UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Parents Protecting Our Children, an Unincorporated association,

Plaintiff,

Case No. 3:22-cv-00508

Eau Claire Area School District, Wisconsin; et. al.,
Defendants.

**DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS**

## INTRODUCTION

Plaintiff, Parents Protecting Our Children, is an unincorporated association of parents whose children attend schools within the Defendant, Eau Claire Area School District[1] (the "District"). The District has developed internal guidance for its staff to ensure that the District provides supports to transgender, non-binary, and gender nonconforming students as required under Title IX and Wisconsin law to foster an inclusive and welcoming environment free from discrimination (the "Guidance"). *See* [ECF 1-3]. Plaintiff's members are upset about this, but admittedly they do not have children that are transgender or gender nonconforming. Nor has the Guidance ever been utilized with any of Plaintiff's members' children. Rather, Plaintiff's members claim that at some unknown point in the future one of their children may be transgender, may disclose their gender identity to the District, and may request that the District not immediately notify their parent of this fact. Plaintiff's members' speculative concerns, however, are entirely

[1] Plaintiff has also named the members of the District Board of Education as defendants in their official capacities: Tim Nordin, Lori Bica, Marquell Johnson, Phil Lyons, Joshua Clements, Stephanie Farrar, and Erica Zerr. Plaintiff also named District Superintendent Michael Johnson in his official capacity. As discussed *infra*, claims against government officials are redundant and unnecessary when the government entity itself is already a party to a lawsuit. These individual defendants must be dismissed with prejudice.

premised upon a complete mischaracterization of the Guidance. Their concerns, and Plaintiff's Complaint, merely reflects a generalized uncomfortableness with transgender individuals, not actual harm.

Plaintiff's lack of actual harm requires this lawsuit to be dismissed as it does not raise a justiciable controversy. Plaintiff's members do not have standing and the claim is not ripe. Moreover, even if Plaintiff could demonstrate associational standing to bring this lawsuit, its constitutional claims fail as a matter of law. The Guidance does not infringe upon any fundamental constitutional rights or otherwise violate federal law. Ignoring the hyperbole and conclusory statements in the Complaint, Plaintiff's Complaint fails to state a claim upon which relief can be granted.

## SUMMARY OF ALLEGATIONS[2]

Plaintiff is an unincorporated association of parents who have children that attend school in the District. [ECF 1, ¶ 6]. Plaintiff takes issue with the District's use of the "Guidance," which is internal, administrative guidance provided to staff to guide them on how to address situations where students seek gender identity support. [ECF 1-3]. The District has issued the Guidance to its staff and has provided training on its potential implementation. [ECF 1, ¶ 20].

The purpose of the Guidance is: "1) to foster inclusive and welcoming environments that are free from discrimination, harassment, and bullying regardless of sex, sexual orientation, gender identity or gender expression; and 2) to facilitate compliance with district policy." [ECF 1-3]. The Guidance acknowledges that each student's situation is unique: "Since individual circumstances, needs, programs, facilities, and resources may differ; administrators and school staff are expected to consider the needs of the individual on a case-by-case basis." *Id.* The Guidance does not purport

[2] While the facts in the Complaint must be relied upon in bringing this motion to dismiss, the District does not admit any of the allegations and reserves the right to contest the same in the future.

to be absolute or to mandate staff take any particular action: "This guidance is intended to be a resource that is compliant with district policies, local, state, and federal laws. They are not intended to anticipate every possible situation that may occur." *Id.*

Plaintiff makes the unsubstantiated claim that the Guidance "mandates that schools and teachers hide critical information regarding a child's health from his or her parents and to take action specifically designed to alter the child's mental and physical well-being" and that it "requires a school and its staff to hold secret meetings" to somehow facilitate a student's gender change to prevent parents from making decisions about their children. [ECF 1, ¶¶ 2-3].

Read fairly, the Guidance calls for the possible development of a Gender Support Plan, in which "School staff, family, and the student should work together to complete this document." [ECF 1-4]. Parent inclusion in these discussions is encouraged unless the student explicitly tells staff not to do so. [ECF 1-3, 1-4]. The Guidance simply provides: "School personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent/guardian." [ECF 1-3]. The creation of a Gender Support Plan, however, is not a secret: "If parents are not involved in creating this plan, and student states they do not want parents to know, it shall be made clear to the student that this plan is a student record and will be released to their parents when they request it." [ECF 1-4]. "This is a [sic] not a privileged document between the student and the school district." *Id.*

None of Plaintiff's members have been impacted by the Guidance. None of their children are currently transgender or gender non-conforming. None of their children have sought gender identity support from the District. Rather, Plaintiff claims that its members are scared that that their child might be "targeted by the school." [ECF 1, ¶ 75]. Plaintiff claims that the existence of the Guidance violates its member's substantive due process right to direct and control the

upbringing of their children and violates their right to freely exercise their religion.[3] *Id.* at ¶¶ 77-99. Plaintiff also claims the Guidance somehow violates the Protection of Pupil Rights Amendment ("PPRA"). *Id.* at ¶¶ 118-125. Plaintiff seeks declaratory and injunctive relief to prevent the Guidance from being used or implemented in any way. *Id.* at p. 25.

## LEGAL STANDARDS

### A. Motion To Dismiss Under Fed. R. Civ. P. 12(b)(6).

To survive dismissal under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)). A court, in examining a pleading under Fed. R. Civ. P. 12(b)(6), conducts a two-step inquiry. First, the Court should discard all legal conclusions from the pleading, and second, as to the remaining factual allegations, the Court should test the sufficiency of the facts pled to determine whether they provide the necessary "factual enhancement" to push the claim across the line from a mere possibility of entitlement to relief into the territory of plausibility of entitlement to relief. *Twombly*, 550 U.S. at 556; *Iqbal*, 556 U.S. at 678-79. Stated another way, a complaint must include sufficient "factual enhancement" to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 557. A complaint that fails to do so "must be dismissed." *Id.*

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. These "[f]actual allegations must be enough to raise a right to relief above

[3] Plaintiff also claims the Guidance violates the parallel portions of the Wisconsin Constitution. [ECF 1, ¶¶ 100-117].

the speculative level." *Twombly*, 550 U.S. at 555. It is not enough for a plaintiff to plead facts that are "merely consistent with" liability "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (internal quotations omitted).

A plaintiff cannot survive dismissal by making conclusory allegations that the elements of a claim have been satisfied. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," *id*., and "a plaintiff's obligations to provide the 'grounds' of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. "[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Iqbal*, 556 U.S. at 687.

**B. Motion To Dismiss Under Fed. R. Civ. P. 12(b)(1).**

A party may move to dismiss an action for lack of a justiciable controversy under Federal Rule of Civil Procedure 12(b)(1). *See Retired Chicago Police Ass'n v. City of Chicago*, 76 F.3d 856, 862 (7th Cir. 1996). At the pleading stage, courts will review justiciability based on the well-plead allegations in the complaint under the Fed. R. 12(b)(6) standard. *See Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1007-08 (7th Cir. 2021). However, a court ruling on a motion to dismiss under Rule 12(b)(1) may rely upon affidavits and other materials supporting its motion. *Pearson v. Garrett-Evangelical Theological Seminary, Inc.*, 790 F. Supp. 2d 759, 762 (N.D. Ill. 2011). The plaintiff carries the burden of establishing standing. *Id.*

## ARGUMENT

### I. PLAINTIFF FAILS TO PRESENT A JUSTICIABLE CONTROVERSY AS IT LACKS ASSOCIATIONAL STANDING AND THE ASSERTED CLAIMS ARE NOT RIPE.

Plaintiff is an unincorporated nonprofit association seeking to assert claims on behalf of its members, parents who have children that attend school in the District. [ECF 1, ¶ 6]. As in every case, however, to proceed Plaintiff must show that it has standing to sue: "Standing to sue is part of the common understanding of what it takes to make a justiciable case." *Bensman v. United States Forest Serv.*, 408 F.3d 945, 949 (7th Cir. 2005).

"To establish standing for injunctive relief or a declaratory judgment, a party must show a real and immediate threat of injury." *Beley v. City of Chi.*, No. 12-cv-9714, 2013 U.S. Dist. LEXIS 90070, at *8 (N.D. Ill. June 27, 2013). Correspondingly, the justiciability doctrine of ripeness "is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong." *Anders v. Fort Wayne Cmty. Sch.*, 124 F. Supp. 2d 618, 630 (N.D. Ind. 2000). This is because ripeness becomes an issue when "a case is anchored in future events that may not occur as anticipated, or occur at all." *Id.* "The doctrine of ripeness is closely related to standing in cases involving a pre-enforcement challenge; the two concepts often collapse into one issue." *Id.*

An organization may sue on behalf of its members "even without a showing of injury to the association itself," a concept known as associational standing. *Prairie Rivers Network*, 2 F.4th at 1008. An organization has associational standing if "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *United African Org. v. Biden*, No. 1:22-CV-

02599, 2022 U.S. Dist. LEXIS 141449, at *14-15 (N.D. Ill. Aug. 9, 2022) (citing *Milwaukee Police Ass'n v. Flynn*, 863 F.3d 636, 639 (7th Cir. 2017)).

Plaintiff cannot show that it has associational standing. A review of the Complaint shows that Plaintiff seeks to protect interests germane to its stated purpose and that individual member participation may not be required, but the individual parent members of Plaintiff do not have standing in their own right, and that is fatal. To have standing, the parent members "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Wadsworth v. Kross, Lieberman & Stone, Inc.*, 12 F.4th 665, 667 (7th Cir. 2021) (internal citation omitted). "At the pleading stage, the standing inquiry asks whether the complaint clearly . . . allege[s] facts demonstrating each element in the doctrinal test." *Larkin v. Fin. Sys. of Green Bay, Inc.*, 982 F.3d 1060, 1064 (7th Cir. 2020) (internal citations omitted).

Whether viewed through the lens of standing (injury in fact) or mootness, Plaintiff has failed to plead a justiciable controversy. Plaintiff's central position is that the mere existence of the Guidance infringes on its members' right to control the upbringing of their children. *See* [ECF 1, ¶ 74]. There are no facts alleged in the Complaint, however, that could establish an injury in fact. As explained *infra*, Plaintiff completely mischaracterizes the contents of the Guidance, but even if it had not selectively interpreted the Guidance, there are simply no allegations that the Guidance has ever been applied to any of the member parents' children or has otherwise impacted the members. Rather, all Plaintiff provides is a conclusion of law that its members have been injured by the Guidance. *Id.* at ¶ 75.

The Supreme Court has consistently stressed that a plaintiff's complaint "must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines v. Byrd*, 521 U.S. 811, 819, 117 S. Ct. 2312, 2317, 138 L.Ed.2d 849, 858 (1997). To establish standing for an alleged infringement of a parent's right to direct the education and upbringing of their child, a complaint must state an actual injury to the parent or their child. *See Students & Parents for Privacy v. Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891, 899 (N.D. Ill. 2019) ("The first amended complaint, however, includes no allegations of an injury to Victoria Wilson particularly or to her children particularly. Accordingly, the Court agrees with District 211 that plaintiffs have not adequately alleged that plaintiff Victoria Wilson has standing."); *see also Moss v. Spartanburg Cty. Sch. Dist. Seven*, 683 F.3d 599, 605 (4th Cir. 2012) (holding that parents of children attending a school cannot challenge the "constitutionality of school policies without demonstrating that they were personally injured in some way by those policies.").

A parent's general distress over a school's policies does not demonstrate an actual injury. As explained by the Supreme Court of Virginia when discussing the standing of parents to challenge a transgender student bathroom policy:

> First, the complaint fails to allege actual or potential injury in fact based on 'present rather than future or speculative facts.' *Id.* The complaint alleges only that Jack Doe fears that the policy might involve the use of his bathroom or locker room by a transgender student. Jack's sharing of a bathroom or locker room by a transgender student is, however, a purely speculative fact. It is not clear what, if any, bathroom policies are being implemented, or even that Jack attends school with a single transgender student. Similarly, Jack alleges that he is 'distressed' about how his words might be misinterpreted and thinks cautiously about his speech. Yet Jack does not allege any present facts that would place him in violation of the policy, rendering any injury purely speculative. While Jack alleges general 'distress' in his educational environment, this 'distress' appears to be due to the existence of the policy out of a general fear that he might be disciplined for an inadvertent action. There is no connection with an articulated injury that Jack is suffering or will suffer based on the present facts as pled. We are left with Jack's bald assertion of fear of

> discipline without any alleged predicate facts to form the basis for such a fear. While we do not reach the question of what must be pled to establish an actual controversy, the injury pled here is insufficient because **general distress over a general policy does not alone allege injury sufficient for standing, even in a declaratory judgment action.**

*Lafferty v. Sch. Bd. of Fairfax Cty.*, 293 Va. 354, 361-62, 798 S.E.2d 164, 168 (2017) (emphasis added). General distress, not an injury in fact, is all that can be found in Plaintiff's Complaint.

In cases like this where the challenged policy or practice has never been applied in the way the parents find objectionable, it is even more difficult to show standing because the parents must demonstrate "that there is a substantial risk" that the policy or practice will be enforced in the way that they foresee. *Reynolds v. Talberg*, No. 1:18-cv-69, 2020 U.S. Dist. LEXIS 202418, at *11 (W.D. Mich. Oct. 30, 2020). Plaintiff's Complaint does not identify facts to show that there is a substantial risk that the Guidance will ever be applied to their members' children. Notably, there are no allegations in the Complaint that any of Plaintiff's members have children who are transgender or gender nonconforming. There are no allegations that the District applied the Guidance in dealing with any member's child. Plaintiff rests completely on the speculative claim that at some unknown point in the future, one of its members' children might seek out the District without their knowledge to address transgender issues or gender nonconformity and specifically ask the District to not notify their parent. This is nothing more than a speculative, hypothetical fear, one that has no indication of ever coming to fruition.

Generalized uncomfortableness with an alleged policy that has never directly impacted Plaintiff's members is not enough to confer standing because there is nothing that "supports the proposition that parents have standing to [challenge] . . . the maintenance of an allegedly unconstitutional school policy in the absence of any allegations that the policy directly affects or threatens to directly affect any of the parent's children." *Schanou v. Lancaster Cty. Sch. Dist. No.*

*160*, 62 F.3d 1040, 1044 (8th Cir. 1995). Mere fear of the future application of a policy or future injury is "insufficient to create standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401, 133 S. Ct. 1138, 1141, 185 L.Ed.2d 264, 270 (2013).

In a recent case, the District Court for the Northern District of Iowa found that parents lacked standing to challenge the constitutionality of a school's use of a gender support plan like the one contemplated by the Guidance:

> Additionally, plaintiff asserts a conjectural possibility of injury via a Gender Support Plan being created for the children without parental knowledge or consent. They predict the school and/or their children will not involve the parents in the creation of or discussions about a Gender Support Plan and that the school will not be forthcoming about Gender Support Plans when parents ask in violation of their fundamental rights of child-rearing. Based on the record currently before the Court, no one has been denied information related to their child's gender identity or Gender Support Plan. Though the Court does not doubt their genuine fears, the facts currently alleged before the Court do not sufficiently show the parents or their children have been injured or that they face certainly impending injury through enforcement of the Policy. The theory that (1) their child will express a desire for or indicate by mistake a desire for a plan, (2) the child will be given a plan, (3) without parental consent or knowledge, (4) and the information will be hidden or denied when parents ask **requires too many speculative assumptions without sufficient factual allegations to support a finding of injury**. *See Turkish Coal.*, 678 F.3d at 622.

*Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist.*, No. 22-CV-78 CJW-MAR, 2022 U.S. Dist. LEXIS 169459, at *28-29 (N.D. Iowa Sep. 20, 2022) (emphasis added).

In sum, because Plaintiff cannot and has not plead facts to show that any of its members have been subjected to the actual application of the Guidance, or that that there is a substantial risk that the Guidance will be enforced in the way that they foresee, the entire claim is merely a speculative assumption based on various contingencies that may never occur. Plaintiff's members lack standing because they have not suffered an injury in fact and any pre-enforcement challenge to the Guidance is not ripe.

## II. PLAINTIFF FAILS TO STATE A CLAIM FOR A VIOLATION OF SUBSTANTIVE DUE PROCESS BECAUSE IT HAS NOT IDENTIFIED A FUNDAMENTAL CONSTITUTIONAL RIGHT AND THE GUIDANCE IS RATIONALLY RELATED TO LEGITIMATE INTERESTS.

Even if Plaintiff could establish standing, its claims still fail because its constitutional claims are deficient as a matter of law. Plaintiff claims that the Guidance violates its members' alleged "fundamental Constitutional right to make decisions concerning the care, custody, and control of their children." [ECF 1, ¶ 80]. This is an alleged violation of substantive due process under the Fourteenth Amendment. "To allege a viable substantive due process claim, [a plaintiff] would need to allege conduct under color of state law that 'violated a fundamental right or liberty' and was so 'arbitrary and irrational' as to 'shock the conscience.'" *Nelson v. City of Chi.*, 992 F.3d 599, 604 (7th Cir. 2021). This would require Plaintiff to identify fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and this must be subject to "careful description." *Id.* Plaintiffs have failed to identify that this case implicates such rights.

### A. The Right To Make Decisions Regarding The Care, Custody, And Control Of Children Is Not Absolute And Does Not Exist In A Vacuum.

"The first (and often last) issue in bringing a substantive due process challenge under the Fourteenth Amendment is the proper characterization of the individual's asserted right, and the determination of whether that right is fundamental." *John & Jane Parents 1 v. Montgomery Cty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 U.S. Dist. LEXIS 149021, at *14 (D. Md. Aug. 18, 2022) (internal citations omitted). "When government action interferes with fundamental rights or liberties, it is subject to 'more demanding scrutiny'—strict scrutiny." *Halcsik v. Knutson*, No. 20-cv-317-pp, 2022 U.S. Dist. LEXIS 52927, at *11-13 (E.D. Wis. Mar. 24, 2022) (citing *St. John's United Church of Christ v. City of Chi.*, 502 F.3d 616, 637 (7th Cir. 2007)). Under strict scrutiny,

a law or action passes constitutional muster only if it is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 7221, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). When the government action does not interfere with fundamental rights or liberties, "substantive due process requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational." *Lee v. City of Chi.*, 330 F.3d 456, 467 (7th Cir. 2003).

Although Plaintiff repeatedly claims that this case involves fundamental rights or liberties, a careful analysis shows that the issues raised in this case do not implicate fundamental rights or liberties. Certainly, it has been recognized that there is a fundamental right for parents to make "decisions regarding the care, custody, and control of their children . . . which includes the right to 'direct the upbringing and education of children under their control.'" *John & Jane Parents 1*, 2022 U.S. Dist. LEXIS 149021, at *21 (citing *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)). However, this right "does not exist in a vacuum." *Sebesta v. Davis*, 878 F.3d 226, 229 (7th Cir. 2017). The precise boundaries of a parent's right to control a child's upbringing and education "is neither absolute nor unqualified." *John & Jane Parents 1*, 2022 U.S. Dist. LEXIS 149021, at *21.

In *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), the Supreme Court concluded that parents are constitutionally entitled to seek out a specific kind of education under the Fourteenth Amendment's Due Process Clause. In *Pierce v. Society of Sisters*, 268 U.S. 510, 534, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), the Supreme Court applied *Meyer* and held that a state law requiring parents to send their children to public school was unconstitutional because it

"unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

These cases reflect the generalized interest of parents directing the upbringing and education of their children, but "subsequent Supreme Court decisions have emphasized that the rights identified in *Meyer* and *Pierce* are limited." *John & Jane Parents 1*, 2022 U.S. Dist. LEXIS 149021, at *22. In *Runyon v. McCrary*, 427 U.S. 160, 177, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976), the Supreme Court stated that *Pierce* "len[ds] no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society." Instead, *Pierce* "held simply that while a State may posit (educational) standards, it may not pre-empt the educational process by requiring children to attend public schools." *Id.* And, in *Norwood v. Harrison*, 413 U.S. 455, 462, 93 S. Ct. 2804, 37 L.Ed.2d 723 (1973), the Supreme Court stressed the limited scope of *Pierce*, stating that it simply "affirmed the right of private schools to exist and to operate."

The Seventh Circuit has recognized this limitation, stating that while there is a fundamental parental right to direct the upbringing and education of a child, "a right to choose the type of school one's child attends, or to direct the *private* instruction of one's child, does not imply a parent's right to control every aspect of her child's education at a public school." *Thomas v. Evansville-Vanderburgh Sch. Corp.*, 258 F. App'x 50, 53-54 (7th Cir. 2007); *see also Hernandez v. Foster*, 657 F.3d 463, 478 (7th Cir. 2011) (explaining that a parent's right "to bear and raise their children . . . is not absolute" and "must be balanced against the state's interest in protecting children from abuse").

Various circuit courts of appeal have also emphasized the limited nature of the parental right to make decisions concerning the care, custody, and control of their children. For example, the Ninth Circuit held in *Fields v. Palmdale School District* that parents do not have a fundamental right to limit what public schools tell their children regarding sex education to comport with "their personal and religious values and beliefs." 427 F.3d 1197, 1211 (9th Cir. 2005). The court stated that the *Meyer-Pierce* right does "not encompass a broad-based right *to restrict the flow of information* in the public schools." *Id.* at 1205. The court held that "there is no fundamental right of parents to be the *exclusive* provider of information regarding sexual matters to their children, either independent of their right to direct the upbringing and education of their children or encompassed by it." *Id.* at 1200.

Subsequently, in *Parents for Privacy v. Barr*, 949 F.3d 1210, 1231 (9th Cir. 2020), the Ninth Circuit further explained that "although the Supreme Court recognized that parents' liberty interest in the custody, care, and nurture of their children resides first in the parents, [it] does not reside there exclusively, nor is it beyond regulation [by the state] in the public interest." (internal citations omitted). In *Barr*, the Ninth Circuit found no fundamental right of parents to prevent transgender students from sharing school bathrooms and locker rooms with cisgender children. *Id.* The Ninth Circuit affirmed the district court's ruling that there was no fundamental parental "right to determine whether their children, while at school, will have to risk exposing their own undressed or partially unclothed bodies to members of the opposite sex" in "intimate, vulnerable settings like restrooms, locker rooms and showers." *Id.*

The Sixth Circuit in *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005), stated that: "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." Similarly, the Second Circuit rejected a parent's claim that he was constitutionally entitled to exempt his child from a mandatory health education class and found that "*Meyer, Pierce,* and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught." *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003). Finally, in *Parker v. Hurley*, 514 F.3d 87, 108 (1st Cir. 2008), the First Circuit held that the was no violation of parental rights when a public school district included books depicting same sex relationships in its curriculum.

In light of this authority, it is too simplistic to say that Plaintiff's members have a generalized fundamental right to control and direct every aspect of the upbringing of their children. Rather, the specific contours of the right asserted must be determined by the Court since the Supreme Court cautions that there must be a "careful description of the asserted fundamental liberty interest." *Washington*, 521 U.S. at 721.

**B. Plaintiff's Claimed Fundamental Right To Be Immediately Notified Of Their Child's Gender Identity If It Differs From Their Biological Sex Is Not A Fundamental Right In The Eyes Of The Constitution.**

To determine the level of scrutiny appropriate here, the Court must identify the specific nature of Plaintiff's asserted right, not simply the generalized right to direct and control the upbringing of their children. *See John & Jane Parents 1*, 2022 U.S. Dist. LEXIS 149021, at *15. Plaintiff claims that the Guidance requires "schools and teachers to secretly 'support the transition' of a child to a different 'gender' by providing psychological or psychiatric counseling or treatment, changing their name and pronouns and their intimate facility usage and overnight accommodations, all without parental notice or consent." [ECF 1, ¶ 83]. By this statement, Plaintiff appears to be declaring that parents have a fundamental right to be made aware of or control their child's disclosure of their gender identity at school.

Plaintiff's belief that the District intends to control or direct a student's gender identity is based upon its interpretation of the Guidance, but that interpretation is strained and impermissibly applied in a vacuum. Plaintiff claims that the "obvious purpose" of the Guidance "is to prevent parents from making critical decisions for their own minor children, from interfering with the school's ideologically-driven activities, from caring for their children, or from freely practicing their religion." *Id.* at ¶ 4. Plaintiff also claim that the Guidance "requires the school to provide psychosocial medical/psychological care to children without parental consent." *Id.* at ¶ 86. From these claims, it is plain to see that Plaintiff is asserting that its member parents have a fundamental right to be promptly informed of their child's gender identity if it differs from the gender associated with their sex assigned at birth, regardless of their child's wishes or any concerns regarding the detrimental effect the disclosure may have on their child.[4]

Mischaracterizing the Guidance and applying it in a vacuum to serve its own interests does not support Plaintiff's cause. This type of effort to re-frame the relevant issues was rejected by the court in *John & Jane Parents 1*. Specifically, the *John & Jane Parents 1* court found it significant that the plaintiff's arguments, similar to those asserted in Plaintiff's Complaint, were based upon an unfair reading of the guidelines for transgender student support utilized by the school. *See* 2022 U.S. Dist. LEXIS 149021, at *20. The court noted that there was no "policy of excluding parents, inasmuch as they actively encourage familial involvement in the development

[4] Plaintiff's claimed fundamental right to control every aspect of a child's upbringing and an unfettered right to control critical decisions for their own minor children, including caring for their children, or from freely practicing their religion free from interference by schools is inconsistent with the how the Wisconsin Legislature already displaces parents on some issues. For example, a school psychologist, counselor, social worker, and nurse, who engages in alcohol or drug abuse program activities, cannot disclose to a parent that the pupil is using or is experiencing problems resulting from the use of alcohol or other drugs. Wis. Stat. § 118.126. A minor may obtain an abortion without her parents' consent under several different scenarios, *see* Wis. Stat. § 48.375(4), and family planning clinics must treat all information gathered, including any personally identifiable information, as part of a confidential medical record. Wis. Stat. § 253.07(3)(c). Information may not be released without the informed consent of the patient with the exception of statistical information compiled without reference to anyone's identity. *See* Wis. Stat. §§ 253.07(3)(c), 905.04(1)(c), (2), and (3). No distinction is made based upon the age of the patient.

and implementation of a transgender or gender nonconforming student's 'Gender Support Plan' whenever possible." *Id.* at *17. Likewise, here the Guidance actively encourages involvement of the parents: "School staff, family, and the student should work together to complete" the Gender Support Plan. [ECF 1-4]. A fair and accurate reading of the Guidance shows that like the guidelines in *John & Jane Parents 1*, it does not "mandate nor encourage the exclusion or distrust of parents, but aims to include parents and other family in the support network they are intended to create." 2022 U.S. Dist. LEXIS 149021, at *19.

Here, like in *John & Jane Parents 1*, the only way for Plaintiff to frame this issue as an attempt "to prevent parents from making critical decisions for their own minor children, from interfering with the school's ideologically-driven activities, from caring for their children, or from freely practicing their religion" is to mischaracterize the Guidance. Like the parents in *John & Jane Parents 1*, Plaintiff's claim of a fundamental right is based on a selective reading that "distorts the Guidelines into a calculated prohibition against the disclosure of a child's gender identity that aims to sow distrust among students and their families." *Id.* at *20.

Like the guidelines in *John & Jane Parents 1*, an objective, fair reading of the Guidance shows that it is not intended to be inflexible or to displace parents. The Guidance like the guidelines in *John & Jane Parents 1*, is meant to be applied flexibly and requires that student needs are to be considered on a case-by-case basis and is not a mandate that school staff should keep information from parents. *See* [ECF 1-3]. Likewise, the Guidance balances the interests of parents with that of students who express concerns about revealing their gender identity to potentially unsupportive parents by encouraging parental involvement unless directed not to do so by the student. *Id.* The Gender Support Plan contemplated by the Guidance foresees parental involvement in its creation. *See* [ECF 1-4]. Finally, the language of the Guidance that Plaintiff

apparently takes issue with—"School personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent/guardian"—just means that disclosure to parents should be considered in light of the totality of the circumstances in line with the goal of fostering an inclusive and welcoming environment that is free from discrimination, harassment, and bullying. [ECF 1-3].

The district court in *John & Jane Parents 1*, looked at the text of the challenged documents and found it important that, like the Guidance, "the language of the Guidelines makes clear that they are not intended to be inflexibly applied to every transgender and gender nonconforming student." 2022 U.S. Dist. LEXIS 149021, at *16. The court found that the disclaimer that the guidelines were to be applied flexibly on a case-by-case basis was important because it did not "command" the alleged interference with parental rights, and instead "carefully balanced the interests of both the parents and students, encouraging parental input when the student consents, but avoiding it when the student expresses concern that parents would not be supportive, or that disclosing their gender identity to their parents may put them in harm's way." *Id.* at *16-17. Here, the Guidance contains similar flexibility. *See* [ECF 1-3] ("[A]dministrators and school staff are expected to consider the needs of the individual on a case-by-case basis . . . They are not intended to anticipate every possible situation that may occur.").

In light of this analysis, the *John & Jane Parents 1* court narrowly construed the right at issue as the "rights as parents . . . to be promptly informed of their child's gender identity, when it differs from that usually associated with their sex assigned at birth, regardless of their child's wishes or any concerns regarding the detrimental effect the disclosure may have on that child." 2022 U.S. Dist. LEXIS 149021, at *20. The district court held that there was no such fundamental right under the Due Process Clause and that rational basis review was the appropriate standard.

*Id.* at *20-21. Here, like the parents in *John & Jane Parents 1*, Plaintiff's true claim is that there is a fundamental right to be immediately informed by the District if their child contacts District staff to address concerns related to their gender identity and to not take any steps to support the child without the express approval of the parent, even if failing to do so would potentially violate federal law. Thus, the right at issue is not a generalized right to control the upbringing of the child. It is a right to be informed of their child's gender identity even if disclosure is against the child's wishes.

Plaintiff's members' claimed right to be informed of their child's gender identity even if disclosure is against the child's wishes is not a fundamental right. *See id.*. As such, this Court's review of the Guidance does not warrant the application of strict scrutiny. Rather, because the government action at issue here does not interfere with fundamental rights or liberties, "substantive due process requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational." *Lee*, 330 F.3d at 467.

### C. The Guidance Is Rationally Related To The Legitimate Governmental Interest Of Fostering An Inclusive And Welcoming Environment For Transgender Students That Is Free From Illegal Discrimination.

Because Plaintiff has not identified a fundamental right, the Guidance withstands constitutional scrutiny as long as it has a rational basis. All rational basis review of a substantive due process claim requires is that the challenged action be "rationally related to legitimate government interests." *Troogstad v. City of Chi.*, 576 F. Supp. 3d 578, 584 (N.D. Ill. 2021). This standard is "highly deferential" to the government. *Id.* Rational basis review places the burden on the plaintiff to show that there is no "conceivable basis which might support" the government's action. *Minerva Dairy, Inc., v. Harsdorf*, 905 F.3d 1047, 1055 (7th Cir. 2018). A court can determine as a matter of law that government action passes rational basis review on a motion to

dismiss based on the face of the complaint. *See D.B. v. Kopp*, 725 F.3d 681, 686 (7th Cir. 2013); *Halcsik v. Knutson*, No. 20-cv-317-pp, 2022 U.S. Dist. LEXIS 52927, at *34 (E.D. Wis. Mar. 24, 2022).

Just as the *John & Jane Parents 1* court found a public school district has a "legitimate interest in providing a safe and supportive environment for all . . . students, including those who are transgender and gender nonconforming," 2022 U.S. Dist. LEXIS 149021, at *35, so too does the District have a legitimate interest in fostering "inclusive and welcoming environments that are free from discrimination, harassment, and bullying regardless of sex, sexual orientation, gender identity or gender expression." [ECF 1-3].

The Guidance, like the guidelines in *John & Jane Parents 1*, provides District staff with a resource to support transgender and gender nonconforming students and is "rationally related to achieving that result." 2022 U.S. Dist. LEXIS 149021, at *35; *see also Barr*, 949 F.3d at 1238-39 (holding that a policy allowing transgender students to use the bathrooms consistent with their gender identity was "rationally related to the legitimate purpose of protecting student safety and well-being, and eliminating discrimination on the basis of sex and transgender status"). Moreover, as explained by the *John & Jane Parents 1* court, the Guidance would also pass strict scrutiny as "protecting their students' safety and ensuring a safe, welcoming school environment where students . . . feel accepted and valued"; "not discriminating against transgender and gender nonconforming students"; and "protecting student privacy" are all compelling governmental interests. 2022 U.S. Dist. LEXIS 149021, at *36. Parental rights can be "limited by the compelling governmental interest in the protection of children particularly where the children need to be protected from their own parents." *Brokaw v. Mercer County*, 235 F.3d 1000, 1019 (7th Cir. 2000).

The Supreme Court has found it "evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling," and as a result has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 756, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

The Supreme Court has held that transgender individuals are protected from discrimination under Title VII. *Bostock v. Clayton County*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020). Even prior to *Bostock*, the Seventh Circuit has held that transgender individuals are protected from discrimination under Title IX's ban against gender-based discrimination. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017). In this regard, the Seventh Circuit has instructed that school districts can violate Title IX by failing to honor a student's use of a requested pronoun, not permitting the student to use the bathroom or locker room facilities that corresponds with their identified gender, and not permitting overnight accommodations consistent with their identified gender. *See id.*; *see also Grimm v. Gloucester Cnty School Bd.*, 972 F.3d 586 (4th Cir. 2020). Finally, Wisconsin law prohibits discrimination based on sex, including gender identity. *See* Wis. Stat. § 111.321. Complying with these federal and state laws and preventing discrimination is a compelling interest.

Providing internal guidance to District staff to help create a support system, even without initial parental involvement, is narrowly tailored to achieving these compelling interests. The *John & Jane Parents 1* court's analysis of the narrowly tailored requirement for strict scrutiny applies in equal force to the Guidance:

> the Guidelines are narrowly tailored in furtherance of that interest. The Guidelines do not aim to exclude parents, but rather anticipate and encourage family involvement in establishing a gender support plan. Guidelines at 4. Even where family support is lacking, the inclusion of family is identified as an eventual

> goal. *Id.* The Guidelines, on their face, are noncoercive, and serve primarily as a means of creating a support system and providing counseling to ensure that transgender children feel safe and well at school. And, importantly, they apply to each student on a case by case basis. By advising that school personnel keep a transgender or gender nonconforming student's gender identity confidential unless and until that student consents to disclosure, they both protect the student's privacy and create, as MCBE puts it 'a zone of protection . . . in the hopefully rare circumstance when disclosure of [the student's] gender expression while at school could lead to serious conflict within the family, and even harm.' Motion at 28. If the Guidelines mandated parental disclosure as the Plaintiff Parents urge, their primary purpose of providing transgender and gender nonconforming students with a safe and supportive school environment would be defeated. **A transgender child could hardly feel safe in an environment where expressing their gender identity resulted in the automatic disclosure to their parents, regardless of their own wishes or the consequences of the disclosure**.

2022 U.S. Dist. LEXIS 149021, at *38-39 (emphasis added).

In sum, the District has a legitimate, if not compelling, interest in fostering an inclusive and discrimination free environment for transgender and gender nonconforming students in compliance with federal law. The District also has a legitimate, compelling interest in supporting students when a student is not comfortable revealing their gender identity to their parents. The Guidance is rationally related and narrowly tailored to those goals because it is a flexible document that encourages family collaboration to develop a plan to best support the needs of the child. As explained above, a requirement that a parent be made immediately aware of their child's transgender status would defeat the purpose of creating a safe and supportive school environment. Plaintiff's substantive due process claim fails as a matter of law.

## III. PLAINTIFF FAILS TO STATE A CLAIM FOR VIOLATION OF ITS MEMBERS' FREE EXERCISE RIGHTS.

Plaintiff also claims that the Guidance somehow violates its members' right to the free exercise of religion under the First Amendment because the Guidance calls for the District to respect a student's asserted gender identity which might conflict with a parent's religious belief

that there are only two sexes and that children are either born male or female and that this chrematistic is immutable. *See* [ECF 1, ¶¶ 90, 94]. This argument is uncompelling.

The Free Exercise Clause prohibits government actors from exerting "any restraint on the free exercise of religion." *Sch. Dist. of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 222-23, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963). To state a claim under the Free Exercise Clause, a plaintiff must "show the coercive effect of the enactment [or government action] as it operates against him in the practice of his religion." *Id.* at 223. In other words, a plaintiff must show that a government action has burdened the exercise of a sincerely held religious belief. *See Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876, 210 L. Ed. 2d 137 (2021).

**A. Because The Guidance Is A Neutral Law Of General Applicability, Rational Basis Review Applies.**

Whether a plaintiff states a viable claim under the Free Exercise Clause depends on the level of scrutiny to be employed by the Court:

> Under *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), neutral laws of general applicability that only incidentally burden religion are not subject to strict scrutiny. *Fulton*, 141 S. Ct. at 1876 (citing *Smith*, 494 U.S. at 878-82). Government action that satisfies *Smith* receives rational basis review, *see Ill. Bible Colls. Ass'n v. Anderson*, 870 F.3d 631, 639 (7th Cir. 2020), while government action that is not neutral or generally applicable must pass strict scrutiny. *Fulton*, 141 S. Ct. at 1881.

*Troogstad*, 2021 U.S. Dist. LEXIS 226665, at *30-31. "[A] law or regulation that is neutral and of general applicability is constitutional even if it has an incidental effect on religion." *People United for Children, Inc. v. City of N.Y.*, 108 F. Supp. 2d 275, 298 (S.D.N.Y. 2000) (internal citations omitted).

To determine if a law is neutral, the Court must first "examine the object of the law." *St. John's United Church of Christ*, 502 F.3d at 631. To determine the object of a law, courts start with the text, "for the minimum requirement of neutrality is that a law not discriminate on its

face." *Mahwikizi v. CDC*, No. 21 CV 3467, 2021 U.S. Dist. LEXIS 225201, at *8 (N.D. Ill. Nov. 22, 2021) (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 2217, 124 L.Ed.2d 472 (1993)).

"A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* Even if a government action does not facially reference religion, courts can look to other evidence to understand the law's purpose, including the "historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the [action's] legislative or administrative history." *Id.* (citing *Lukumi*, 508 U.S. at 540).

A review of the text of the Guidance (including the Gender Support Plan), reveals that there is absolutely no mention of religion. *See* [ECF 1-3, 1-4]. It does not impermissibly refer to a religious practice. *See Lukumi*, 508 U.S. at 533. Nor is its purpose to suppress "religion or religious conduct." *Id.* The only mention of religion is in a different, unrelated document identified by Plaintiff. That document is not tied to the Guidance and is merely a guide for facilitating discussion about general equity issues for a District staff professional development. [ECF 1-5]. That document only contains a general statement that: "Since Slide 56 will most likely focus on parents' religious objections to LGBTQIA+ people, **it's important to take a moment and reaffirm that religion is not the problem** (after all, there are millions of queer people of various faith traditions); rather, it's the weaponization of religion against queer people. *Id.* (emphasis added).

The document also provides a list of things the facilitator should be prepared to address, and this list contains points on dealing with general religious objections to LGBTQIA+ people or potentially unsupportive parents. *Id.* Just because a facilitator guide for a professional

development session references religion, it does not mean that the Guidance (which is not mentioned in the guide) was intended to somehow target religion. Rather, the Guidance was developed in compliance with state and federal law and is not directed at any particular religious belief. There are potentially religious objections to any policy or practice that supports students that are homosexual, gender nonconforming, or transgender. Any policy could be said to then implicate religion whether it is even referenced. It is clear that the Guidance is religiously neutral.

The Guidance is also generally applicable. The question of general applicability addresses whether a law treats religious observers unequally. *See Lukumi*, 508 U.S. at 542. For example, "inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542-43. Thus, a law is not generally applicable "if its prohibitions if its prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) (citing *Lukumi*, 508 U.S. at 542-46).

The Guidance does not prohibit religious conduct while permitting other conduct that may undermine its interest in fostering an inclusive and welcoming environment that is free from discrimination, harassment, and bullying regardless of sex, sexual orientation, gender identity or gender expression. *See Villareal v. Rocky Knoll Health Ctr.*, No. 21-CV-729, 2022 U.S. Dist. LEXIS 97364, at *9 (E.D. Wis. June 1, 2022) (citing *Fulton*, 141 S. Ct. at 1877). The Guidance applies to any individual that "asserts a gender identity or gender expression at school or work that is different from the gender assigned at birth" without any reference to religion or religious practices. *See* [ECF 1-3].

The Ninth Circuit's Free Exercise analysis of a "Student Safety Plan" that permitted transgender students to use the locker room and bathroom that corresponded to the gender they identify as (as opposed to their biological sex) is instructive here. *See Barr*, 949 F.3d at 1218. In *Barr*, the plaintiffs claimed that the Student Safety Plan violated their First Amendment rights to freely exercise their religion because the Student Safety Plan "forces them to be exposed to an environment in school bathrooms and locker facilities that conflicts with, and prevents them from fully practicing, their religious beliefs." *Id.* at 1233-34. The complaint alleged that plaintiffs "have the sincere religious belief" that children "must not undress, or use the restroom, in the presence of a member of the opposite biological sex, and also that they must not be in the presence of the opposite biological sex while the opposite biological sex is undressing or using the restroom," and because the Student Safety Plan permits transgender students who were assigned the opposite biological sex at birth into their locker rooms, the Plan prevents students from practicing the modesty that their faith requires of them, and it further interferes with parents teaching their children traditional modesty and insisting that their children practice modesty, as their faith requires." *Id.* at 1234.

The Ninth Circuit agreed with the district court's conclusion that the Plan was neutral and generally applicable with respect to religion and did not violate the plaintiffs' First Amendment rights. *See id.* at 1234-1236. More specifically, the Ninth Circuit found that the complaint contained no allegation suggesting that "the Student Safety Plan was adopted with the object of suppressing the exercise of religion", that the Student Safety Plan "make[s] no reference to any religious practice, conduct, belief, or motivation", and that the Plan itself stated that it was "created to support a transgender male expressing the right to access the boy's locker room at Dallas High School." *Id.* at 1235. The Ninth Circuit held that the Plan was neutral for purposes of analyzing

the Free Exercise claim because the plaintiffs did not counter this evidence or "point to anything in the record suggesting that the Student Safety Plan was adopted with the specific purpose of infringing on Plaintiffs' religious practices or suppressing Plaintiffs' religion." *Id.*

The Ninth Circuit also found that the Student Safety Pan was generally applicable. *See id.* at 1236. Specifically, the Ninth Circuit emphasized that the Plan did "not require only religious students to share a locker room with a transgender student who was assigned the opposite sex at birth" and affected all students and staff—it does not place demands on exclusively religious persons or conduct. *Id.* The Ninth Circuit explained the appropriate question to ask was "whether, in seeking to create a safe, non-discriminatory school environment for transgender students, the Student Safety Plan selectively imposes certain conditions or restrictions only on religious conduct." *Id.* Because the plaintiffs did not make any showing that the Plan did so, the Plan was generally applicable for purposes of the free exercise analysis. *Id.*

In sum, the Guidance does not target religion and it imposes no conditions or restrictions on religious conduct. Because the Guidance is a "neutral law of general applicability", it only needs to be supported by a rational basis.

### B. The Guidance Is Rationally Related To the Legitimate Interest Of Fostering An Inclusive And Welcoming Environment For Transgender Students That Is Free From Discrimination.

As explained above, to survive rational-basis review, a government action must only be rationally related to a legitimate government interest. *See Srail v. Vill. of Lisle*, 588 F.3d 940, 946 (7th Cir. 2009). Under rational-basis review, a policy is presumed valid. *Lyng v. International Union*, 485 U.S. 360, 370, 108 S. Ct. 1184, 99 L. Ed. 2d 380 (1988). Rational basis review places the burden on the plaintiff to show that there is no "conceivable basis which might support" the government's action. *Minerva Dairy, Inc., v. Harsdorf*, 905 F.3d 1047, 1055 (7th Cir. 2018).

As explained above, the Guidance is rationally related to its stated purpose: "to foster inclusive and welcoming environments that are free from discrimination, harassment, and bullying regardless of sex, sexual orientation, gender identity or gender expression." [ECF 1-3]. This purpose has been found to be a legitimate governmental interest. *C.f. Barr*, 949 F.3d at 1238 ("[T]he Student Safety Plan is rationally related to the legitimate purpose of protecting student safety and well-being, and eliminating discrimination on the basis of sex and transgender status."). Creating a Guidance to support students who articulate that they are transgender and have certain needs is rationally related to this legitimate interest, including potentially keeping certain information from the student's parent initially if the student makes such a request.

There is absolutely nothing in the Complaint to negate the rational basis which supports the Guidance. Plaintiff's Free Exercise claim must be dismissed.

## IV. PLAINTIFF'S PROTECTION OF PUPIL RIGHTS AMENDMENT CLAIM FAILS AS THERE IS NO PRIVATE CAUSE OF ACTION UNDER THE PPRA, SECTION 1983 CANNOT BE USED AS A VEHICLE TO ASSERT A PPRA CLAIM, AND THE PPRA IS OTHERWISE INAPPLICABLE TO THE FACTS OF THIS CASE.

Plaintiff asserts a specious claim against the District under the PPRA. The PPRA, 20 U.S.C. § 1232h, deals with surveys and evaluations administered to students. *See* 20 U.S.C. § 1232h(a) and (b). The PPRA requires local authorities to develop policies to protect student privacy. 20 U.S.C. § 1232h(c).

It is difficult to discern what portion of the PPRA Plaintiff alleges to be at issue, but based on the face of the Complaint, it appears that the provision at issue is:

> **(b) Limits on survey, analysis, or evaluations.** No student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning—
> **(1)** political affiliations or beliefs of the student or the student's parent;
> **(2)** mental or psychological problems of the student or the student's family;
> **(3)** sex behavior or attitudes;
> **(4)** illegal, anti-social, self-incriminating, or demeaning behavior;

> **(5)** critical appraisals of other individuals with whom respondents have close family relationships;
> **(6)** legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
> **(7)** religious practices, affiliations, or beliefs of the student or student's parent; or
> **(8)** income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program),
> without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

20 U.S.C. § 1232h(b). Correspondingly, a PPRA regulation provides that:

> **(a)** No student shall be required, as part of any program specified in § 98.1 (a) or (b)[5], to submit without prior consent to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning one or more of the following:
> **(1)** Political affiliations;
> **(2)** Mental and psychological problems potentially embarrassing to the student or his or her family;
> **(3)** Sex behavior and attitudes;
> **(4)** Illegal, anti-social, self-incriminating and demeaning behavior;
> **(5)** Critical appraisals of other individuals with whom the student has close family relationships;
> **(6)** Legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or
> **(7)** Income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program.

34 C.F.R. § 98.4(a).

Notwithstanding that the legal conclusions in the Complaint mischaracterize this law, there is no private cause of action under the PPRA and Section 1983 cannot be used to enforce this

[5] 34 C.F.R. § 98.1(a) and (b) states:

> This part applies to any program administered by the Secretary of Education that:
> **(a)**
> **(1)** Was transferred to the Department by the Department of Education Organization Act (DEOA); and
> **(2)** Was administered by the Education Division of the Department of Health, Education, and Welfare on the day before the effective date of the DEOA; or
> **(b)** Was enacted after the effective date of the DEOA, unless the law enacting the new Federal program has the effect of making section 439 of the General Education Provisions Act inapplicable.

provision. Additionally, even if there was a vehicle for bringing a PPRA claim forward, Plaintiff fails to state a claim for violation of any provision.

**A. There Is No Private Right Of Action Under the PPRA.**

Plaintiff appears to concede that there is no independent cause of action under the PPRA as it attempts to plead this cause of action using Section 1983 as the vehicle to assert this claim. This concession makes sense as most courts that have addressed the issue have operated under the assumption that there is no private cause of action under the statute. *See John & Jane Parents 1*, 2022 U.S. Dist. LEXIS 149021, at *52 n.17 ("The Parents do not concede but also do not dispute that there is no private right of action under PPRA."); *C. N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 170 n.13 (3d Cir. 2005) (noting that there is no private cause of action under FERPA and that the parties interpreted this to prohibit direct claims under the PPRA); *Newkirk v. E. Lansing Pub. Sch.*, File No. 1:91:CV:563, 1993 U.S. Dist. LEXIS 13194, at *6-8 (W.D. Mich. Aug. 16, 1993) ("This Court, in its opinion of March 31, 1993, determined that there is no private right of action under this statute.").

**B. A Claim Under The PPRA Cannot Be Brought Through Section 1983.**

Because there is no private right of action under the PPRA, Plaintiff attempts to bootstrap a claim by alleging a Section 1983 action related to the alleged violation of the PPRA. "Section 1983 creates a federal remedy against anyone, under color of state law, deprives any citizen of the United States . . . of any rights, privileges, or immunities secured by the Constitution and laws." *Saint Anthony Hosp. v. Eagleson*, 40 F.4th 492, 502 (7th Cir. 2022) (internal citations omitted). This means that Section 1983 also authorizes suits to enforce individual rights under federal statutes. *Id.* "Yet not all statutory benefits, requirements, or interests are enforceable under section 1983. A plaintiff seeking redress for an alleged violation of a federal statute through a section

1983 action 'must assert the violation of a federal *right*, not merely a violation of federal *law*.'" *Id.* (citing *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997)).

"[W]here the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit." *Gonzaga University v. Doe*, 536 U.S. 273, 286, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). "Congress must have *intended to create a federal right*, and the statute must be phrased in terms of the persons benefited with 'an *unmistakable focus* on the benefited class." *Saint Anthony Hosp.*, 40 F.4th 492 at 502-03 (internal citations omitted). It is not enough to fall "within the general zone of interest that the statute is intended to protect" to assert a right under section 1983. *Gonzaga*, 536 U.S. at 283.

Under *Blessing*, courts consider three factors when determining whether a federal statute creates and confers a federal right: (1) "Congress must have intended that the provision in question benefit the plaintiff"; (2) the asserted right must not be "so vague and amorphous that its enforcement would strain judicial competence"; and (3) "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Fiers v. La Crosse Cty.*, 132 F. Supp. 3d 1111, 1114-15 (W.D. Wis. 2015). In *Gonzaga*, the Supreme Court clarified the *Blessing* factors, holding that federal statutes must *unambiguously* create and confer federal rights to support a cause of action under section 1983. *Id.* Post-*Gonzaga*, the *Blessing* factors "are meant to set the bar high" as "nothing short of an unambiguously conferred right [will] support a cause of action brought under § 1983." *Id.* (internal citations omitted).

Even if these three factors are satisfied, the defendant may overcome this presumption by demonstrating that "Congress shut the door to private enforcement." *Gonzaga*, 536 U.S. at 284 n.4. "Congress may foreclose a remedy under section 1983 either expressly, through specific evidence from the statute itself, or impliedly, by creating a comprehensive enforcement scheme

that is incompatible with individual enforcement under § 1983." *Saint Anthony Hosp.*, 40 F.4th 492 at 503 (internal citations omitted). In other words, "Section 1983 does not create a private right of action for damages where the federal statute provides an exclusive administrative enforcement mechanism." *Norris v. Bd. of Educ. of Greenwood Cmty. Sch. Corp.*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992).

Plaintiff's claim under the PPRA fails under the first *Blessing* factor as the PRRA is not intended to specifically benefit parents of District students. Comparing the PPRA to another student privacy statute, the Federal Educational Rights and Privacy Act ("FERPA") demonstrates this conclusion. "Congress enacted FERPA under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records." *E. D. v. Noblesville Sch. Dist.*, No. 1:21-cv-03075-SEB-MPB, 2022 U.S. Dist. LEXIS 179762, at *36-37 (S.D. Ind. Sep. 30, 2022). As explained by the Seventh Circuit:

> The Supreme Court concluded that Congress did not grant an individual whose interests were violated under FERPA a right enforceable through section 1983. Because the statutory provisions did not have an individualized focus, they failed *Blessing* factor one: '[The] provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure. Therefore, as in *Blessing*, they have an 'aggregate' focus, they are not concerned with 'whether the needs of any particular person have been satisfied,' and they cannot 'give rise to individual rights.'' *Gonzaga*, 536 U.S. at 287-88 (internal citation omitted), quoting *Blessing*, 520 U.S. at 343-44. The Court also highlighted that the Secretary of Education could take away funds only if the university did not *substantially* comply with the statutory requirements. This fact contributed to the understanding that the focus was on systemwide performance rather than individual instances of improper disclosure. Finally, since FERPA's provisions spoke only to the Secretary and directed him to withdraw funding from schools that had a 'prohibited 'policy or practice,'' the Court determined that their focus was 'two steps removed from the interests of individual students and parents.' *Id.* at 287 (citation omitted). The provisions therefore failed to confer an individual right enforceable under section 1983.

*Saint Anthony Hosp*, 40 F.4th at 506-07.

This analysis applies in equal force to the PPRA. A review of 20 U.S.C.S. § 1232h shows that the statute has an institutional focus. It sets forth standards to ensure schools comply with development of polices concerning student privacy and parental access to information in general. *See* 20 U.S.C.S. § 1232h(c). Like FERPA, the Secretary of Education is authorized to enforce this statute and can terminate assistance provided under applicable programs if there is a failure to comply with the provisions. *See* 20 U.S.C. § 1232h(e). There is nothing in the statute or regulations that confer a specific federal right to Plaintiff's members to be notified immediately if their child requests supports related to their gender identity.

Even if the statute met the *Blessing* factors, congress foreclosed a private cause of action for the PPRA as the regulations already provide an exclusive administrative enforcement mechanism. Specifically, 34 C.F.R. §§ 98.7-10 provides a comprehensive administrative complaint procedure that permits a student or parent to file a complaint with the Secretary of Education if they have been directly affected by a violation under the PPRA. *See* 34 C.F.R. § 98.7 (complaint filing procedure); 34 C.F.R. § 98.8 (notice procedure); 34 C.F.R. § 98.9 (investigation and written notice of findings procedure); 34 C.F.R. § 98.10 (enforcement options). This comprehensive enforcement scheme is incompatible with individual enforcement under Section 1983 and means that Plaintiff cannot assert a claim under the PPRA.

**C. The PPRA Is Inapplicable Based On The Face Of the Complaint.**

Even if Plaintiff could assert a claim under the PPRA, it still fails to allege a violation of the statute. Based on the Complaint, it appears that Plaintiff is claiming that the Guidance violates 34 C.F.R. § 98.4, which state states that: "No student shall be required, as part of any program specified in § 98.1 (a) or (b), to submit without prior consent to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment." 34 C.F.R. § 98.4(a).

First, Plaintiff ignores the term "required." Even if the Court accepts Plaintiff's claim that the Guidance implicates psychiatric or psychological treatment, no student is required to do anything. The Guidance merely provides guidelines for dealing with students who voluntarily come to staff seeking out supports related to their gender identity.

Second, the Guidance has nothing to do with a "program" as defined by the PPRA. A program is one administered by the Secretary of Education. *See* 34 C.F.R. § 98.1. "Section 1221 of the General Educations Provisions Act provides that an applicable program is any program for which the Secretary or the Department [of Education] has administrative responsibility as provided by law or by delegation of authority pursuant to law." *Herbert v. Reinstein*, 976 F. Supp. 331, 340 (E.D. Pa. 1997). "The text of this statute and the regulations implementing it indicate that Section 1232h was meant to apply only to programs administered by the Secretary of Education." *Id.*

Clearly, there are no allegations in the Complaint that any student is required to submit to a psychiatric evaluation and/or examination as part of any "applicable program." *See id.* ("Plaintiff simply fails to set forth any facts that would indicate he was required to submit to a psychological evaluation as part of his law school program."); *Newkirk*, 1993 U.S. Dist. LEXIS 13194, at *16-17 ("[T]here is no contention that the 'programs' in which Jason Newkirk participated were "applicable programs" under the federal statute."). For Plaintiff's members to be covered by the PPRA, the alleged lack of consent must be related to a "program for which an administrative head of an education agency has administrative responsibility." *Newkirk*, 1993 U.S. Dist. LEXIS 13194, at *12-14. This would have required Plaintiff to allege facts "to suggest that the specific programs at issue were in any way subject to federal administrative responsibility, such as would be the case if the activities were part of a federally funded project." *Id.*

Because there is no mandatory requirement for any student to submit to any "psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment" without parental consent as part of a program administer by the Secretary of Education, the PPRA is completely inapplicable. Even if Plaintiff could have brought a claim under the PPRA, it substantively fails to allege a violation as a matter of law.

## V. THE INDIVIDUALLY NAMED DEFENDANTS MUST BE DISMISSED BECAUSE OFFICIAL CAPACITY CLAIMS ARE MERELY CLAIMS AGAINST THE DISTRICT ITSELF.

Plaintiff has named the individual District Board members and the District superintendent as defendants solely in their official capacities. *See* [ECF 1, ¶¶ 8-15]. However, a Section 1983 action against a government official acting in his or her official capacity is treated as an action against the governmental entity itself. *See Henry v. Farmer City State Bank*, 808 F.2d 1228, 1238 (7th Cir.1986). Accordingly, when a plaintiff files suit against a public school district, a court should dismiss official capacity claims against the individual school board members or superintendent as redundant. *See Smoler v. Bd. of Educ.*, 524 F. Supp. 3d 794, 803 (N.D. Ill. 2020) (citing *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)). Thus, if the case is permitted to proceed in any capacity, the claims against the individual board members and superintendent defendants must still be dismissed with prejudice.

## VI. PLAINTIFF'S STATE LAW CLAIMS SHOULD BE DISMISSED WITHOUT PREJUDICE ONCE THE FEDERAL CLAIMS ARE DISMISSED.

In the event Plaintiff's federal claims are dismissed, the Court should relinquish jurisdiction over Plaintiff's state law claims because upon dismissal of all federal claims in a lawsuit, federal courts generally dismiss the state law claims without prejudice rather than take supplemental jurisdiction over the state law claims. *See A.M.C. v. Sch. Dist. of La Crosse*, No. 18-cv-175-bbc, 2018 U.S. Dist. LEXIS 167068, at *17 (W.D. Wis. Sep. 28, 2018) (citing 28 U.S.C. § 1367(c)(3))

(explaining that "the general rule is that federal courts should relinquish jurisdiction over state law claims if all federal claims are resolved before trial").

## CONCLUSION

For the reasons set forth above, the District respectfully requests that the Court grant its motion to dismiss and dismiss Plaintiff's Complaint with prejudice and in its entirety.

Dated this 7th Day of November, 2022.

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