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' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiff, Parents Protecting Our Children, opposes Defendant, Eau Claire Area School District's (the "District") motion to dismiss.[1] To do so, however, Plaintiff relies on a gross overgeneralization of the governing law and a continued mischaracterization of the Guidance [ECF 1-3]. Rather than address the District's substantive arguments, Plaintiff relies on hyperbole and sweeping conclusory statements, ignoring almost all of the analogous cases from across the country which have deemed rejected similar challenges against gender support policies.

Plaintiff does not have standing to bring this suit as its members' alleged injury is dependent upon a multitude of speculative contingencies that may never occur. Even if there was a justiciable controversy, Plaintiff's claims are legally unsound. If the scope of parental rights is properly defined, it is clear that the Guidance does not unconstitutionally infringe upon that right. The Guidance is also a neutral policy and cannot be found to impermissibly burden Plaintiff's members' religious beliefs. Finally, the Protection of Pupil Rights Amendment ("PPRA") is not implicated by the allegations in the Complaint, and it too fails.

Plaintiff's members' uncomfortableness with transgender individuals, and their speculative fears about what would happen if their child became gender non-conforming, is not enough to state a claim for relief. The Complaint must be dismissed.

[1] As identified in the District's principal brief, Plaintiff has also named the members of the District Board of Education and the District superintendent as defendants in their official capacities. [ECF 12, p. 1].

ARGUMENT

I. PLAINTIFF DOES NOT HAVE STANDING TO CHALLENGE THE GUIDANCE BECAUSE THE FEAR OF FUTURE INJURY IS NOT SUFFICIENT TO CREATE A CASE OR CONTROVERSY.

Plaintiff does not claim that it has standing on its own. Instead, it relies upon a claim of associational standing, but that claim fails as none of its members have standing in their own right. None of Plaintiff's members have suffered an injury in fact and their speculative claim of possible future injury is not sufficient to create standing. Plaintiff's standing argument relies upon snippets from case law; snippets of sentences and phrases that sound like they support Plaintiff's argument but fail to do so when one digs into the holdings that were formulated from those snippets. When the holdings in those cases are analyzed, they all point to the same conclusion: Plaintiff cannot establish a justiciable controversy that gives it standing.

A. Plaintiff's Members' Alleged Injury Is Premised Upon A Speculative Chain Of Possibilities, And That Precludes Plaintiff From Establishing Standing.

The Supreme Court has cautioned that to establish standing the alleged injury cannot be speculative; instead, the "threatened injury must be *certainly impending* to constitute injury in fact," and "[a]llegations of *possible* future injury" are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S. Ct. 1138, 1147, 185 L.Ed.2d 264, 276 (2013) (internal citations omitted) (emphasis in original). Plaintiff claims that the holding in *Clapper* "does not control." [ECF 15, p. 8]. Nevertheless, nearly every case that Plaintiff relies on recognizes and relies upon *Clapper's* holding that the material risk of future harm can satisfy the concrete harm requirement of standing only if the risk of harm is sufficiently imminent and substantial. *See id.* (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210, 210 L.Ed.2d 568, 590-91 (2021); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 2341, 189 L.Ed.2d 246, 255 (2014); *Remijas v. Neiman Marcus Grp.*, LLC, 794 F.3d 688, 693 (7th Cir. 2015)).

The Supreme Court was absolutely clear in *Clapper* that an injury in fact cannot be based on "a highly attenuated chain of possibilities." 568 U.S. at 410. In other words, an injury cannot be "certainly impending" if it requires multiple contingencies to occur. *See id.* (explaining that five events needed to occur in the way predicted by the plaintiffs for them to sustain their alleged injury from the government's application of the Foreign Intelligence Surveillance Act of 1978).

Despite *Clapper's* clear admonition that allegations of *possible* future injury are not sufficient, Plaintiff's entire standing argument is premised upon a speculative chain of possibilities. Plaintiff's asserted injury appears to be its belief that the Guidance will interfere with one of its members' abilities to control their child's life. For one of Plaintiff's members to sustain such an injury, however, one of its members' children must: (1) develop a belief that they have a gender identity that differs from their biological sex; (2) affirmatively approach a District employee and request gender identity support; (3) request a Gender Support Plan [ECF 1-4]; and (4) make the request without parental consent or knowledge. Additionally, as part of that chain of possibilities, the school must never discuss the Gender Support Plan with the parent and the parent must also never request to see the student's educational records as the Gender Support Plan is maintained as a student record that is <u>always</u> accessible to a parent. *See* [ECF 1-4]. Thus, for Plaintiff's member's claimed injury to occur, multiple contingencies must take place.

Courts have explained that an injury that is premised upon a speculative chain of possibilities, like the one asserted by Plaintiff's members, precludes a plaintiff from establishing standing. In *Parents Defending Educ. v. Linn-Mar Cmty. Sch. Dist.*, the district court found that a parent organization lacked standing to challenge a school policy that among other things provided that: "All persons, including students, have a right to privacy which includes the right to keep one's transgender status private at school" and that "[t]ransgender and gender nonconforming students

have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information . . . School staff should always check with the student first before contacting their parent/guardian." No. 22-CV-78 CJW-MAR, 2022 U.S. Dist. LEXIS 169459, at *8-9, 26 (N.D. Iowa Sep. 20, 2022). In finding that the parents' organization did not have standing, the district court relied on *Clapper's* holding that an injury in fact cannot be established by a speculative chain of events that may never occur. *Id.* at *27-28. The district court explained that for the policy to arguably impact the parent plaintiffs' rights of child rearing, a child must: (1) request a gender support plan from the school; (2) a plan will be provided; (3) the child would make the request without parental consent or knowledge; and (4) the information would be hidden from the parents. *Id.* at *28.

Here, just like the plaintiff in *Linn-Mar Cmty. Sch. Dist.*, for the alleged harm to materialize, Plaintiff's members must rely on the discretionary acts of others, namely their child's independent decision to request gender identity support. Reliance on such speculative, discretionary acts precludes a finding of standing. *Id*.; s*ee also The Cornucopia Inst. v. United States Dep't of Agric.*, 260 F. Supp. 3d 1061, 1069 (W.D. Wis. 2017) ("Like *Clapper*, plaintiffs' chain of causation here is further weakened by its reliance on third parties' discretionary acts.").

Plaintiff also relies on *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S. Ct. 2738, 168 L.Ed.2d 508 (2007), for the proposition that merely having children enrolled in the District is enough to confer standing, but that case was clearly postured differently than this case. *Parents Involved* addressed a policy of using a student's race to assign which school they would attend. It was undisputed that plaintiff's members' children had not yet been prevented from choosing their preferred school because of their race, but the Supreme Court found that harm was not speculative because by virtue of being enrolled in the school district, every student would

eventually be "forced to compete in a race-based system that may prejudice the plaintiff." *Id.* at 719. The injury was systemic and was bound to occur as students matriculated from elementary school to middle school or middle school to high school. *Id.* Here, the alleged injury is not systemic and there is no eventuality that any of Plaintiff's members' children will ever have needs that are addressed by the Guidance. *Parents Involved* does not support a finding that there is a case or controversy here.

Plaintiff's reliance on *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015) is similarly misplaced. *Remijas* does not support a broad proposition that speculative future injury is sufficient to confer standing. In *Remijas*, plaintiffs complained of a data breach that had already occurred. *Id.* at 694-95. The Seventh Circuit determined that the plaintiffs had standing because they were clearly more susceptible to identity theft because of the breach, taking their future harm out of the realm of being speculative. *Id.* The Seventh Circuit explained in *Remijas* that the standing inquiry was distinguishable from *Clapper* because "*Clapper* was addressing speculative harm based on something that may not even have happened to some or all of the plaintiffs." *Id.* at 694. Here, Plaintiffs' members, like the Plaintiffs in *Clapper*, may never be in a situation where their child's needs are addressed pursuant to the Guidance. Unlike the *Remijas* plaintiffs, Plaintiff has not shown that its members are any more susceptible to encountering the application of the Guidance.

B. Plaintiff's Reliance On Pre-Enforcement Review Cases Is Misguided And Does Not Confer Standing On It To Challenge The Guidance.

Plaintiff also asserts that its members have standing, claiming that they may bring a pre-enforcement challenge consistent with Article III. Plaintiff relies upon several cases that have recognized standing for those seeking a pre-enforcement challenge. Plaintiff's mere quotation of case law snippets, however, fails to develop an argument that supports its claim of standing.

1. Plaintiff fails to meet any of the elements that would permit a pre-enforcement challenge.

Cases that have found standing based upon pre-enforcement review have typically been reserved for challenges to allegedly unconstitutional laws that subject a plaintiff to criminal prosecution or civil penalties. *See Susan B. Anthony List*, 573 U.S. at 158-59; *Brown v. Kemp*, 506 F. Supp. 3d 649, 656 (W.D. Wis. 2020) ("As the United States Supreme Court acknowledged in *Susan B. Anthony List*, however, the U.S. Constitution permits 'pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent.'").

To satisfy the injury in fact requirement of standing in a pre-enforcement challenge, a plaintiff must show: (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest"; (2) "proscribed by a statute"; and (3) "there exists a credible threat of prosecution thereunder." *Brown*, 506 F. Supp. 3d at 656 (citing *Susan B. Anthony List*, 573 U.S. at 159). However, "the mere existence of a statute adverse to plaintiff's interests is not sufficient to show justiciability." *Deida v. City of Milwaukee*, 192 F. Supp. 2d 899, 905-06 (E.D. Wis. 2002). "Persons having no concrete fears that a policy or statute will be applied against them, except for those fears that are imaginary or speculative, are not accepted as appropriate plaintiffs." *Anders v. Fort Wayne Cmty. Sch.*, 124 F. Supp. 2d 618, 628 (N.D. Ind. 2000) (internal citations omitted).

Pre-enforcement claims involve an individual who is subject to a threat, an actual arrest, prosecution, or other enforcement action because of their conduct. *Susan B. Anthony List*, 573 U.S. at 158. Plaintiff does not identify its members' intention to engage in a course of conduct arguably affected with a constitutional interest. Plaintiff's members' conduct, in fact, is not at issue at all. It is Plaintiff's opposition to the District's conduct that is at issue. The absence of any facts to suggest that Plaintiff's members intend to engage in any conduct precludes a finding of standing under the pre-enforcement doctrine.

Plaintiff attempts to manufacture conduct by arguing that parents may withdraw their children from school or abandon their rights to public education, but that scenario is again speculative, does not involve any threatened enforcement of a law, and it cannot create an Article III injury. Plaintiff has not alleged that it or its members are subject to a threat, an actual arrest, prosecution, or other enforcement action. Thus, its members' reaction to the existence of the Guidance does not create pre-enforcement standing. Additionally, any claim that one of Plaintiff's members will engage in that course of conduct remains purely speculative.

Plaintiff also fails to recognize that no course of conduct is prohibited by the Guidance. Rather, the Guidance allows a student to request gender support. The Guidance does not punish or prevent the parent from taking any particular course of action. It enables the student to have input on how their gender identity information is shared with others but there is absolutely no prohibition against parents receiving the Gender Support Plan or being prevented from taking any particular course of action.

Finally, Plaintiff completely ignores that there is "no credible threat of prosecution." There is no prosecution or liability at issue under the Guidance. There are no allegations that the Guidance will be utilized to arrest, prosecute, or otherwise be enforced against anyone. The lack of a threat of injury in this case is exemplified by the holding in *Linn-Mar Cmty. Sch. Dist.*, where the district court pointed out that the parents in that case had not alleged that the existence of a gender support plan in a vacuum was likely to cause any injury:

> The Court finds plaintiff has not shown a likelihood of success on the merits based on an alleged violation of the fundamental right of child rearing. Plaintiff is certainly correct no one can decide without proper process that a parent is unfit or should not be allowed to make decisions directed toward the care, custody, and control of their children. *See Stanley v. Illinois*, 405 U.S. 645, 651-52, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). Plaintiff has not shown sufficiently, however, that there is any certain, impending action taken under the Policy that will interfere with that right. Plaintiff does not allege on behalf of any of the parents that their children

> have been given a plan or allege with sufficient specificity that they will be given a plan. Nor does plaintiff allege these parents have been left out of any plan creation or sufficiently allege that they will with certainty soon be left out.
>
> Finally, plaintiff and parents do not allege they have been denied access to information about their minor children nor have they shown any certain impending denial of access. To be sure, that is not to say that the language of the Policy does not raise legitimate concerns about whether defendants could, or would fail to disclose to, or conceal information from, parents about their children's gender identity. The Policy itself is not explicit as to what standards schools will apply in supplying to parents information about their minor child's gender identity. Nevertheless, based on the record currently before the Court, plaintiff will have difficulty showing that the Policy violates their constitutional rights.

2022 U.S. Dist. LEXIS 169459, at *30-31.

Plaintiff has entirely failed to show that it can demonstrate pre-enforcement standing.

2. Plaintiff's claim that possibly being subject to a governmental policy creates standing to challenge the policy before it has been applied is legal fiction.

Plaintiff apparently recognizes that none of the elements that would permit a pre-enforcement challenge exist here, and instead argues that standing exists because "persons who are subject to a government policy have standing to bring a pre-enforcement challenge provided that the plaintiffs face a credible threat of the policy's application." [ECF 15, p. 14]. Plaintiff's argument is less than forthright.

Contrary to Plaintiff's argument, *Am. C.L. Union of Illinois v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012) and *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1394-95 (6th Cir. 1987) do not support a claim that standing to assert a pre-enforcement claim extends to the possible future application of a policy that does not contemplate an enforcement action. Both cases concerned a pre-enforcement challenge to statutory provisions that evinced a credible threat of prosecution against the plaintiffs. Neither case assists Plaintiff's standing argument.

Plaintiff's claim that *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127 S. Ct. 764, 771, 166 L.Ed.2d 604, 614-15 (2007) supports that it has standing is even more strained. *MedImmune* was a declaratory judgment action between two private parties. The Supreme Court explained that in declaratory judgment actions:

> Our decisions have required that the dispute be 'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' and 'admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'

Id. at 127 (citing *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937)).

Contrary to Plaintiff's claim, *MedImmune* does not stand for the proposition that a party has standing to challenge a governmental policy "provided that the plaintiffs face a credible threat of the policy's application, and the court can adequately evaluate the merits of the plaintiff's claim in a pre-enforcement posture." [ECF 15, p. 14]. It merely re-affirms that to have standing to bring a declaratory judgment action there must be a "definite and concrete" dispute. *See MedImmune, Inc. v. Genentech, Inc*., 549 U.S. at 127. The possibility that a policy may eventually be applied to someone does not create a case or controversy.

C. The Guidance Does Not Prevent Plaintiff's Members From Exercising Any Rights.

Plaintiff asserts that its members have sustained an injury in fact because the Guidance "denies parents information they need to direct the upbringing of their children and decide if they want to keep their children in public school." [ECF 15, p. 18]. Plaintiff characterizes this as an interference with its members' fundamental constitutional rights. As explained *infra*, Plaintiff mischaracterizes the scope of any rights at issue in this case and its interference claim fails for that reason. It also fails, however, because the Guidance does not interfere with any rights.

Plaintiff offers no support for its claim that the Guidance denies its members information that they need to determine whether to keep their child in public school, and that this denial of information "constitutes an injury-in-fact for standing purposes." *Id.* Plaintiff's reliance *on Jackson v. City and County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) is entirely misplaced. *Jackson* does not stand for the proposition claimed by Plaintiff. The cited passage analyzed whether a constitutional claim had been stated, not whether the plaintiff had standing. In addressing standing, the *Jackson* court applied the "'injury in fact' that is 'concrete and particularized' and 'actual or imminent,' not 'conjectural or hypothetical'" requirement. *Id.*

Plaintiff is also less than honest in claiming that there is "no way to even obtain the information necessary to exercise their constitutional right," [ECF 15, p. 19], or that "the District will violate parents' constitutional rights in certain situations (whenever minors request secrecy from their parents)" and that it will "actively hide a constitutional violation from parents."[2] *Id.* at p. 10. The Guidance explicitly states that "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, p. 2]. It does not direct staff to actively hide anything, much less a constitutional violation. The Guidance also recognizes that parents will always have access to a gender support plan: "A copy of the final plan should be maintained in the student's cumulative file." [ECF 1-4, p. 1]. The Gender Support Plan explicitly states that: "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

[2] Over and over Plaintiff makes factual claims about the Guidance, citing to its Complaint rather than the Guidance itself. Although the well-plead facts alleged in a complaint are entitled to the presumption of truth, when a plaintiff attaches documents to the complaint as exhibits, those exhibits control over contrary pleadings. *See Massey v. Merrill Lynch & Co., Inc.*, 464 F.3d 642, 645 (7th Cir. 2006) (citing *Centers v. Centennial Mortg., Inc.*, 398 F.3d 930, 933 (7th Cir. 2005))). For example, although Plaintiff alleges in the Complaint that the Guidance requires teachers to use "the child's actual name and pronouns when addressing her parents so they will not be alerted to the changes the school has made," there is no such requirement in the Guidance. [ECF 1-3].

the student that this plan is a student record and will be released to their parents when they request it. This is a not a privileged document between the student and the school district." *Id.*

D. The Existence Of The Guidance Has Not Prevented Plaintiff's Members From Exercising Any Rights.

In another attempt to manufacture standing in the absence of any threatened injury, Plaintiff makes a superficial argument that the existence of the Guidance conditions the right to attend public school on surrendering a constitutionally protected right. This argument stretches the bounds of standing and overexaggerates the facts in the Complaint.

"Essentially, the unconstitutional condition doctrine prohibits the government from doing indirectly what it cannot do directly . . . However, the doctrine does not give rise to a constitutional claim in its own right; the condition must actually cause a violation of a substantive . . . right." *Eklecco Newco LLC v. Town of Clarkstown*, No. 16-CV-6492 (NSR), 2019 U.S. Dist. LEXIS 85487, at *33 (S.D.N.Y. May 21, 2019) (internal citations omitted). "[I]t has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question." *Dolan v. City of Tigard*, 512 U.S. 374, 407 n.12, 114 S. Ct. 2309, 2328, 129 L.Ed.2d 304, 330 (1994) (J. Stevens, dissenting). Moreover, "modern decisions invoking the doctrine have most frequently involved First Amendment liberties." *Id.* (collecting cases).

Plaintiff's citation to *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697, 33 L.Ed.2d 570, 577 (1972), is unavailing. The Supreme Court merely reaffirmed that the government cannot deny someone a government benefit because that person exercised a constitutionally protected right, such free speech. *Id.* at 597. This general principal has been applied to denials of tax exemptions . . . unemployment benefits . . . welfare payments . . . [and] to denials of public employment." *Id.* (internal citations omitted). In this context, such claims are

typically viewed as retaliation for having exercised a constitutional right. Plaintiff makes no such claim or retaliation, and instead simply objects to the Guidance under its bald claim that it is unconstitutional. None of Plaintiff's members have been subjected to any retaliation for their opposition to the Guidance, and the Guidance does not hinder the Plaintiff's members' right to send their children to public school.

Carson v. Makin, 142 S. Ct. 1987, 213 L.Ed.2d 286 (2022) does not assist Plaintiff's claim of standing. In that case, the Supreme Court merely reiterated the unextraordinary principal that a "State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." *Id.* at 1996. Plaintiff's members have not been excluded from anything. The District is not requiring Plaintiff's members to refrain from doing anything. This argument does not provide an avenue for asserting standing.

E. Plaintiff Does Not Have Independent Standing To Assert A PPRA Claim.

As stated in the District's principal brief, *see* [ECF 12, pp. 28-34], and *infra*, Plaintiff cannot bring a PPRA claim against the District because there is no private right of action under the PPRA, such a claim cannot be brought under Section 1983, and even if Plaintiff could assert this cause of action, the PPRA is inapplicable to the allegations in the Complaint.

It goes without saying that Plaintiff's members cannot suffer an injury if the PPRA does not create a private right of action. *See Lawyers' Comm. for 9/11 Inquiry, Inc. v. Wray*, 848 F. App'x 428, 430 (D.C. Cir. 2021) (endorsing the argument that "plaintiffs cannot assume away the entire informational-standing inquiry merely by erroneously asserting that the statute creates a cognizable interest in information."). There is no private right of action under the PPRA. *See Ashby v. Isle of Wight Cnty. Sch. Bd.*, 354 F. Supp. 2d 616, 623 n. 9 (E.D. Va. 2004) (stating that the PPRA contains no private right of action); *see also C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d

159, 170 n.13 (3rd Cir.2005) ("While Gonzaga addressed only the FERPA, the parties have obviously interpreted it to dictate the fate of the private PPRA claim asserted here."). Plaintiff has no standing under a statute that it cannot obtain any benefit from, and it cannot assert this claim as well.

II. PLAINTIFF'S "FUNDAMENTAL RIGHT" IS NOT CAREFULLY DESCRIBED OR AS BROAD AS PLAINTIFF INSISTS.

Plaintiff acknowledges that its substantive due process claim turns on the nature of the right asserted. However, Plaintiff disregards the Supreme Court's requirement "in substantive-due-process cases [for] a 'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 2268, 117 S. Ct. 2302, 2268, 138 L.Ed.2d 772, 788 (1997).

A. Plaintiff Avoids A Careful Definition Of Its Purported Fundamental Right.

Plaintiff does not carefully define its asserted fundamental interest. Plaintiff vacillates in what it claims is its members' rights. Plaintiff states that this right entails the right to "make medical care and treatment decisions for their children." [ECF 15, pp. 23, 28]. But Plaintiff also claims a generalized right to make all decisions regarding the care, custody, and control of their children. *Id.* at p. 27. And, Plaintiff also claims that its members' asserted right is "to be involved in the decision about whether [District] staff will treat their child as the opposite sex while at school." *Id.* at pp. 22-23.

Plaintiff seems to believe that its members have a right to control every aspect of their children's lives. It is too simplistic, however, to say that Plaintiff's members have a fundamental right to control every aspect of their children's lives, including while they attend public school. Nor does this statement truly reflect what Plaintiff seeks. The Court must look to the face of the

Complaint and the actual language of the Guidance to frame the right at issue, and it cannot rely on Plaintiff's vague, fluid, conclusory assertions in its brief.

As previously explained by the District, one must review the allegations in the Complaint and compare them to the actual language of the Guidance to discern the specific right that Plaintiff claim's is being infringed upon. This review discloses that what Plaintiff seeks as a "fundamental right" is a purported right to be immediately informed if their child contacts District staff to address concerns related to gender support and to not take any steps to support the child without the express approval of the parent. *See* [ECF 12, pp. 15-18]. As is explained below, this is not a fundamental right.

B. There Is No Fundamental Constitutional Right To Be Fully Informed And Involved In Issues Relating To Gender Support While Children Are At School.

Plaintiff claims that the right to make decisions regarding the care, custody, and control of children has been "expansively understood" to be a fundamental right. [ECF 15, p. 23]. This statement ignores the line of Supreme Court cases that have progressively narrowed the scope of what is considered a fundamental right relating to the upbringing of children. *See* [ECF 12, pp. 11-14].

While parents retain a fundamental right to make decisions concerning the care, custody, and control of their children, *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), no court has expanded the scope of that right so broadly as to include a right of parents to be fully informed and involved in addressing issues relating to gender support at school. Nor has any court suggested that such a right would be violated by reasonable school guidelines that further important educational and safety goals, such as the Guidance at issue here. To the contrary, courts have consistently recognized that public schools have the authority to make many kinds of

judgments regarding students' educational experience, and that parents do not have a fundamental constitutional right to override, or claim exemptions from, those considered judgments.

The right of parents and guardians to make decisions concerning the care, custody, and control of their children as recognized by *Troxel*, 530 U.S. at 66 (interpreting jurisprudence flowing from *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)), is not unlimited. The Supreme Court has repeatedly cautioned that substantive due process protects only those fundamental rights and liberties that have been "carefully refined by concrete examples . . . found to be deeply rooted in our legal tradition." *Washington*, 521 U.S. at 722; *see also Belle Terre v. Boraas*, 416 U.S. 1, 7-8, 94 S. Ct. 1536, 39 L.Ed.2d 797 (1974); *City of Dallas v. Stanglin*, 490 U.S. 19, 22-25, 109 S. Ct. 1591, 104 L.Ed.2d 18 (1989). It follows, the Supreme Court has explained, that rights protected as a matter of substantive due process must be narrowly defined to ensure fidelity to that tradition. *See Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993) ("Substantive due process analysis must begin with a careful description of the asserted right, for the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.") (internal citations omitted).

As the First Circuit explained in *Parker v. Hurley*, 514 F.3d 87, 101 (1st Cir. 2008), constitutional parental-rights jurisprudence produces two primary strains of case law: one concerning the custody of children, and another concerning the fundamental control of children's schooling. Although Plaintiff's Complaint mentions certain concepts relating to the custody cases, *see, e.g.*, [ECF 1, ¶ 80], the Complaint is plainly framed to invoke control at school.

None of the cases cited by Plaintiff requires the Court to recognize a right to be fully informed and involved in addressing issues relating to one's child's request for gender support

while at school. "[W]hile parents can choose between public and private schools, they do not have a constitutional right to 'direct how a public school teaches their child.'" *Parker*, 514 F.3d at 102 (citing *Blau v. Fort Thomas Pub. Sch. Dist*., 401 F.3d 381, 395 (6th Cir. 2005)). The schooling cases "'evince the principle that the state cannot prevent parents from choosing a specific educational program.'" *Id.* at 101 (citing *Brown v. Hot, Sexy & Safer Prods., Inc*., 68 F.3d 525, 533 (1st Cir. 1995)). In other words, the state may not "completely foreclos[e] the opportunity of individuals and groups to choose a different path of education." *Brown*, 68 F.3d at 533.

Such a constraint on Plaintiff's members' rights is not at issue here. Nothing in the Guidance prohibits Plaintiff's members from choosing a different educational path for their children. Plaintiff's members are free to remove their children from the Eau Claire Area School District and open enroll them elsewhere or select a private institution. *Pierce*, 268 U.S. at 534-535. To more completely oversee their children's expression of gender identity, they can also educate their children at home. *See Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). The Guidance has no effect on Plaintiff's members' right to choose a different path of education if they so choose.

What Plaintiff seeks here, but is unwilling to admit, is to expand the scope of parents' basic right to control their children's schooling to include a right to dictate the operations of public schools. This attempt to expand this basic right has, time and again, been rejected by courts. For example, courts have rejected parents' challenges to schools' sex education programs, *see Fields v. Palmdale Sch. Dist*., 427 F.3d 1197, 1207 (9th Cir. 2005); mandatory health curriculums, *see Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003); and mandatory community service programs. *See Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ*., 899 F. Supp. 1443, 1450 (M.D.N.C. 1995), *aff'd,* 89 F.3d 174 (4th Cir. 1996). These cases recognize the same

overarching principle—that parents' right to direct their children's education does not include the right to overrule reasonable educational judgments of a public school system while their children are at school.

As the Sixth Circuit has explained, courts' reluctance to extend constitutional parental rights into the schoolhouse reflects not only concerns about expanding substantive due process beyond its historical grounding but also their longstanding deference to the reasonable educational judgments of public educational institutions:

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

Blau, 401 F.3d at 395-96 (citing *Goss v. Lopez*, 419 U.S. 565, 578, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975)). With unwavering consistency, courts have rejected the view that parents' rights to control the education of their children confer on parents a line-item veto over school policies.

Plaintiffs' effort to invoke a parental right to make health-related decisions for children is similarly unsupported by the case law. Certainly, courts recognize a familial right to "independence in making certain kinds of important decisions." *Hodge v. Jones*, 31 F.3d 157, 163 (4th Cir. 1994). But that right is "neither absolute nor unqualified," *id*., nor is it as sweeping as what Plaintiffs assert here. The right "may be outweighed by a legitimate governmental interest." *Id*. at 163-64 (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)) (explaining that the state has a "parens patriae interest in preserving and promoting the welfare of the child"). And courts have consistently found that reasoned efforts to protect the welfare of children do not "intrude[] so

vigorously into the [] family as to infringe their family privacy right." *Renn By & Through Renn v. Garrison*, 100 F.3d 344, 349 (4th Cir. 1996).

The Guidance imposes no limits on how Plaintiff's members may counsel their children on gender support, gender identity, or gender expression. The Guidance does not reach inside the family home and does not restrict anything that parents may discuss with their children. The Guidance concerns only how issues related to gender support should be handled while children are under school supervision in order to protect student safety and to facilitate their education—where parents' familial privacy rights are necessarily more circumscribed.

Plaintiff argues that the federal constitution imposes on schools an affirmative duty to disclose any and all information a student shares with school personnel about the student's gender identity as expressed at school, regardless of the student's wishes or safety concerns. Such a sweeping right and such an intrusion on school policy and practice has no grounding in case law discussing family privacy rights. Indeed, courts rarely consider the family privacy right to decisional independence when adjudicating schooling cases, relying instead on the *Meyer-Pierce* line of case law.[3]

In the few instances where courts have found schools to have violated family privacy rights, the decisions turned on the presence of two factors: (1) coercive pressure on the child to undertake a controversial or intimate act; and (2) concealment of that fact from the parents. *See Reardon v. Midland Cmty. Sch.*, 814 F. Supp. 2d 754, 771 (E.D. Mich. 2011). For example, in *Arnold v. Board of Educ. of Escambia Cnty., Ala.*, the Eleventh Circuit concluded that school officials violated a

[3] As the Supreme Court noted in *Runyon v. McCrary*, "[t]he *Meyer-Pierce-Yoder* 'parental' right and the [familial] privacy right . . . may be no more than verbal variations of a single constitutional right." 427 U.S. 160, 179 n.15 (1976) (noting the Court's reliance in *Roe v. Wade*, 410 U.S. 113, 152-153 (1973), on *Meyer* and *Pierce* in recognizing a constitutional right to privacy).

plaintiffs' familial privacy rights by coercing a minor into having an abortion and concealing the decision from her parents. 880 F.2d 305, 311-12 (11th Cir. 1989), *overruled on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). Similarly, in *Gruenke v. Seip*, the Third Circuit[4] recognized the parental rights of a mother whose daughter was forced by her swim team coach to take a pregnancy test and who then spread rumors of the teen's pregnancy at the school without informing her parents. 225 F.3d 290, 308-09 (3d Cir. 2000). But where, as here, plaintiffs make no allegations of coercion, courts find no constitutional violation of familial privacy. *See, e.g.*, *Reardon*, 814 F. Supp. 2d at 771-72 (finding no violation of familial privacy where school personnel provided advice, financial assistance, counseling, and an offer to act as foster parents); *Anspach ex rel. Anspach v. City of Philadelphia, Dep't of Pub. Health*, 503 F.3d 256, 264-267 (3d Cir. 2007) (holding that there was no violation of familial privacy where city health department provided a minor with emergency contraception without notifying her parents or encouraging her to consult with them).

All the cases cited by Plaintiff involve parental rights applied in specific circumstances not present here. For example, *Troxel v. Granville* only concerned "a state government's interference with a mother's decision about the amount of visitation with her daughters' paternal grandparents that was in her daughters' best interests; it did not address the extent of parents' rights to direct the policies of the public schools that their children attend." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1229-31 (9th Cir. 2020) (citing *Troxel*, 530 U.S. at 67-73). Likewise, *Stanley v. Illinois* merely held that no one can decide that a parent is unfit without proper process and that parents have a fundamental interest in "retaining custody of" their children. 405 U.S. 645, 651-52, 92 S.

[4] To the extent the Court considers caselaw out of the Third Circuit, it should be noted that that circuit contains a "broader precedent" regarding the scope of parental rights than other circuits. *See Tatel v. Mt. Lebanon Sch. Dist.*, No. 22-837, 2022 U.S. Dist. LEXIS 196081, at *42 (W.D. Pa. Oct. 27, 2022).

Ct. 1208, 31 L. Ed. 2d 551 (1972); *see also Quilloin v. Walcott*, 434 U.S. 246, 248 (1978) (reiterating the concept in *Stanley* that a parent has a fundamental right to physical custody of their child). And, *Parham v. J.R* only discussed generalized parental rights in the context of framing the issue of whether the commitment of a child implicates a fundamental liberty interest of the child and parent. 442 U.S. 584, 604, 99 S. Ct. 2493, 2505, 61 L.Ed.2d 101, 120 (1979).

The Seventh Circuit decisions cited by Plaintiff also do not support its claim. *Brokaw v. Mercer County* articulated the standard for balancing the right to familial integrity against the state's interest in protecting children from abuse. 235 F.3d 1000, 1019 (7th Cir. 2000). The fundamental right at issue involved the physical removal of a child from her home and parents, i.e., the "fundamental right to the family unit." *Id.* Likewise, *Doe v. Heck* only established that unreasonable child-abuse investigations can violate the right to familial relations. 327 F.3d 492, 524 (7th Cir. 2003).

Here, there are no allegations in the Complaint that District staff is coercing students to seek to transition or to hide their gender identity to their parents. Far from coercing students into undertaking a gender transition—or any other important decision potentially touching on familial privacy—the Guidance puts the burden on the student or their parent to come forward and request gender support; it is not initiated by the District. [ECF 1-3]. The Guidance also encourages communication with the parents: "School personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent/guardian." *Id.* There is nothing in the Guidance or the Gender Support Plan that directs secrecy or advises that parents will be precluded from knowing about a gender support plan. In fact, the opposite is true: "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. This is a not a privileged document between the student and the school district." [ECF 1-4, p. 1]. The Gender Support Plan explicitly contemplates involvement of a student's parents: "School staff, family, and the student should work together to complete this document." *Id.* Moreover, the District "will only make name changes in Skyward after the completion of a Gender Support Plan and with parent/guardian permission." [ECF 1-3, p. 4] (emphasis in original).[5]

The Guidance does not implicate familial privacy rights and Plaintiff has not identified any other fundamental right at issue here. The Guidance is subject to rational basis review.

C. Because There Is No Fundamental Right Involved, The Guidance Only Needs To Pass Rational Basis Review, And It Does.

The District identified multiple legitimate (and compelling) government interests the Guidance serves. The explicit purpose of the Guidance is "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]. Beyond the express language of the Guidance, the District also explained that it has legitimate (compelling) interests in protecting their students' physical and psychological safety and ensuring a safe, welcoming school environment where students feel accepted and valued; not discriminating against transgender and gender nonconforming students; protecting student privacy; supporting students when a student is not comfortable revealing their gender identity to their parents; and complying with federal and state law. [ECF 12, pp. 19-22]. The Guidance is rationally related to these interests and would even pass the heightened standard of strict scrutiny.

[5] The Complaint attempts to portray the Guidance as invoking coercion and secrecy, but those allegations are contrary to the actual language of the Guidance, and as such they are not entitled to a presumption of truth. *See* Footnote 2.

1. The Guidance Passes Rational Basis Review.

The Guidance is rationally related and narrowly tailored to the interests identified above. Plaintiff's argument in opposition is premised on a mischaracterization of these interests and the Guidance and focuses on its overgeneralization of the right at issue. Plaintiff's claim that the existence of the Guidance presumes that its members are engaging in child abuse or labels them as presumptive abusers nonsensical. It goes without saying that if a student is not comfortable discussing their gender identity issues with a parent, then automatic disclosure of that information would negatively impact the student and hinder their well-being at school. The balance of interests applied by the Seventh Circuit in *Heck*, 327 F.3d at 520, related to child abuse investigations is inapplicable here.

The rational basis standard is deferential: "Courts typically ask whether a rational basis is conceivable, without paying mind to what the state actually said or thought." *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1013 (7th Cir. 2019). "[T]he rational basis need not even be the *actual* justification . . . [A]ny reasonably conceivable state of facts that could provide a *rational basis* will suffice." *145 Fisk, LLC v. Nicklas*, 986 F.3d 759, 771 (7th Cir. 2021) (internal citations omitted).

Plaintiff's claim that the Guidance, and specifically the provision that immediate parental notification is not required, is not rationally related to the governmental interests, has no basis in law or fact. The Guidance is at a minimum rationally related to these legitimate interests. *See John & Jane Parents 1 v. Montgomery Cty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 U.S. Dist. LEXIS 149021, at *35 (D. Md. Aug. 18, 2022); *Barr*, 949 F.3d at 1238-39.

Providing District staff with a resource on how to support students with gender issues, including providing them with the safety of not instantly disclosing this information to a parent is

rationally related to the stated purpose of the Guidance. As explained in *John & Jane Parents 1*, if the Guidance "mandated parental disclosure . . . their primary purpose of providing transgender and gender nonconforming students with a safe and supportive school environment would be defeated." 2022 U.S. Dist. LEXIS 149021, at *38-39.

Schools have a legitimate interest in maintaining "an environment where learning can take place" including "maintaining a positive and functioning educational experience." *Sharp v. Cmty. High Sch. Dist. 155*, No. 3:21-cv-50324, 2022 U.S. Dist. LEXIS 119702, at *13 (N.D. Ill. July 7, 2022). Schools "also have a legitimate interest in protecting gay students at its school from being harmed, both physically and psychologically." *Zamecnik v. Indian Prairie Sch. Dist.*, No. 07 C 1586, 2007 U.S. Dist. LEXIS 28172, at *33 (N.D. Ill. Apr. 17, 2007). The Guidance as a whole easily passes rational basis review.

2. The Guidance would also pass strict scrutiny.

At least one court has already concluded that guidelines for transgender and gender non-conforming student support satisfies strict scrutiny even where the guidelines do not require parental disclosure before offering supports. *John & Jane Parents 1*, 2022 U.S. Dist. LEXIS 149021, at *35 ("Even assuming momentarily that the Guidelines *were* subject to strict scrutiny (they are not), I would conclude that they satisfy that standard as well."). The district court in *John & Jane Parents 1* held that those guidelines were narrowly tailored to the compelling interests of: "(1) protecting their students' safety and ensuring a safe, welcoming school environment where students . . . feel accepted and valued; (2) not discriminating against transgender and gender nonconforming students; and (3) protecting student privacy." *Id.* at *36. Plaintiff's claims that these are not compelling interests or that the Guidance is not narrowly tailored to serve these interests is unavailing.

These are not "broad, general interests." The interests cited by the District are specific to properly supporting gender non-conforming students at public school. For example, protecting student privacy, providing a psychological safe school environment, and not discriminating against transgender students in violation of federal and state law, are all compelling interests specifically related to the purposes that the Guidance is intended to support. The District's interest in fostering an "inclusive and welcoming environments that are free from discrimination, harassment, and bullying regardless of sex, sexual orientation, gender identity or gender expression" is not some amorphous concept.

Plaintiff's reliance on *Ricard v. USD 475 Geary Cty.*, No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742 (D. Kan. May 9, 2022) does nothing to diminish the conclusion that the Guideline is narrowly tailored meet compelling interests. That case concerned whether a policy that prohibited a teacher from using a student's preferred pronoun in parental communications had a reasonable likelihood of infringing on her free exercise rights as she had alleged a religious belief that prohibited her from being dishonest. *Id.* at *12. The plaintiff claimed that it was a form of dishonesty to converse with parents using one name and set of pronouns when the child is using a different name and pronouns at school. *Id.* This free exercise case does not stand for any proposition that the District's stated interests are not compelling.

Transgender and gender non-conforming students are a vulnerable population and providing them with in-school supports fosters an emotionally and psychological safe environment:

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

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

John & Jane Parents 1, 2022 U.S. Dist. LEXIS 149021, at *37-38.

The Guidance is narrowly tailored to this compelling government interest of supporting a vulnerable population of students while they attend public school. The Guidance would also pass strict scrutiny.

III. THE EXISTENCE OF THE GUIDANCE DOES NOT INFRINGE ON ANY OF ITS MEMBERS' FREE EXERCISE RIGHTS.

Plaintiff acknowledges that the appropriate standard for evaluating whether government action impermissibly infringes upon religion requires an analysis of whether the action is neutral and generally applicable or specifically targeted at religious beliefs. *See generally* [ECF 12, p. 23]. The Guidance does not infringe on religious beliefs because it does not: "(1) compel affirmation of religious beliefs; (2) punish the expression of religious doctrines it believes to be false; (3) impose special disabilities on the basis of religious views or religious status; or (4) lend its power to one side or the other in controversies over religious authorities or dogma." *Employment Division v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

Plaintiff cannot dispute that the Guidance is facially neutral as the actual language of the Guidance and the Gender Support Plan does not address religion. *See* [ECF 1-3, 1-4]. This concession is evident by Plaintiff's focus on other unrelated documents. While it is true that a court can look to other evidence to understand a 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," *see Mahwikizi v. CDC*, No. 21 CV 3467, 2021 U.S. Dist. LEXIS 225201, at *8 (N.D. Ill. Nov. 22, 2021), that evidence must actually be related to the government action at issue.

Plaintiff's reliance on the facilitator guide for the District's equity professional development for all staff is unavailing. *See* [ECF 1-5]. While Plaintiff claims "upon information and belief" that this document is reflective of training on the Guidance, *see* [ECF 1, ¶ 36], a review of the actual document shows that it never mentions the Guidance either directly or indirectly. *See* [ECF 1-5]. Plaintiff mischaracterizes this document and cherry picks language out of context to make its argument. The actual language is not antagonistic to any particular religious belief. Generalized statements in an unrelated training about supporting students that may have parents with religious objections to LGBTQIA+ people do not evidence that the Guidance harbors hostility towards Plaintiff's members' religious beliefs. *See* [ECF 12, pp. 24]. Even if the professional development materials were relevant, there is no "open hostility" towards religion. This language coupled with Plaintiff's conclusory assertions in the Complaint are not sufficient to make a finding that the Guidance is not neutral and generally applicable.

Plaintiff ignores the Ninth Circuit's analysis in *Barr*, in which it held that a policy that permitted transgender students to use locker rooms and bathrooms that correspond to the gender they identify with did not impermissibly infringe upon religion. *See* 949 F.3d at 1218. The plaintiffs in that case alleged that their religious beliefs would be violated if their children would be exposed to children of the same biological sex in states of undress. *Id.* at 1234. Here, like in *Barr*, the well-plead facts in Plaintiff's Complaint do not allege that the Guidance was adopted with the object of suppressing the exercise of religion. *Id.* at 1235. Supporting transgender

students is not religiously motivated even if certain individuals believe that gender non-conformity violates their religious beliefs. *See id.*

Plaintiff's challenge to the Guidance is similar to the claims asserted in *Jones v. Boulder Valley Sch. Dist. Re-2*, where parents challenged public school transgender tolerance policies as violating their free exercise rights. Civil Action No. 20-cv-03399-RM-NRN, 2021 U.S. Dist. LEXIS 223090, at *2 (D. Colo. Oct. 4, 2021). The district court explained that: "To the extent that Plaintiffs have an overarching objection to a curriculum that is 'pro-LGBTQ' or 'pro-Transgender' because it seeks to weave principles of tolerance and understanding of different views and lifestyles into the courses taught at the School, they similarly have no claim." *Id.* at *47. Likewise, absent Plaintiff's unreasonable reading of the unrelated professional development materials and its attempt to connect the professional development with the Guidance, Plaintiff is left with only a generalized objection to pro-transgender policies.

The Guidance does not target religion and it imposes no conditions or restrictions on religious conduct. Because rational basis review should apply, the Guidance easily passes this standard. And, as stated above, even if strict scrutiny was appropriate, the Guidance is narrowly tailored to the District's stated compelling interests.

IV. PLAINTIFF'S PUPIL RIGHTS AMENDMENT CLAIM FAILS AS THAT LAW IS NOT IMPLICATED BY THE ALLEGATIONS IN THE COMPLAINT.

Plaintiff acknowledges that there is no independent cause of action under the PPRA and that it is only trying to bring a claim for violation of the statute under Section 1983. Plaintiff appears to believe that it has a cause of action under 20 U.S.C. § 1232h(b), which prohibits schools that are a part of an applicable program to require students to submit to survey's that reveal information concerning, among other things "mental or psychological problems of the student."

However, Section 1983 cannot be used to privately enforce this statute, and even if it could be, the PPRA is inapplicable based on the allegations in the Complaint.

A. The PPRA Does Not Create A Federal Right That Can Be Asserted In A Section 1983 Claim.

Section 1983 can be used as a vehicle to assert a violation of a federal statutes, but only if the statute confers a federal right upon the plaintiff. *See Saint Anthony Hosp. v. Eagleson*, 40 F.4th 492, 502 (7th Cir. 2022). For a federal statute to confer a 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." *Blessing v. Freestone*, 520 U.S. 329, 340-41, 117 S. Ct. 1353, 1359, 137 L.Ed.2d 569, 582 (1997). Even if the *Blessing* factors are present, Section 1983 cannot be used as a vehicle for bringing a claim for a statutory violation if a comprehensive "enforcement scheme" already exists. *Saint Anthony Hosp.*, 40 F.4th at 503.

Plaintiff claims that the PPRA benefits its members, but never points to any specific language to demonstrate that 20 U.S.C. § 1232h(b) is meant to benefit parents of students. There is no mandatory language that asserts rights on behalf of parents. The statute says that "[n]o student shall be required, as part of any applicable program, to submit to a survey," *see id.*, but says nothing about parental rights to be informed of anything. "Only persons who are subjected to testing or treatment for the primary purpose of revealing information in the seven specified categories could be considered 'intended beneficiaries' of subsection (b)." *Newkirk v. E. Lansing Pub. Sch.*, File No. 1:91:CV:563, 1993 U.S. Dist. LEXIS 13194, at *16 (W.D. Mich. Aug. 16, 1993). Plaintiff says that there is not an institutional focus in the PPRA like in FERPA, but again develops no argument to support this claim. Like in 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. The right asserted by Plaintiff fails the first *Blessing* factor.

Even if the PPRA did not fail the *Blessing* standards, 34 C.F.R. §§ 98.7-10 provides a comprehensive administrative complaint procedure that permits a student or parent of a student to file a complaint with the Secretary of Education if they have been directly affected by a violation under the PPRA. Plaintiff attempts to challenge this argument but provides no authority to support its position other than to generically conclude that parents' have the right to control the education and upbringing of their children.

B. The Facts Alleged By Plaintiff Fail To State A Claim For Violation Of The PPRA, And That Precludes A Section 1983 Action Premised Upon An Alleged PPRA Violation.

Even if Plaintiff could use the PPRA as a vehicle for a Section 1983 claim, it fails to allege facts that would establish a violation of the PPRA. Plaintiff makes only superficial arguments to support its PPRA claim. First, it claims that the Gender Support Plan is not voluntary because students cannot consent to filling it out. This argument makes no sense. The Gender Support Plan is an available tool in the event that a student voluntarily requests the creation of one. No student is ever required to request this aid.

Plaintiff calls the District's argument circular, but relies on a case that does not address the PPRA in support of its position. *Rhoades v. Penn-Harris-Madison Sch. Corp.*, 574 F. Supp. 2d 888, 889, 892 (N.D. Ind. 2008), involved a substantive due process claim claiming a school district committed an invasion of privacy when it conducted mandatory psychological assessments to all

students without parental consent. In that case, students were brought from class to take a suicide assessment test. *Id.* at 892. The allegations related to whether the student had been forced to disclose private and personal information without consent, not whether the PRRA had been violated. There is no allegation here that any student is ever forced to participate in the Guidance. In fact, a Gender Support Plan only exists if the student seeks it out. The checklist in the Gender Support Plan cannot be compared to a mandatory psychological assessment.

Even if the Gender Support Plan was not voluntary, the Guidance and the Gender Support Plan have nothing to do with a "program" as defined by the PPRA. Plaintiff completely ignores that the Gender Support Plan is not being administered as part of a "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). "Section 1232h was meant to apply only to programs administered by the Secretary of Education." *Id.* Plaintiff does not address this portion of the District's argument.

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." 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. *See Newkirk*, 1993 U.S. Dist. LEXIS 13194, at *12-14 ("No allegations or facts have been provided 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.").

V. THE INDIVIDUALLY NAMED DEFENDANTS MUST BE DISMISSED.

Typically, official capacity claims under Section 1983 against government officials are the same as a claim against the government entity itself. *See Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). Plaintiff seeks to name the District's board of education members and superintendent as redundant defendants. It claims that because it seeks injunctive and declaratory relief, all eight of these officials are proper defendants. While official capacity claims can be asserted against government officials for injunctive relief, it does not change the fact when a government entity and officer are named in the same suit, the usual practice is to dismiss the official capacity claims as redundant. Courts dismiss redundant official capacity claims against individual defendants even when the plaintiff seeks injunctive relief when they also name the entity. *See, e.g., A.J. & R.J. v. Butler Ill. Sch. Dist. 53*, No. 17 C 2849, 2018 U.S. Dist. LEXIS 49121, at *8-9 (N.D. Ill. Mar. 26, 2018) (dismissing claim for injunctive relief against school board members in their official capacities when the entity was already named as a defendant); *Searles v. Bd. of Educ.*, No. 03 C 8966, 2004 U.S. Dist. LEXIS 11977, at *11-12 (N.D. Ill. June 25, 2004) (dismissing claims for injunctive and declaratory relief against school principal when government entity was also named in the suit). There is no reason to keep the individual defendants in this case when the District is the proper party.

CONCLUSION

For the reasons set forth above, the District respectfully requests that the Court grant its motion to dismiss and dismiss the federal claims in Plaintiff's Complaint with prejudice and in their entirety and decline supplemental jurisdiction over the state law claims.[6]

Dated this 16th Day of December, 2022.

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[6] The Court should relinquish jurisdiction over Plaintiff's state law claims and dismiss them without prejudice. *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).