staff regarding and even promoting socially transitioning to a discordant gender identity, a recognized form of mental health care, without the knowledge or consent of their parents.

153. Plaintiffs' parental rights continue to be violated by the Protocol's instructions that parents are to be deliberately deceived by staff who are directed to use their child's legal name and pronouns corresponding to their sex when speaking with parents, but children's preferred alternative names and pronouns at all other times in school-related communications.

154. The continuing existence and implementation of the Protocol also infringes on and violates Plaintiffs Feliciano's and Salmeron's rights to free exercise of religion in that their sincerely held religious beliefs require truthfulness in speech, obedience to parents, and that their children's identities as being created male or female be respected regardless of contrary personal beliefs and ideologies of school staff members.

155. Defendants' Protocol that affirms children's desires to be called by an alternate gender discordant name and pronouns and actively promotes the idea that they can socially transition to another gender involves significant mental health decisions affecting children's well-being with potentially life-long consequences. Pursuant to the Protocol, these decisions are being made without the knowledge or consent of parents.

156. Defendants have acted with reckless disregard for the rights of Plaintiffs Foote and Silvestri as the parents of B.F. and G.F. and substituted their judgment for that of the parents in providing unauthorized mental health counseling and intervention without the knowledge or consent of B.F.'s and G.F.'s fit parents

157. Defendants have intentionally and purposefully disrupted Plaintiffs' relationships with their children, fostered distrust of parents, caused the children to question whether their parents can appropriately care for them and keep them safe, and otherwise irreparably harmed the parent-child relationship.

158. In adopting and continuing to implement the Protocol, Defendants have substituted, and continue to substitute, their judgment for that of the parents in directing the upbringing and mental health care for the children of Ludlow Public Schools.

159. Defendants' actions and public statements evidence a reckless disregard and disdain for the fundamental rights of Plaintiffs regarding decision-making related to children's assertion of a discordant gender identity and request to socially transition, a recognized mental health treatment.

160. Defendants' reckless disregard for the rights of Plaintiffs has impermissibly supplanted the rights of the parents to make mental health decisions and direct the upbringing of their children, interfered with the privacy rights of the family, created uncertainty and distrust between parents and children and between parents and educators, and threatened religious free exercise rights.

161. Unless and until Defendants, *inter alia*, a) publicly rescind the Protocol, b) cease communicating to and instructing Ludlow Public School staff that parents are not to be notified, c) publicly establish a policy that parents will be notified when children raise issues related to their mental health and discordant gender identity, d) cease meeting with

children to provide counsel, advice and advocacy related to mental health and discordant gender identity without parental notice and consent, e) cease deceiving parents by using one set of names and pronouns when communicating with them and another at school, and f) abide by parents' instructions concerning their child's mental health treatment and assertion of a discordant gender identity, Plaintiffs' fundamental rights to direct the upbringing of their children, to make decisions regarding their children's medical and mental health, right of familial privacy, and free exercise rights will continue to be violated.

162. Defendants' ongoing violations of Plaintiffs' fundamental parental rights have caused and will continue to cause irreparable harm unless and until discontinued.

FIRST CAUSE OF ACTION
VIOLATION OF CIVIL RIGHTS,
42 U.S.C. § 1983
(Violation of Plaintiffs' Substantive Due Process Fundamental Parental Right to Direct the Education and Upbringing of Their Children under the U.S. Constitution)
(By All Plaintiffs Against all Defendants)

163. Plaintiffs incorporate the preceding factual allegations in paragraphs 9-162 by reference as if set forth in full.

164. The Due Process Clause in the 14th Amendment to the United States Constitution protects the fundamental right of parents to direct the upbringing, care, custody, and control of their

children. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Troxel v. Granville*, 530 U.S. 57, 68 (2000)

165. Defendants have violated and are continuing to violate Plaintiffs' fundamental right to make decisions regarding the upbringing, custody, care, and control of their children in establishing and implementing the Protocol that prohibits informing parents regarding their children's assertions regarding gender non-conformity, transgender status and attendant requests to affirm alternate identities unless their minor children of any age consent.

166. Defendants have acted and are continuing to act with reckless disregard for Plaintiffs' fundamental parental rights by purposefully and intentionally concealing critical information and decisions regarding the upbringing and care of their children, *i.e.*, that the children are asserting a discordant gender identity, that the children have requested to be addressed by an opposite sex name and pronouns and other information and decisions associated with affirming the children's assertions.

167. Defendants have acted and are acting with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience as described *infra*.

Allegations Regarding School Committee and Town

168. Defendant School Committee acting as final policymaker for Defendant Town has acted and is continuing to act with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that a) the School

Committee knows that the DESE Guidance is not a legal mandate, but claims that it requires that school staff conceal information from parents; b) the School Committee knows that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claims that it supports Defendant's Protocol that parents are not to be told about children's social transitioning unless the child consents; c) the School Committee knows that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but authorizes and sanctions the deliberate concealment of information from parents of children under age 14 unless the child consents; and d) the School Committee knows that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but have approved and implemented a Protocol that directs staff to encourage, facilitate, develop and implement gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or gaining consent from parents.

Allegations Against Defendant Gazda

169. Defendant Gazda, as superintendent charged with implementing policies sanctioned by the School Committee through June 2021, acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that a) Mr. Gazda knew that the DESE Guidance is not a legal mandate but claimed that it requires that school staff conceal information from parents; b) Mr. Gazda knew that the DESE Guidance suggests only that school

staff should speak to students before speaking to parents, but claimed that it supports Defendants' Protocol that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Mr. Gazda knew that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but authorized and directed school staff to deliberately conceal information from parents of children under age 14 unless the child consents; and d) Mr. Gazda knew that under Massachusetts law, parents must be informed of and consent to medical/mental health care for their children who are under 18, but approved and implemented a Protocol that directs staff to encourage, facilitate, develop and implement gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or obtaining consent from parents.

170. Defendant Gazda, as superintendent charged with implementing policies sanctioned by the School Committee, through June 2021, acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Mr. Gazda knew that Plaintiffs Foote and Silvestri had exercised their parental rights to direct the upbringing of their children by securing a private therapist for B.F. and requested that school staff not engage with their children regarding mental health issues. Nevertheless, Defendant Gazda failed to adequately supervise and train employees to not implement the Protocol or actively encouraged employees to implement the Protocol and engage with Plaintiffs' children without notifying Plaintiffs.

171. Defendant Gazda acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Mr. Gazda publicly stated during School Committee meetings that parents with concerns about not being notified and their decisions not being honored regarding their children's gender identity issues (i.e., upbringing) were driven by "prejudice and bigotry," and "under the spell" of "outside groups," and that school officials would continue with their policies regardless of what parents thought.

Allegations Against Defendant Nemeth

172. Defendant Nemeth, as interim superintendent charged with implementing policies sanctioned by the School Committee, since June 2021, has acted and is acting with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that a) Ms. Nemeth knows that the DESE Guidance is not a legal mandate, but claims that it requires that school staff conceal information from parents; b) Ms. Nemeth knows that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claims that it supports Defendants' Protocol that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Ms. Nemeth knows that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but nonetheless authorizes and directs school staff to deliberately conceal information from parents of children under age 14 unless the child consents; d) Ms. Nemeth knows that under Massachusetts law parents must be informed of and

consent to medical/mental health care for their children who are under 18, but implements a Protocol that directs staff to encourage, facilitate, develop and implement gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or obtaining consent from parents.

Allegations Against Defendant Monette

173. Defendant Monette, as principal of Baird Middle School charged with implementing policies sanctioned by the School Committee at the school, has acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that a) Ms. Monette knew or should have known that the DESE Guidance is not a legal mandate, but claimed that it requires that school staff conceal information from parents; b) Ms. Monette knew or should have known that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claimed that it supports Defendants' Protocol that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Ms. Monette knew or should have known that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but nonetheless authorized and directed school staff to deliberately conceal information from parents of children under age 14 unless the child consents; d) Ms. Monette knew or should have known that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but implemented a Protocol that directs

staff to encourage, facilitate, develop and implement gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or obtaining consent from parents.

174. Defendant Monette as principal of Baird Middle School acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Ms. Monette knew that Plaintiffs Foote and Silvestri had exercised their parental rights to direct the upbringing of their children by securing a private therapist for B.F. and requested that school staff not engage with their children regarding mental health issues. Nevertheless, Defendant Monette but failed to adequately supervise and train employees to not implement the Protocol or actively encouraged employees to implement the Protocol and engage with Plaintiffs' children without notifying Plaintiffs.

Allegations Against Defendant Foley

175. Defendant Foley, as school counselor at Baird Middle School, has acted and continues to act with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that a) Ms. Foley knows or should have known that the DESE Guidance is not a legal mandate, but claims that it requires that school staff conceal information from parents; b) Ms. Foley knows or should have known that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claims that it supports Defendants' Protocol that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Ms. Foley

knows or should have known that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but deliberately concealed information and authorized and directed others to deliberately conceal information from parents of children under age 14 unless the child consents; d) Ms. Foley knows or should have known that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but encouraged, facilitated, developed and implemented gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or obtaining consent from parents; e) Ms. Foley knows or should have known that under Massachusetts law parents have sole control over their children's information until children are 14 years old or in grade nine and that parents must consent to mental health treatment for their children, but advised and instructed Baird Middle School staff that the law did not require that staff provide information related to gender identity to parents of children under age 14.

176. Defendant Foley acted and continues to act with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Ms. Foley knew that Plaintiffs Foote and Silvestri had exercised their parental rights to direct the upbringing of their children by securing a private therapist for B.F. and requested that school staff not engage with their children regarding mental health issues, but actively engaged with B.F. regarding her mental health issues related

to a discordant gender identity without notifying Plaintiffs.

177. Defendant Foley acted and continues to act with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Ms. Foley knew that Plaintiffs Foote and Silvestri had exercised their parental rights to direct the upbringing of their children by securing a private therapist for B.F. and requested that staff not engage with their children, but actively and intentionally defied the parents' instructions by soliciting and participating in private meetings with B.F. and questioning whether B.F.'s parents could keep her safe or provide proper therapeutic care.

178. Defendant Foley acted and continues to act with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Ms. Foley knew that Plaintiffs Foote and Silvestri had exercised their parental rights to direct the upbringing of their children by securing a private therapist for B.F. and requested that staff not engage with their children, but actively and intentionally defied the parents' instructions by soliciting and participating in private meetings with B.F. and referring B.F. to Defendant Funke for private meetings aimed at facilitating and promoting social transitioning to a discordant gender identity without the knowledge and consent of her parents.

Allegations Against Defendant Funke

179. Defendant Funke, when school librarian at Baird Middle School, acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that a) Ms. Funke knew

or should have known that the DESE Guidance is not a legal mandate but claimed that it requires that school staff conceal information from parents; b) Ms. Funke knew or should have known that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claimed that it supports Defendants' Protocol that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Ms. Funke knew or should have known that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but deliberately concealed information and directed others to deliberately conceal information from parents of children under age 14 unless the child consents; d) Ms. Funke knew or should have known that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but nonetheless encouraged, facilitated, promoted and implemented gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or gaining consent from parents.

180. Defendant Funke acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Ms. Funke knew or should have known that Plaintiffs Foote and Silvestri had exercised their parental rights to direct the upbringing of their children by securing a private therapist for B.F. and requested that school staff not engage with their children regarding mental health issues, but actively engaged

with B.F. regarding gender-affirming social transitioning without Plaintiffs' consent.

181. Defendant Funke acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Ms. Funke actively defied the parents' instructions by meeting privately with B.F. and G.F. and promoting social transitioning through private meetings and conversations, recommendation of and referral to advocacy-driven sites, materials and activities to experiment with discordant gender identities and socially transition without the knowledge and consent of their parents.

General Allegations

182. By approving and implementing the Protocol, all Defendants have and are explicitly and intentionally excluding Plaintiffs from significant decision-making directly related to their children's upbringing and care in a manner that Defendants know to be contrary to law.

183. Defendants' reckless disregard for Plaintiffs' rights has resulted in and is resulting in deprivation of their fundamental constitutional rights.

184. Plaintiffs' constitutionally protected right to direct the upbringing of their children was violated as the plainly obvious consequence of Defendants' actions in intentionally and explicitly concealing information and purposefully deceiving Plaintiffs in accordance with and through implementation of the Protocol.

185. Plaintiffs' constitutionally protected right to direct the upbringing of their children was violated as

the plainly obvious consequence of Defendants' actions in, *inter alia*, a) meeting secretly with their children to engage in counseling and advocacy related to mental health and discordant gender identity without parental notice and consent, b) deceiving parents by using one set of names and pronouns when communicating with them and another at school, c) directing children to speak untruthfully by instructing them to use alternate gender pronouns and names for their peers, d) actively defying Plaintiffs' explicit instructions to not engage in mental health discussions with their children, e) actively and intentionally nurturing distrust for parents through secret meetings in which parents' decisions and ability to act in the best interest of their children are questioned, and f) publicly dismissing and demeaning parents' challenges to the Protocol as "bigotry" driven by outside groups and pledging to continue to defy parental rights.

186. Defendants cannot assert a compelling interest for disregarding Plaintiffs' long-established fundamental constitutional right to direct the upbringing, care, and custody of their children, and Defendants' protocol and actions in furtherance thereof is not narrowly tailored.

187. Defendants' violation of Plaintiffs' fundamental constitutional rights has caused and continues to cause Plaintiffs undue hardship and irreparable harm.

188. Plaintiffs have no adequate remedy at law to correct the continuing deprivation of their fundamental rights.

SECOND CAUSE OF ACTION
VIOLATION OF CIVIL RIGHTS,
42 U.S.C. § 1983
(Violation of Plaintiffs' Fundamental Parental Right to Direct the Medical and Mental Health Decision-making for Their Children Under the U.S. Constitution)
(By All Plaintiffs Against all Defendants)

189. Plaintiffs incorporate the factual allegations in paragraphs 9-162 by reference as if set forth in full.

190. The Due Process Clause in the 14th Amendment to the United States Constitution protects the fundamental right of parents to direct the medical and mental health decision-making for their children. *Parham v. J. R.*, 442 U.S. 584 (1979). *See also*, *Custody of a Minor*, 375 Mass. 733, 747 (1978) (Parents, as the "natural guardians of their children," have the right to consent to routine, non-emergency treatment of a minor child).

191. Social transitioning, or affirming a child's asserted discordant gender identity involves significant mental health and medical decisions affecting the well-being of children with potentially life-long consequences.

192. Defendants' adoption and implementation of the Protocol that directs school administrators, teachers, counselors and staff to conceal from parents information and decisions regarding their children's assertion of a discordant gender identity and gender-affirming social transitioning (mental health treatment), and deceive parents by using given names and pronouns in their presence and children's

preferred names and pronouns at all other times unless the children consent, infringes Plaintiffs' fundamental constitutional right as fit parents to make mental health decisions for their children.

193. In adopting and implementing the Protocol, Defendants have usurped Plaintiffs' responsibility for the health and well-being of their children and sought to substitute their authority for Plaintiffs' authority as fit parents to be the ultimate decisionmakers regarding the physical and mental health of their children, including decisions related to their children's assertion of discordant gender identities and request to socially transition, which is a known mental health treatment for gender dysphoria.

194. Defendants have violated and are violating Plaintiffs' fundamental right to make decisions regarding the mental health of their children by adopting and implementing the Protocol providing that a) Parents are not to be informed if their children express a discordant gender identity and ask to socially transition unless the children consent; b) Parents are presumed to pose a danger to their children's health and well-being if informed of their child's assertion of a discordant gender identity and desire to socially transition; c) Parents are to be intentionally misled and lied to when school staff discuss their children, in that staff are to use the children's legal name and biologically accurate pronouns when talking to parents but not in other circumstances; and d) Parents' directives that school staff not interfere with parents' decisions regarding therapy for their children are to be ignored.

195. By excluding parents from discussions regarding their children's assertion of a discordant gender identity and adopting and implementing the Protocol requiring secrecy unless children consent, Defendants have made and continue to make decisions that affect the mental health of Plaintiffs' children in contravention of Plaintiffs' fundamental rights as enumerated in the U.S. Constitution.

196. Defendants have acted and continue to act with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience as described *infra*.

Allegations Regarding School Committee and Town

197. Defendant School Committee, acting as final policymaker for Defendant Town, has acted and continues to act with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that a) The School Committee knows that the DESE Guidance is not a legal mandate but claims that it requires that school staff conceal information from parents; b) The School Committee knows that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claims that it supports Defendant's Protocol that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) The School Committee knows that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but sanctions the deliberate concealment of information from parents of children under age 14

unless the child consents; d) The School Committee knows that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but has approved and implemented a Protocol that directs staff to encourage, facilitate, promote and implement gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or gaining consent from parents.

Allegations Against Defendant Gazda

198. Defendant Gazda, as superintendent charged with implementing policies sanctioned by the School Committee, through June 2021, acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that a) Mr. Gazda knew that the DESE Guidance is not a legal mandate, but claimed that it requires that school staff conceal information from parents; b) Mr. Gazda knew that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claimed that it supports Defendants' Protocol that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Mr. Gazda knew that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but directed school staff to deliberately conceal information from parents of children under age 14 unless the child consents; d) Mr. Gazda knew that under Massachusetts law, parents must be informed of and consent to medical/mental health care for their children who are under 18, but approved and implemented a Protocol that directs staff to facilitate

and encourage gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or obtaining consent from parents.

199. Defendant Gazda, as superintendent charged with implementing policies sanctioned by the School Committee, through June 2021 acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Mr. Gazda knew that Plaintiffs Foote and Silvestri had exercised their parental right to make mental health decisions for their children by securing a private therapist for B.F. and requested that school staff not engage with their children regarding mental health issues, but failed to adequately supervise and train employees to not implement the Protocol or actively encouraged employees to implement the Protocol and engage with Plaintiffs' children without notifying Plaintiffs.

200. Defendant Gazda acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Mr. Gazda publicly stated during School Committee meetings that parents with concerns about not being notified and their decisions not being honored regarding their children's gender identity issues were driven by "prejudice and bigotry," and "under the spell" of "outside groups," and that school officials would continue with their policies regardless of what parents thought or instructed.

Allegations Against Defendant Nemeth

201. Defendant Nemeth, as interim superintendent charged with implementing policies sanctioned

by the School Committee, since June 2021 has acted and is acting with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that a) Ms. Nemeth knows that the DESE Guidance is not a legal mandate, but claims that it requires that school staff conceal information from parents; b) Ms. Nemeth knows that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claims that it supports Defendants' Protocol that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Ms. Nemeth knows that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but directs school staff to deliberately conceal information from parents of children under age 14 unless the child consents; d) Ms. Nemeth knows that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but implements a Protocol that directs staff to encourage, facilitate, promote and implement gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or obtaining consent from parents.

Allegations Against Defendant Monette

202. Defendant Monette, as principal of Baird Middle School charged with implementing policies sanctioned by the School Committee at the school, has acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that a) Ms. Monette knew or should have known that the DESE Guidance is not a legal

mandate, but claimed that it requires that school staff conceal information from parents; b) Ms. Monette knew or should have known that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claimed that it supports Defendants' Protocol that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Ms. Monette knew or should have known that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but directed school staff to deliberately conceal information from parents of children under age 14 unless the child consents; d) Ms. Monette knew or should have known that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but implemented a Protocol that directs staff to encourage, facilitate, promote and implement gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or gaining consent from parents.

203. Defendant Monette as principal of Baird Middle School acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Ms. Monette knew that Plaintiffs Foote and Silvestri had exercised their parental right to make mental health decisions for their children by securing a private therapist for B.F. and requested that school staff not engage with their children regarding mental health issues, but failed to adequately supervise and train employees to not implement the Protocol or actively encouraged

employees to implement the Protocol and engage with Plaintiffs' children without notifying Plaintiffs.

Allegations Against Defendant Foley

204. Defendant Foley as school counselor at Baird Middle School has acted and continues act with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that a) Ms. Foley knows or should have known that the DESE Guidance is not a legal mandate, but claims that it requires that school staff conceal information from parents; b) Ms. Foley knows or should have known that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claims that it supports Defendants' Protocol that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Ms. Foley knows or should have known that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but deliberately concealed information and directed others to deliberately conceal information from parents of children under age 14 unless the child consents; d) Ms. Foley knows or should have known that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but encouraged, facilitated, promoted and implemented gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or gaining consent from parents; e) Ms. Foley knows or should have known that under Massachusetts law parents have sole control over

their children's information until children are 14 years old or in grade nine and that parents must consent to mental health treatment for their children, but told Baird Middle School staff that the law did not require providing information related to gender identity to parents of children under age 14..

205. Defendant Foley acted and continues to act with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Ms. Foley knew that Plaintiffs Foote and Silvestri had exercised their parental rights to make mental health decisions for their children by securing a private therapist for B.F. and requested that school staff not engage with their children regarding mental health issues, but actively engaged with B.F. regarding her mental health issues related to a discordant gender identity without notifying Plaintiffs.

206. Defendant Foley acted and continues to act with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Ms. Foley knew that Plaintiffs Foote and Silvestri had exercised their parental rights to make mental health decisions for their children by securing a private therapist for B.F. and requested that staff not engage with their children, but actively defied the parents' instructions by soliciting and participating in private meetings with B.F. and questioning whether B.F.'s parents could keep her safe or provide proper therapeutic care.

207. Defendant Foley acted and continues to act with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the

conscience in that Ms. Foley knew that Plaintiffs Foote and Silvestri had exercised their parental rights to make mental health decisions for their children by securing a private therapist for B.F. and requested that staff not engage with their children, but actively defied the parents' instructions by soliciting and participating in private meetings with B.F. and referring B.F. to Defendant Funke for private meetings aimed at facilitating and promoting B.F.'s gender-affirming social transitioning to a discordant gender identity without the knowledge and consent of her parents.

Allegations Against Defendant Funke

208. Defendant Funke when school librarian at Baird Middle School acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that a) Ms. Funke knew or should have known that the DESE Guidance is not a legal mandate, but claimed that it requires that school staff conceal information from parents; b) Ms. Funke knew or should have known that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claimed that it supports Defendants' Protocol that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Ms. Funke knew or should have known that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but deliberately concealed information from parents of children under age 14 unless the child consents; d) Ms. Funke knew or should have known that under Massachusetts law parents must be informed of and consent to

medical/mental health care for their children who are under 18, but encouraged, facilitated, promoted and implemented gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or gaining consent from parents.

209. Defendant Funke acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Ms. Funke knew or should have known that Plaintiffs Foote and Silvestri had exercised their parental rights to make mental health decisions for their children by securing a private therapist for B.F. and requested that school staff not engage with their children regarding mental health issues, but actively engaged with B.F. regarding gender-affirming social transitioning without Plaintiffs' consent.

210. Defendant Funke acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Ms. Funke actively defied the parents' instructions by meeting privately with B.F. and G.F. and encouraging them through conversations, materials, internet sites, and recommended activities to experiment with discordant gender identities and socially transition without the knowledge and consent of their parents.

General Allegations

211. Defendants' reckless disregard for Plaintiffs' rights has resulted in and continues to result in deprivation of their fundamental constitutional rights.

212. Plaintiffs' constitutionally and statutorily protected rights to make decisions regarding the mental health of their children was violated as the plainly obvious consequence of Defendants' actions in adopting and implementing the Protocol that intentionally concealed from Plaintiffs information regarding their children's assertion of discordant gender identities and gender-affirming social transitioning, recognized mental health treatments.

213. Plaintiffs' constitutionally protected right to make mental health decisions for their children was violated as the plainly obvious consequence of Defendants' actions in, *inter alia*, a) meeting secretly with their children to engage in counseling and advocacy related to mental health and discordant gender identity without parental notice and consent, b) deceiving parents by using one set of names and pronouns when communicating with them and another at school, c) directing children to speak untruthfully by instructing them to use alternate gender pronouns and names for their peers, d) actively defying Plaintiffs' instructions to not engage in mental health discussions with their children, d) actively and intentionally nurturing distrust for parents through secret meetings in which parents' decisions and ability to provide for their children are questioned, and e) publicly dismissing and demeaning parents' challenges to the Protocol as "bigotry" driven by outside groups and pledging to continue to defy parental rights.

214. Defendants cannot assert a compelling interest for disregarding Plaintiffs' long-established fundamental constitutional right to direct the medical and mental health care for their children.

215. Defendants' prohibition against parental notification is not narrowly tailored.

216. Defendants' violation of Plaintiffs' fundamental constitutional rights has caused and continues to cause Plaintiffs undue hardship and irreparable harm.

217. Plaintiffs have no adequate remedy at law to correct the continuing deprivation of their fundamental rights.

THIRD CAUSE OF ACTION
VIOLATION OF CIVIL RIGHTS,
42 U.S.C. § 1983
(Violation of Plaintiffs' Right to Familial Privacy Under the U.S. Constitution)
(By All Plaintiffs Against all Defendants)

218. Plaintiffs incorporate the factual allegations in paragraphs 9-162 by reference as if set forth in full.

219. The Due Process Clause in the 14th Amendment to the United States Constitution protects the sanctity of the family as an institution deeply rooted in this Nation's history and tradition through which moral and cultural values are passed down. *Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1977). The Constitution protects the private realm of the family from interference by the state. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

220. In substituting their judgment regarding the mental health and identity of B.F., G.F., and other Ludlow Public Schools students for the judgment of their parents by implementing the Protocol to withhold information regarding children's assertion

of a discordant gender identity and request to affirm that identity without notifying the parents, Defendants have impermissibly inserted themselves into the private realm of Plaintiffs' families by usurping Plaintiffs' rights to make decisions regarding their children's upbringing, mental health, and well-being.

221. In substituting their judgment for the judgment of parents by refusing to inform parents or comply with parents' instructions when their children disclose a discordant gender identity and seek affirmation of the identity at school without notifying the parents, Defendants have impermissibly inserted themselves into the private realm of Plaintiffs' families by depriving B.F., G.F., and other minor Ludlow Public Schools students of their right to have decisions regarding their upbringing, mental health and well-being made by their parents.

222. Defendants have infringed Plaintiffs' right to family privacy by adopting and implementing the Protocol and associated procedures which send the message to children that their parents cannot be trusted to be informed of or to make decisions related to their assertion of a discordant gender identity.

223. Defendants School Committee, acting as final policymaker for the Town, and Gazda have explicitly evidenced their hostility toward Plaintiffs' rights to familial privacy and intent to infringe upon family privacy through public statements that Defendants' schools are the only safe space for many children, that parental concerns about their children proclaiming a discordant gender identities are rooted in bigotry, and that school officials will continue to defy parental

requests to be informed about children's gender-affirming social transitioning.

224. Through their implementation of the Protocol and public statements denigrating parents who disagree with the Protocol, Defendants have sent and continue to send the message to Plaintiffs' children that their parents cannot be trusted to make decisions or act in their children's best interests, thereby impermissibly inserting themselves into the private realm of Plaintiffs' family and creating discord between parents and their children.

225. Defendants have acted and are acting with reckless disregard for Plaintiffs' rights to family privacy by their actions in intentionally casting doubt on parents' ability to respond appropriately to their children's expression of discordant gender identities and excluding parents from decision-making related to their children's questions regarding their sex and gender identity.

226. Defendants have acted and are acting with reckless disregard for Plaintiffs' rights to family privacy by their actions in giving children the power to determine whether their parents can be informed about their children's discordant gender identity and gender-affirming social transitioning, thereby disrupting the family dynamic in a way contrary to the law's provision of decision-making authority to parents.

227. Defendants have acted and are acting with reckless disregard for Plaintiffs' fundamental right to family privacy in a manner that shocks the conscience as described *infra*.

Allegations Regarding School Committee and Town

228. Defendant School Committee, acting as final policymaker for Defendant Town, has acted and is acting with reckless disregard for Plaintiffs' fundamental right to family privacy in a manner that shocks the conscience in that a) The School Committee knows that the DESE Guidance is not a legal mandate but claims that it requires that school staff conceal information from parents; b) The School Committee knows that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claims that it permits the reversal of parent and child roles by providing that parents are not to be told about children's gender-affirming social transitioning unless the minor child consents; c) The School Committee knows that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but sanctions deliberately concealing information from parents of children under age 14 unless the child consents; d) The School Committee knows that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but have approved a Protocol that directs staff to encourage, facilitate, develop and implement gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or gaining consent from parents.

Allegations Against Defendant Gazda

229. Defendant Gazda as superintendent charged with implementing policies sanctioned by the School Committee through June 2021 acted with reckless disregard for Plaintiffs' fundamental right to family privacy in a manner that shocks the conscience in that a) Mr. Gazda knew that the DESE Guidance is not a legal mandate but claimed that it requires that school staff conceal information from parents; b) Mr. Gazda knew that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claimed that it permits the reversal of parent and child roles by providing that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Mr. Gazda knew that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but directed school staff to deliberately conceal information from parents of children under age 14 unless the child consents, thereby reversing the roles of parents and children; d) Mr. Gazda knew that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but approved and implemented a Protocol that directs staff to encourage, facilitate, promote and implement gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or obtaining consent from parents.

230. Defendant Gazda, as superintendent charged with implementing policies sanctioned by the School Committee, through June 2021 acted with reckless disregard for Plaintiffs' fundamental right to family

privacy in a manner that shocks the conscience in that Mr. Gazda knew that Plaintiffs Foote and Silvestri had exercised their rights as parents to provide mental health care through a private therapist and requested that school staff respect their rights and not engage with their children, but failed to adequately supervise and train employees to not implement the Protocol or actively encouraged employees to defy Plaintiffs' directions and engage with Plaintiffs' children without notifying Plaintiffs.

231. Defendant Gazda acted with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Mr. Gazda publicly stated during School Committee meetings that parents with concerns about not being notified and their decisions not being honored regarding their children's gender identity issues were driven by "prejudice and bigotry," and "under the spell" of "outside groups," and that school officials would continue with their policies regardless of what parents thought.

Allegations Against Defendant Nemeth

232. Defendant Nemeth, as interim superintendent charged with implementing policies sanctioned by the School Committee, since June 2021 has acted and is acting with reckless disregard for Plaintiffs' fundamental right to family privacy in a manner that shocks the conscience in that a) Ms. Nemeth knows that the DESE Guidance is not a legal mandate but claims that it requires that school staff conceal information from parents; b) Ms. Nemeth knows that the DESE Guidance suggests only that school staff should speak to students before speaking

to parents, but claims that it permits the reversal of parent and child roles by providing that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Ms. Nemeth knows that under Massachusetts law parents have sole control and access to information in their child's records until the child is age14 or in the ninth grade, but directs school staff to deliberately conceal information from parents of children under age 14 unless the child consents; d) Ms. Nemeth knows that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but implements a Protocol that directs staff to encourage, facilitate, promote and implement gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or gaining consent from parents.

Allegations Against Defendant Monette

233. Defendant Monette, as principal of Baird Middle School charged with implementing policies sanctioned by the School Committee at the school, has acted with reckless disregard for Plaintiffs' fundamental right to familial privacy in a manner that shocks the conscience in that a) Ms. Monette knew or should have known that the DESE Guidance is not a legal mandate but claimed that it requires that school staff conceal information from parents; b) Ms. Monette knew or should have known that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claimed that it permits the reversal of parent and child roles by providing that parents are not to be told about children's gender-affirming social transitioning

unless the child consents; c) Ms. Monette knew or should have known that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but directed school staff to deliberately conceal information from parents of children under age 14 unless the child consents; d) Ms. Monette knew or should have known that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but implemented a Protocol that directs staff to encourage, facilitate, promote and implement gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or gaining consent from parents.

234. Defendant Monette as principal of Baird Middle School acted with reckless disregard for Plaintiffs' fundamental right to familial privacy in a manner that shocks the conscience in that Ms. Monette knew that Plaintiffs Foote and Silvestri had exercised their rights as parents to provide mental health care through a private therapist and requested that school staff respect their rights and not engage with their children, but failed to adequately supervise and train employees to not implement the Protocol or actively encouraged employees to defy Plaintiffs' directions and engage with Plaintiffs' children without notifying Plaintiffs.

Allegations Against Defendant Foley

235. Defendant Foley, as school counselor at Baird Middle School, has acted and continues act with reckless disregard for Plaintiffs' fundamental right to family privacy in a manner that shocks the conscience

in that a) Ms. Foley knows or should have known that the DESE Guidance is not a legal mandate but claims that it requires that school staff conceal information from parents; b) Ms. Foley knows or should have known that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claims that it permits the reversal of parent and child roles by providing that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Ms. Foley knows or should have known that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but deliberately concealed information and directed others to deliberately conceal information from parents of children under age 14 unless the child consents; d) Ms. Foley knows or should have known that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but encouraged, facilitated, promoted and implemented gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or gaining consent from parents.

236. Defendant Foley acted and continues to act with reckless disregard for Plaintiffs' fundamental right to familial privacy in a manner that shocks the conscience in that Ms. Foley knew that Plaintiffs Foote and Silvestri had exercised their rights as parents to provide mental health care through a private therapist and requested that school staff respect their rights and not engage with their children on these matters, but intentionally defied

Plaintiffs' directions and engaged with Plaintiffs' children without notifying Plaintiffs, thereby inserting herself into the family dynamic in violation of Plaintiffs' right to family privacy.

237. Defendant Foley acted and continues to act with reckless disregard for Plaintiffs' fundamental right to familial privacy in a manner that shocks the conscience in that Ms. Foley knew that Plaintiffs Foote and Silvestri had exercised their rights as parents to provide mental health care through a private therapist and requested that school staff respect their rights and not engage with their children on these matters, but actively defied the parents' instructions by soliciting and participating in private meetings with B.F. and questioning whether B.F.'s parents could keep her safe or provide proper therapeutic care.

238. Defendant Foley acted and continues to act with reckless disregard for Plaintiffs' fundamental parental rights in a manner that shocks the conscience in that Ms. Foley knew that Plaintiffs Foote and Silvestri had exercised their rights as parents to provide mental health care through a private therapist and requested that school staff respect their rights and not engage with their children on these matters, but actively defied the parents' instructions by referring B.F. to Defendant Funke for private meetings aimed at facilitating and promoting gender-affirming social transitioning to a discordant gender identity without the knowledge and consent of her parents.

Allegations Against Defendant Funke

239. Defendant Funke, when school librarian at Baird Middle School, acted with reckless disregard for Plaintiffs' fundamental right to familial privacy in a manner that shocks the conscience in that a) Ms. Funke knew or should have known that the DESE Guidance is not a legal mandate but claimed that it requires that school staff conceal information from parents; b) Ms. Funke knew or should have known that the DESE Guidance suggests only that school staff should speak to students before speaking to parents, but claimed that it permits the reversal of parent and child roles by providing that parents are not to be told about children's gender-affirming social transitioning unless the child consents; c) Ms. Funke knew or should have known that under Massachusetts law parents have sole control and access to information in their child's records until the child is age 14 or in the ninth grade, but deliberately concealed information and directed others to deliberately conceal information from parents of children under age 14 unless the child consents; d) Ms. Funke knew or should have known that under Massachusetts law parents must be informed of and consent to medical/mental health care for their children who are under 18, but encouraged, facilitated, promoted and implemented gender-affirming social transitioning, a known mental health treatment, with children under age 18 without informing or gaining consent from parents.

240. Defendant Funke acted with reckless disregard for Plaintiffs' fundamental right to family privacy in a manner that shocks the conscience in that Ms. Funke knew or should have known that Plaintiffs

Foote and Silvestri had exercised their parental rights by securing a private therapist for B.F. and requested that school staff not engage with their children regarding mental health issues, but actively engaged with B.F. regarding gender-affirming social transitioning without Plaintiffs' consent thereby impermissibly inserting herself into the Plaintiffs' family dynamic.

241. Defendant Funke acted with reckless disregard for Plaintiffs' fundamental right to family privacy in a manner that shocks the conscience in that Ms. Funke actively defied the parents' instructions by meeting privately with B.F. and G.F. and encouraging them through conversations, materials, internet sites, and recommended activities to experiment with discordant gender identities and socially transition without the knowledge and consent of their parents.

General Allegations

242. Defendants' deliberate indifference to Plaintiffs' rights has resulted in and continues to result in deprivation of their constitutional rights to family privacy.

243. Plaintiffs' constitutionally protected rights to family privacy were violated as the plainly obvious consequence of Defendants' actions in intentionally and explicitly withholding information in accordance with the Protocol that parents were not to be notified when their children assert a discordant gender identity and seek to socially transition unless the children consent.

244. Plaintiffs' constitutionally protected right to family privacy was violated as the plainly obvious

consequence of Defendants' actions in, *inter alia*, a) meeting secretly with their children to engage in counseling and ideologically-driven advocacy related to mental health and discordant gender identity without parental notice and consent, b) deceiving parents by using one set of names and pronouns when communicating with them and another at school, c) directing children to speak untruthfully by instructing them to use alternate gender pronouns and names for their peers, and d) nurturing distrust for parents through secret meetings in which parents' decisions and ability to act in the best interest of their children are questioned, thus disrupting the parent-child relationship.

245. Defendants cannot assert a compelling state interest for recklessly disregarding Plaintiffs' constitutional rights to family privacy.

246. Defendants' prohibitions against parental notification and unauthorized involvement in children's mental health decisions related to gender identity are not narrowly tailored.

247. Defendants' violation of Plaintiffs' constitutional rights has caused and continues to cause Plaintiffs undue hardship and irreparable harm in that Plaintiffs have been and are being denied their right to direct decisions concerning the upbringing and mental health care for their children without interference from the state, and their children are denied the right to have upbringing and mental health decisions made by their parents in keeping with their family values, advice of the family's mental health professionals, and their sincerely held religious beliefs.

248. Plaintiffs have no adequate remedy at law to correct the continuing deprivation of their fundamental rights.

FOURTH CAUSE OF ACTION
Violation of Civil Rights, 42 U.S.C. § 1983
(Violation of Plaintiffs' Right to Free Exercise of Religion Under the U.S. Constitution)
(By Plaintiffs Feliciano and Salmeron Against all Defendants)

249. Plaintiffs incorporate the factual allegations in paragraphs 9-162 by reference as if set forth in full.

250. The Free Exercise Clause of the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, prohibits Defendants from abridging Plaintiffs' right to free exercise of religion.

251. Plaintiffs have sincerely held Biblically-based religious beliefs that human beings are created male or female and that the natural created order regarding human sexuality cannot be changed regardless of individual feelings, beliefs, or discomfort with one's identity, and biological reality, as either male or female.

252. Plaintiffs have Biblically-based sincerely held religious beliefs that parents have the non-delegable duty to direct the upbringing and beliefs, religious training, and medical and mental health care of their children, that children are to respect their parents' authority, and that any intrusion of the government into that realm infringes upon the free exercise of their religion.

253. Plaintiffs have sincerely held Biblically-based religious beliefs that all people are to be treated with respect and compassion, and that respect and compassion do not include misrepresenting an individual's natural created identity as either a male or a female.

254. Plaintiffs have sincerely held religious beliefs that individuals are to speak the truth, including speaking the truth regarding matters of sexual identity as a male or female.

255. Defendants' actions in excluding Plaintiffs Feliciano and Salmeron from decision making regarding their children's sexual and gender identity target the Plaintiffs' beliefs regarding the created order, human nature, sexuality, gender, parental authority, and morality which constitute central components of their sincerely held religious beliefs.

256. Defendants' actions have caused a direct and immediate conflict with Plaintiffs' religious beliefs by prohibiting them from being informed of mental health issues their children are or might be experiencing and by denying them the opportunity to seek counseling and guidance for their children in a manner that is consistent with the beliefs sincerely held by their family instead of the government.

257. Defendants' actions are coercive in that they deliberately supplant Plaintiffs' role as advisors of the moral and religious development of their children so that they are not able to direct their children's mental health care, counseling, and beliefs regarding sex and gender identity in accordance with their values because Defendants have substituted and supplanted the state's perspective on the issues of sex and gender

identity for the perspective of Plaintiffs in violation of Plaintiffs' free exercise rights.

258. Defendants' actions are neither neutral nor generally applicable, but rather, specifically and discriminatorily target the religious speech, beliefs, and viewpoint of Plaintiffs and, thus, expressly constitute a substantial burden on sincerely held religious beliefs that are contrary to Defendants' viewpoint regarding gender identity and affirmation of a discordant gender identity.

259. No compelling state interest justifies the burdens Defendants have imposed and are imposing on Plaintiffs' rights to the free exercise of religion.

260. Defendants' actions are not the least restrictive means to accomplish any permissible government purpose Defendants seek to serve.

261. Defendants' violation of Plaintiffs' rights to free exercise of religion has caused, is causing, and will continue to cause Plaintiffs to suffer undue and actual hardships.

262. Defendants' violation of Plaintiffs' rights to free exercise of religion has caused, is causing, and will continue to cause Plaintiffs to suffer irreparable injury. Plaintiffs have no adequate remedy at law to correct the continuing deprivation of their most cherished constitutional liberties.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

1. A declaration that Defendants have violated Plaintiffs' fundamental rights as parents, under the

United States Constitution and other laws to the extent that they: a) have approved and implemented a Protocol to conceal from parents when their children express a discordant gender identity and are being socially transitioned, unless the children consent; b) actively implement and reinforce the Protocol through surreptitious meetings with minor children to discuss gender identity, socially transition, and promote experimenting with alternative gender identities without the knowledge or consent of their parents; c) actively and intentionally nurture in children distrust of their parents by questioning the parents' care for their children during secret meetings of which the parents are not aware nor consent to; and d) actively and intentionally direct school staff to deceive parents by using given names and pronouns in communications with parents but otherwise affirming a minor child's preferred gender discordant name and pronouns.

2. A declaration that teachers and staff: a) may not facilitate a child's social transition to a different gender identity at school without parental notification and consent; b) must communicate with parents if they have reason to believe their child may be dealing with gender confusion or dysphoria, without first obtaining the child's consent; and c) may not attempt to deceive parents by, *inter alia*, using different names and pronouns around parents than are used in school;

3. A declaration that the Protocol and any associated policies, procedures, and practices are to be publicly rescinded and that parents be notified that the Protocol and associated policies and procedures have been rescinded.

4. Preliminary and permanent injunctions prohibiting Defendants, their employees, agents and third parties acting at their direction, from: a) Using, referencing, relying on, or otherwise acting upon the Protocol and associated policies and procedures fostering secrecy from parents as guidance for Ludlow Public Schools' staff and administrators; b) Training staff to exclude parents from discussions, meetings, and other interventions with the parents' children related to their children's assertion of a discordant gender identity and desire to socially transition; c) Failing to notify parents when their children express the belief that they have a discordant gender identity and want to take actions to affirm that identify; d) Failing or refusing to abide by parents' instructions concerning their children's discordant gender identity; e) Meeting with children to discuss, promote, or engage in counseling regarding the children's discordant gender identity and desire to socially transition without notice to and the consent of their parents.

5. Preliminary and permanent injunctions prohibiting Defendants, their employees, agents and third parties acting at their direction from instructing, directing, or encouraging Ludlow Public Schools staff to participate in programs, initiatives, activities, or discussions in which Ludlow Public Schools staff promise children that their parents will not be told about the children's disclosures about a discordant gender identity or that they are socially transitioning at school.

6. For nominal damages;

7. For compensatory damages according to proof for the injuries caused by Defendants' acts and omissions, as proven at trial;

8. For attorneys' fees and costs under 42 U.S.C. § 1988;

9. For such other relief as the Court deems proper.

Dated: June 21, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Court on June 21, 2022. Service will be effectuated by the Court's electronic notification system upon all counsel or parties of record.

/s/Mary E. McAlister
Mary E. McAlister

Statement by Superintendent Todd Gazda

There are a group of individuals in our community who continue to take exception to the inclusive practices of our schools. As an educational community, our staff strives to create an environment where every student and staff member feels safe, supported and free to be themselves regardless of their race, sexual orientation, disability or gender identity. We take pride in the fact that we are an inclusive public school system and the only message we are "pushing" is one of acceptance and inclusion.

Every action we take is in compliance with the laws and regulations of our state and the guidance on these issues released by the Massachusetts Department of Elementary and Secondary Education. However, we take the actions we do to support our students not because we are required to, but because we celebrate the diversity of our student and staff population. If anything, we do not do enough to support our LGBTQ students and staff and we need to do more.

Right now we have a situation where intolerance, prejudice and bigotry against LGBTQ individuals by members of our community is being thinly veiled behind a camouflage of what is being asserted as "parental rights". Half-truths, misrepresentations, incomplete information and false accusations are being put forth to support this façade.

Myself and other members of our Ludlow staff have been called, evil, sick, twisted and deviants. We have been accused of "grooming" students, implying we are pedophiles, for supporting an inclusive environment in our schools where all students and staff can feel safe and supported. Harassing phone calls have been

made to our personal home phones and cell phones all in a pathetic attempt to intimidate and harass.

At it's core this current controversy isn't about sex, it's about identity. It is about ensuring a safe environment with caring adults that students can rely on to discuss problems, issues or questions they might have. For many of our students school **IS** their only safe place and that safety evaporates when they leave the confines of our buildings.

We will not support any action that denies our students the right to express who they are at the most basic level as an individual. We cannot consider any requirement that would cause us to discriminate against members of our student body or staff by refusing to recognize them in the manner they wish to be identified as an individual.

This may be my last meeting as the superintendent of the Ludlow Public Schools, but I am confident that the Ludlow school committee, administrators, teachers and staff will stand up to this prejudice and bigotry and continue to create a safe, caring, supportive inclusive environment where all our students can grow as individuals.

Cases Involving Parental Exclusion from Social Transition Decisions

Reynolds v. Talberg, No. 1:18-CV-69, 2020 WL 6375396 (W.D. Mich., filed Jan. 19, 2018)

Doe v. *Madison Metro. Sch. Dist.*, No. 20-cv-454 (Dane Cnty., Wis., Cir. Ct., filed Feb. 18, 2020)

John and Jane Parents 1 v. *Montgomery Cnty. Bd. of Educ.*, No. 8:20-cv-3552 (D. Md., removed to federal court on Dec. 7, 2020)

The Fam. Found. et. al v. *Va. Dep't of Educ.*, No. CL21-1399-3 (Richmond City, Va. Cir. Ct., filed Mar. 30, 2021)

Littlejohn v. *Sch. Bd. of Leon Cnty.*, Fla., No. 4:21-cv-415 (N.D. Fla., filed Oct. 18, 2021)

T.F. v. *Kettle Moraine Sch. Dist.*, No. 21-cv-1650 (Waukesha Cnty., Wis. Cir. Ct., filed Nov. 11, 2021)

Perez v. *Broskie*, No. 3:22-cv-83 (M.D. Fla., filed Jan. 24, 2022)

Doe v. *Manchester Sch. Dist.*, No. 216-2022-cv-117 (N.H. Sup. Ct., filed Mar. 3, 2022)

Ricard v. *USD 475 Geary Cnty.*, KS Sch. Bd., 5:22-cv-4015 (D. Kan., filed Mar. 7, 2022)

Foote v. *Ludlow Sch. Comm.*, No. 3:22-cv-30041 (D. Mass., filed April 12, 2022)

Vesely v. *Ill. Sch. Dist. 45*, No. 22-CV-2035 (N.D. Ill., filed April 19, 2022)

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