

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
No. 2022-0537

Jane Doe
(Plaintiff/Appellant)

v.

Manchester School District
(Defendant/Appellee)

BRIEF OF *AMICI CURIAE*
GLBTQ LEGAL ADVOCATES & DEFENDERS,
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE,
AMERICAN MEDICAL ASSOC., HEATHER & NICO ROMERI,
ANDRES MEJIA, RACHEL BLANSETT, QUINCI WORTHEY,
NH MEDICAL SOC., NH ACADEMY OF FAMILY PHYSICIANS,
NH PEDITARIC SOC., NH PSYCHIATRIC SOC., UU ACTION NH,
NH COUNCIL OF CHURCHES, JASON WELLS, KALI FYRE,
MARJORIE GEBRACHT, SARAH ROCKWELL, BOB STEWART,
ELSA WORTH, JAY MCLEOD, GLSEN, GLSEN NH, YWCA NH,
SEACOAST OUTRIGHT, AND 603 EQUALITY
IN SUPPORT OF MANCHESTER SCHOOL DISTRICT
Appeal Pursuant to Supreme Court Rule 7 from
New Hampshire Superior Court, Hillsborough County, Northern District
Case No. 216-2022-CV-00117

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**Motion for Admission Pro Hac Vice Forthcoming*

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OTHER AUTHORITIES

Am. Acad. of Pediatrics, Comm. on Adolescence, <i>The Adolescent Right to Confidential Care When Considering Abortion</i> , 97 Pediatrics 746 (1996)	27
Carol A. Ford et al., <i>Foregone Health Care Among Adolescents</i> , 282 JAMA 2227 (1999)	30
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Kia Daring Hammond & Linda Darling Hammond, <i>Supportive and Inclusive Schools</i> , in <i>The Civil Rights Road to Deeper Learning</i> (Teachers College Press 2022)	24
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Tina Cheng et al., <i>Confidentiality in health care: a survey of knowledge, perceptions, and attitudes among high school students</i> , 269 JAMA 1404 (1993).....	30
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STATEMENT OF INTEREST OF *AMICI CURIAE*

Through strategic litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders** (“GLAD”) works in New England and nationally to create a just society free from discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS.

The **American Civil Liberties Union of New Hampshire** (“ACLU-NH”) is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest civil liberties organization with over 1.7 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation to encourage the protection of individual rights guaranteed under the United States and New Hampshire Constitutions, as well as under our state and federal civil rights laws, especially for historically marginalized people.

Heather Romeri and her son **Nico Romeri**, reside in Milford, New Hampshire, where Nico attends public school. Nico, a transgender boy, and his mother Heather are grateful for the support they have received from trusted adults in New Hampshire’s public schools and others in the broader community. Heather believes that their family benefitted from adults outside their home with whom Nico could discuss his gender identity, even before he was ready to talk to his mother. Heather and Nico continue to rely on support from Milford High School.

The **Directors of Diversity, Equity, and Inclusion** for school districts in New Hampshire (see Addendum) are administrators charged

with supporting students of diverse backgrounds in public schools, including students who are transgender and gender nonconforming. However, they are filing this brief *in their individual capacities*, not in their capacities as administrators. These administrators are attuned to the obligations of public schools to provide a safe and supportive learning environment for all students, including LGBTQ students.

The members of the **Medical Organizations** (see Addendum), including the **American Medical Association**, are healthcare providers who work across New Hampshire and nationally to help ensure that families are healthy and thriving. Healthcare providers know that transgender and gender nonconforming youth need schools to provide a healthy and affirming environment for those children to develop and learn.

The **New Hampshire Faith Leaders** (see Addendum) believe that trusted adults in New Hampshire public schools play a vital role, in connection with other pillars of community support, in nurturing young people and in helping families adjust to new information. For parents who are learning about differences in their child's gender identity, the community must work together to ensure that those parents have the tools they need to meet the needs of their children.

The **LGBTQ Advocacy Organizations** (see Addendum) work across New Hampshire and nationally to provide support for transgender and gender nonconforming youth and their families. These organizations attest to the important role that public schools play in providing a supportive learning environment for all students including transgender and gender nonconforming students.

STATEMENT OF THE CASE AND THE FACTS

Amici curiae incorporate by reference the Statement of the Case and Facts in the Brief of Defendant-Appellee Manchester School District.

SUMMARY OF ARGUMENT

To meet the needs of all students and families in each community, New Hampshire public school districts must retain broad authority to implement policies, including the policy at issue in this case, that balance diverse interests while working in partnership with parents to foster an educational environment conducive to learning.

Manchester School District adopted Policy 100.1 to support, as it must, its transgender and gender nonconforming students and their families. The policy is in alignment with prevalent legal and pedagogical precepts that oblige schools to affirm and build trust with students who are developing their identities throughout their youth and adolescence.

The New Hampshire Constitution, like the United States Constitution, allows public schools great latitude to implement flexible policies that further educational interests, promote a positive school climate, and balance the rights of students and their families.

ARGUMENT

I. THE TRIAL COURT’S RULING SHOULD BE SUSTAINED AS IT PROPERLY CONSIDERS AND BALANCES THE INTEREST OF PARENTS, SCHOOLS, AND STUDENTS.

A. MANCHESTER SCHOOL DISTRICT’S POLICY OF SUPPORTING AND AFFIRMING THE GENDER IDENTITY OF CHILDREN AND ADOLESCENTS AT SCHOOL SERVES ITS LEGAL OBLIGATIONS AND VITAL EDUCATIONAL INTERESTS.

The role of New Hampshire public schools is enshrined in the state constitution:

Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantage of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools”

NH CONST. pt. II, art. 83 (1784). In carrying out this command, New Hampshire schools have a long history of working in partnership with parents to ensure that young people are educated and prepared for citizenship. “Th[is] language commands, in no uncertain terms, that the State provide an education to all its citizens and that it support all public schools.” *Claremont School District v. Governor*, 138 N.H. 183, 187 (1993). The framers understood public education as fundamental to a functioning society: “[A] free government is dependent for its survival on citizens who are able to participate intelligently in the political, economic, and social functions of our system.” *Id.* at 192.

Manchester School District Policy 100.1 (hereinafter, “Policy 100.1” or the “policy”) allows parents, guardians, or students to request a student be referred to by a name and corresponding pronoun other than their existing legal name in order to acknowledge the student’s gender identity at school.¹ Absent voluntary disclosure, the school regards a student’s status

¹ The policy defines “Transgender” as “describ[ing] people whose gender identity is different from their gender assigned at birth,” and “Gender nonconforming” as “describ[ing] people whose gender expression differs from stereotypical expectations, such as ‘feminine’ boys, ‘masculine’ girls, and those who are perceived as androgynous.” The policy also addresses

as transgender or gender nonconforming as personal “confidential information” and identifies safeguards before school employees disclose such information to teachers, staff, and other students. *See* Pf. App’x at 0039-0040. In short, schools are restrained from unauthorized disclosure of “information that may reveal a student’s transgender status, legal name, or gender assigned at birth,” absent authorization from the parent, guardian, or student. *Id.*

While acknowledging a student’s protected privacy interests in their status as transgender or gender nonconforming, the policy specifically assures all students, “regardless of gender identity,” of a right to “increased privacy, regardless of the underlying reason,” whenever reasonable. *Id.* Privacy is necessarily limited when disclosure is “legally required” or where the school has an “obligation . . . to take action when student safety is concerned.” *Id.* In these ways, the policy attempts to balance the school’s interest in maintaining its educational environment with student privacy rights and deference to parents in the ordinary course, while maintaining the imperative to keep students safe and ensure their well-being. The policy also respects the expressive interests of students, including “hav[ing] the right to discuss and express their gender identity and expression openly.” *Id.*

In the present case, the plaintiff-appellant parent challenges a general policy, calling for consideration of individual circumstances and an exercise of discretion, in supporting students who are transgender and

several important issues affecting transgender and gender nonconforming students, including dress codes, bathrooms, and harassment.

gender nonconforming.² She argues that she is entitled to immediate notification when her child adopts a name and pronouns that she has not authorized. In her view, the policy “requires the school to lie to parents,” Pf. Br. at 23,³ and the failure to inform her constitutes a violation of her right to bring up her child.

A ruling from this Court that the New Hampshire Constitution mechanistically mandates public schools to disclose certain information about students’ identities to their parents, as the plaintiff-appellant seeks, would undermine students’ engagement with school and learning, and deter them from seeking other supports at school. The right of parents to direct the upbringing of their children does not extend to “direct *how* a public school teaches their child.” *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008), quoting *Blau v. Fort Thomas Public School District*, 401 F.3d 381, 395 (6th Cir. 2005) (emphasis in original). The policy is fully consistent with the longstanding legal principle that school districts, due to their unique expertise, must retain discretion to decide how to best address

² The plain terms of Manchester Policy 100.1, “Transgender and Gender Non-Conforming Students,” “set[] out *guidelines* for schools and district staff to address the needs of transgender and gender nonconforming students” (emphasis added). As such, Policy 100.1 “does not anticipate every situation that might occur with respect to transgender or gender nonconforming students, and the needs of each transgender or gender nonconforming student must be assessed on a case-by-case basis.”

³ See Compl. at ¶ 29 (“[T]he Policy creates a right for students . . . to compel teachers to lie to parents, either directly or through omission, and to require school personnel to otherwise mislead parents about a child’s in-school gender expression.”).

student situations based on individualized circumstances. *See Parker*, 514 F.3d at 102.

Moreover, the uncomfortable fact for parents, schools, and students across generations is that schools often learn information about students and their identities, including information that is not yet known to their parents. For example, a child may be drawn to Catholicism after attending services with a friend, even if the child's parents are Unitarian Universalists. A student's family may keep kosher, but the student may not be observant while sharing food in the cafeteria with friends. The student's parents may be Democratic activists, but the child may wish to attend a non-curricular Libertarian Club. To force a disclosure by the school that in all likelihood would otherwise come directly from the student voluntarily once the young person is ready, or when parents raise questions about their own observations with the young person, would be the very insertion into family relationships to which the plaintiff-appellant objects. *See Pf. Br.* at 22; *infra* at Part II.A, n.19 & accompanying text. Further, and given that teachers and staff hear and see so much about their students' lives, what would be the justification for singling out only this aspect of an individual's identity for disclosure? If parents seek disclosure of information relating to a student's gender identity, then what is to prevent a burdensome situation for staff now compelled to disclose anything that a particular parent might find of interest or concerning? Just as importantly, it would require the school to interfere with the parent-child relationship and damage or undermine their relationship, as well as the student's sense that home or school is a safe place for them to explore who they are.

A constitutionally mandated rule of disclosure would also have other unintended consequences, including an adverse impact on the learning environment for any student now concerned that their exploration and assertion of their identities will be reported, and deterring children and adolescents generally from sharing information at school. Schools and parents are natural partners in advancing the education and well-being of students. At the same time, schools must control the learning environment for the benefit of all students.

B. TO DIFFUSE KNOWLEDGE AND LEARNING, AS THE CONSTITUTION COMMANDS, SCHOOLS MUST MEET THE EDUCATIONAL NEEDS OF ALL ASPECTS OF THE COMMUNITY, INCLUDING TRANSGENDER AND GENDER NONCONFORMING STUDENTS.

New Hampshire’s public schools embrace the awesome responsibility of providing an education to all young people across the state without turning anyone away. Where “[p]roviding an adequate education” is a constitutionally mandated “duty,” schools rightly meet students and their parents and guardians as they are, regardless of the identity or individualized needs of the students or their parents’ circumstances. *See, e.g.,* RSA 186-C:1 to 22 (guaranteeing “equal educational opportunities” for all students and identifying particular expectations for supporting students with disabilities through individualized education programs). Public schools accomplish extraordinary outcomes in partnership with parents, their natural allies in advancing the education and well-being of young people, with support from all aspects of the community, including the *amici*.

In effectuating the legal obligations and mission of public schools, state and federal laws require them to provide equal opportunities to all

students and prohibit discrimination based on sex, transgender status, and gender identity. In 2019, the New Hampshire legislature enacted a statute to ensure that “[n]o person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools” based on their membership in a protected class, including, among other classes, sex⁴ and gender identity. RSA 193:38.⁵

The legislature further required school districts to adopt proactive policies for “guid[ing] the development and implementation of a coordinated plan to prevent, assess the presence of, intervene in, and respond to incidents of discrimination” RSA 193:39. This statute imposes an ongoing obligation to ensure a learning environment free from discrimination, which has spurred many school districts across the state to adopt a version of the New Hampshire School Boards Association’s 2015 Sample Policy JBAB.⁶

⁴ As the Supreme Court ruled in *Bostock v. Clayton County*, “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.” 140 S. Ct. 1731, 1741 (2020).

⁵ The statute provides aggrieved students with the right to file a complaint in Superior Court or in the New Hampshire Commission for Human Rights, and it is modeled on the protections against discrimination in education, housing, and public accommodations enshrined in RSA 354-A.

⁶ The New Hampshire School Boards Association removed JBAB from its list of optional policies in February 2022, referencing “a myriad of issues concerning transgender protections in public schools currently being litigated in New Hampshire and throughout the country,” and citing positive developments in the law that support the rights of transgender people including the adoption of RSA 193:38 and the Supreme Court’s decision in 2020 in *Bostock v. Clayton County*. New Hampshire School

Policy JBAB provides guidance, grounded in law and educational practice, to guarantee that transgender students are treated fairly and in a way that ensures full inclusion in schools, from privacy to use of names and pronouns in school, to amending official records, to sex-separated facilities.⁷ The defendant-appellee was among the school districts to adopt a policy modeled off of JBAB, approving Policy 100.1 on February 8, 2021.

“[C]herish[ing] the interest of literature and the sciences,” as mandated by the New Hampshire Constitution, requires an awareness of and an acknowledgment of the varied needs of students and their families. NH CONST. pt. II, art. 83 (1784). According to the school district website, the “Mission and Promise” of Manchester schools is “Excellence and Equity – Every Class Room – Every Day.” Accordingly, “[e]very student in Manchester is known by name, served by strength and need, and graduates ready for college, career, and community.” Policy 101, “District Equity,” goes even further to say Manchester School District “is committed to equity

Boards Association Policy Services Spring 2022 Policy Update (March 2022), *available at* <https://newhampshirebulletin.com/wp-content/uploads/2022/10/NHSBA-Spring-2022-Policy-Update-Summary.pdf>.

⁷ For students who are transgender and gender nonconforming, the commonplace recognition of gender through words or access to programs and facilities may be questioned, challenged, or even attacked while at school. The model policy helps staff and students navigate questions that may arise as public schools work to meet the needs of transgender and gender nonconforming students. Many school districts, including the defendant-appellee, have separate policies for addressing the unique needs of students with other protected characteristics, including for students with disabilities (Policy 103 and Policy 112), and for preventing and responding to incidents of sexual harassment (Policy 102).

and the success of every student” by way of “a safe and respectful learning environment that maximizes [students’] potential for success,” specifying that “[t]he responsibility for addressing these disparities among students [in outcomes based on protected class status] rests with the adults, not with the students.” This policy also promises to “[c]reate and nurture and inclusive and welcoming environment for all students” Ultimately, these policies, including Policy 100.1, are the school district’s way of creating a learning environment where students are known, safe, and respected, and will be met where they are so they can succeed.

In addition to local policy, public schools are also subject to state and federal constitutional requirements,⁸ federal statutes such as Title IX,⁹ and other state and federal laws intended to guarantee equal opportunity and inclusion for all students.¹⁰ New Hampshire public schools also have a

⁸ See N.H. CONST. pt. 1, art. 2 (“All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.”); U.S. CONST. amend. XIV (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

⁹ 20 U.S.C. § 1681 (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity”).

¹⁰ See, e.g., 42 U.S.C. § 2000c (Title IV of the Civil Rights Act prohibiting discrimination based on race, sex, and other classifications in schools); 42 U.S.C. § 12132 (Title II of the Americans with Disabilities Act prohibiting disability discrimination by public entities); 20 U.S.C. § 1400 et seq. (Individuals with Disabilities Education Act); 20 U.S.C. § 4071 (Equal

statutory obligation to guard against bullying.¹¹ Each of these interlocking layers of protection for students strives to ensure that public schools are a place where all young people have the opportunity to thrive.

Amici understand from their own experience that courts, like the public in general, are learning about transgender and gender nonconforming children and adolescents. Similarly, school communities have had to learn that being a transgender or gender nonconforming person is a normal part of the human experience for a small minority of people. In 2014, the Maine Supreme Judicial Court was the first state supreme court to rule that state nondiscrimination law protected a transgender student's right to use the restroom consistent with her gender identity. *John Doe v. Regional School Unit 26*, 86 A.3d 600, 607 (Maine 2014) ("Where, as here, it has been clearly established that a student's psychological well-being and educational success depend upon being permitted to use the communal bathroom consistent with her gender identity, denying access to the appropriate bathroom constitutes [gender identity] discrimination in violation of the [state law against discrimination].").

Since then, three federal circuit courts of appeal, building on a large body of district court decisions,¹² have held that transgender students must

Access Act protecting the right of students to participate in noncurricular groups).

¹¹ See RSA 193-F:4 (requiring school boards to adopt a policy to prevent and respond to bullying in schools).

¹² See, e.g., *M.A.B. v. Board of Education*, 286 F. Supp. 3d 704, 727 (D. Md. 2018) (denying school district's motion to dismiss); *J.A.W. v. Evansville Vanderburgh School Corp.*, 323 F. Supp. 3d 1030, 1042 (S.D. Ind. 2018) (issuing preliminary injunction against school policy), 396 F.

not be excluded from using school facilities in a manner that reflects who they are. In 2020, the Court of Appeals for the Fourth Circuit upheld a summary judgment order in support of a transgender boy’s right to use the boys’ restroom at school. *Grimm v. Gloucester County School Board*, 972 F.3d 586, 614 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh’g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (“[S]howing respect for each student’s gender identity supports the dignity and worth of all students by affording them equal opportunities to participate and learn.” [quoting from Brief of School Administrator Amici]).¹³ The other two circuit courts upheld preliminary injunctions on the grounds that Title IX ensures that transgender boys and girls can access school facilities based on their insistent and persistent sense of their gender. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Board of Education*, 858 F.3d 1034, 1049-50 (7th Cir. 2017) (affirming preliminary injunction); *Dodds v. United States Department of Education*, 845 F.3d 217, 220 (6th Cir. 2016) (*per curiam*) (denying stay of preliminary injunction). Conversely, efforts by non-transgender students and their

Supp. 3d 833 (S.D. Ind. 2019) (allowing partial summary judgment for plaintiff); *Evancho v. Pine-Richland School District*, 237 F. Supp. 3d 267, 294-95 (W.D. Penn. 2017) (issuing preliminary injunction against school policy); *see also N.H. v. Anoka-Hennepin School District No. 11*, 950 N.W.2d 553, 573 (Minn. Ct. App. 2020) (finding Minnesota Human Rights Act prohibits restroom policy based on “biological sex”).

¹³ A recent appellate decision has gone against the weight of authority in ruling that neither Title IX nor the United States Constitution protect the right of transgender students to access sex-separated facilities consistent with their gender identity. *Adams v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (*en banc*).

parents to assert a right to be separated from transgender students have failed repeatedly in courts.¹⁴

Given the context of state and federal statutory and case law, school policies must, at a minimum, ensure transgender and gender nonconforming students the same breadth of opportunity, aspiration, and engagement available to all students. Referring to a transgender student by their chosen name and the pronouns associated with their gender identity is a critical piece of a school's work to meet its obligations.

C. POLICY 100.1 SERVES VITAL EDUCATIONAL ATTAINMENT OBJECTIVES.

Robust educational and health research and literature confirm that all students benefit from a positive school environment in which they are welcomed and supported by staff in their social, emotional, intellectual, and physical development. *See, e.g., Jonathan Cohen, School Climate and Culture Improvement: A Prosocial Strategy that Recognizes, Educates, and Supports the Whole Child and the Whole School Community*, from Handbook of Prosocial Education Vol. 1 (Rowman & Littlefield Publishers, Inc. 2012). School policies that welcome all students and support them, including in their expression of identity, help to create a positive school climate. The Centers for Disease Control and Prevention (the "CDC") explains that student "engage[ment] in school and learning" is tied to "*staff dedicating their time, interest, attention, and emotional support to them.*"

¹⁴ *See, e.g., Parents for Privacy v. Barr*, 949 F.3d 1210, 1239-40 (9th Cir. 2020) (no right under Title IX to use restroom and locker rooms apart from transgender students); *Doe v. Boyertown Area School District*, 897 F.3d 518, 537-38 (3d Cir. 2018) (same).

CDC, U.S. Dep't of Health & Hum. Servs., *School Connectedness: Strategies for Increasing Protective Factors Among Youth* 6 (2009) (footnotes omitted) (emphasis added), available at <https://stacks.cdc.gov/view/cdc/5767>.

As with anyone, transgender and gender nonconforming students need to know “that adults care about them as individuals as well as about their academic achievement.” *Id.* According to the National Academies of Science, Engineering & Medicine, there is “clear evidence that state and local K-12 education policies that are inclusive of SGD [sexual and gender diverse] students” support a “positive school climate and student well-being and success.” Nat'l Acads. of Sci., Eng'g, & Med., *Understanding the Well-Being of LGBTQI+ Populations*, at 9-5 (2020) (hereinafter “National Academies”), available at <http://nap.edu/25877>.¹⁵

¹⁵ This case has arisen amid a mental health crisis affecting young people nationwide. See CDC, U.S. Dep't of Health & Hum. Servs., *Data and Statistics on Children's Mental Health* (June 13, 2022), available at <https://www.cdc.gov/childrensmentalhealth/data.html>. The impact of this crisis has fallen disproportionately on LGBTQ youth. The Trevor Project, *2022 National Survey on LGBTQ Youth Mental Health* (2022), available at https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf. Cf. National Academies, at 2-7 (“Gender affirmation is a key determinant of health and well-being for transgender people.”); Stephen T. Russell et al., *Chosen Name Use is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior Among Transgender Youth*, 63 J. Adolescent Health 503, 505 (2018) (“Transgender youth who were able to use their chosen name in multiple contexts reported fewer depressive symptoms and less suicidal ideation and behavior.”).

A positive school climate, fostering a sense of safety, belonging, and respect, has deep and long-lasting effects for every child who experiences it. Such an environment is also optimal for learning. A review of 78 studies looking to associations of economic background, inequality, school climate, and academic achievement found that positive school climate can raise grades, affect student attendance and achievement and also mitigate the negative effects of poverty on academic performance. *See* Kia Daring Hammond & Linda Darling Hammond, *Supportive and Inclusive Schools*, in *The Civil Rights Road to Deeper Learning*, at 40 (Teachers College Press 2022).

Consistent with this research, experts on the administration of schools recommend that “[a]ll school staff should use the student’s preferred name and pronoun, which is a sign of respect to the student and affirms his or her gender identity.” Nat’l Ass’n of Secondary Sch. Principals, *Position Statement: Transgender Students*, at 5 (2016), <https://goo.gl/kcfImn>. (hereinafter the “NASSP”). The NASSP goes on to recommend “us[ing] the student’s legal name and the pronoun corresponding to the student’s gender assigned at birth when contacting the parent or guardian of a transgender student” unless the student or parent has directed otherwise. *Id.* at 6.

Manchester School District has responded to the research and directives of experts in education and health by ensuring that transgender and gender nonconforming students can be themselves at school in order to meet its obligation to provide “a safe and respectful learning environment that maximizes [students’] potential for success.” Manchester School District Policy 101, “District Equity.”

II. MANCHESTER POLICY 100.1 IS CONSISTENT WITH ALL LEGAL REQUIREMENTS, INCLUDING THE NEW HAMPSHIRE CONSTITUTION.

Policy 100.1 complies with both the New Hampshire Constitution and the U.S. Constitution. *See generally* Def. Br. The plaintiff-appellant has asked this Court to recognize a novel constitutional right that would insert parents into school management and constrain the ability of public schools to implement policies to create a positive school climate and to support both students and their parents in addressing myriad issues that arise with young people, including for transgender and gender nonconforming youth.

A. IN DECIDING WHEN IT IS APPROPRIATE OR NECESSARY TO SHARE INFORMATION WITH PARENTS, SCHOOLS MUST RETAIN THE FLEXIBILITY AND DISCRETION NECESSARY TO WEIGH THE FACTORS SURROUNDING AN INDIVIDUAL STUDENT AND THAT STUDENT’S FAMILY.

With multifactor guidelines for addressing the needs of transgender and gender nonconforming students, Policy 100.1 is a permissible exercise of the school board’s authority and violates none of the plaintiff-appellant’s parental rights. The policy acknowledges that student needs are to “be assessed on a case-by-case basis” and that the policy itself “does not anticipate every situation that might occur with respect to transgender or gender nonconforming students.” In short, the policy calls for the inclusion and respect that, as demonstrated above, meets the requirements of New Hampshire educational law and policy. Teachers and staff retain discretion to assess the maturity, age, and circumstances of the student over time, which the plaintiff-appellant ignores in her characterization of the policy.

The individual assessment of circumstances and the flexibility afforded to school personnel by the policy underscore that it is not an

intrusion on parental rights. The plaintiff-appellant complains that the policy “gives absolutely no guidance whatsoever as to what circumstances would warrant a decision by a teacher or other staff to overrule the wishes of the child and advise the parents of the child’s in-school gender identity.” Pf. Br. at 26. Rather than recognizing the importance of the adaptability built into the policy for meeting the needs of individual students, the plaintiff-appellant argues it is unconstitutional because it does not establish any rigid bright-line rules. Pl. Br. at 26-27. But, here, such a holding would have a negative impact on a family’s right to privacy, rather than protecting that right.

Indeed, if this Court were to rule this policy violates her rights and those of parents more generally, then public schools in New Hampshire would be unable to play their *de facto* role of supporting students in myriad ways even when parents, of necessity, are not and cannot be aware of everything a child is saying, doing, or being at school. It would thwart the obligations of public schools to balance the intertwined objectives of respecting student privacy, creating a positive learning environment, and supporting inclusion of all students and their families through a litany of challenging circumstances, ranging from sexual activity to substance use to exploration of the young person’s religious, political, or sexual identity. Student privacy within the school setting, as modulated in individual circumstances, can be essential to allowing a student the opportunity to have important and sensitive conversations at home. When students are given space and time to share vital personal information at home, they are more likely to do so, which is *protective* of familial privacy. Among pregnant teenagers, for example, around ninety percent eventually disclose

that information to at least one parent. Laurie Zabin et al., *To Whom Do Inner-City Minors Talk About Their Pregnancies? Adolescents' Communications with Parents and Parent Surrogates*, 24 Fam. Plan. Persp. 148, 151 (1992).¹⁶

When it comes to supporting young people and their families, schools are in an excellent position to direct students to resources about how to have sensitive and important conversations at home. Trusted adults at school are a resource for students to help prepare them to talk to their parents about their gender identity and other concerns they may have. For varied reasons, young people will sometimes turn to teachers or other school staff for support in being lesbian, gay, bisexual, or transgender (LGBTQ) before they look for support from their parents, even when those relationships are strong.¹⁷ Stated differently, a transgender or gender

¹⁶ To *amici*'s knowledge, there is no available evidence that forcing school personnel to disclose confidential information is correlated with positive familial communication or outcomes. Am. Acad. of Pediatrics, Comm. on Adolescence, *The Adolescent Right to Confidential Care When Considering Abortion*, 97 Pediatrics 746, 746 (1996). In fact, research strongly indicates the opposite is true; minors whose parents found out about the minor's pregnancy from a third party were two to four times more likely to face adverse consequences. Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 Fam. Plan. Persp. 196 (1992).

¹⁷ While approximately two-thirds of LGBTQ students have come out at school, just over half have come out at home to their immediate families. Human Rights Campaign, *National Coming Out Day Youth Report 3* (2018), <https://assets2.hrc.org/files/assets/resources/NCOD-Youth-Report.pdf>.

nonconforming child may simply need some time before discussing with their family.

There are many reasons that a student may need time to prepare to have a conversation at home with their parents about gender identity. For example, a student may be uncertain about their feelings about their gender. Or a student may need time to collect information from external sources about how to talk about gender with their parents. Or a concurrent family crisis may cause a student to wait before talking to their parents to allow their family time to address more immediate concerns.¹⁸ While the age of the plaintiff-appellant's child is unknown, middle- or high-school aged students need to learn to make their own decisions about how and when to talk to their parents about challenging topics.

School employees are a likely source for safe conversations with trusted adults because they are involved in the young person's everyday life. Of course, parents may at any time initiate conversations with their children on any topic. Nothing in the plaintiff-appellant's complaint suggests Manchester School District has impeded her ability to talk to her child.

When schools take on the role of disclosing information about student identity to parents, however, that disclosure could undermine trust

¹⁸ *Amici* are aware of a situation in a New Hampshire public school where a school interceded to disclose a student's asserted gender identity to that student's parents on the day the parents were bringing the student's sibling home from the hospital after a suicide attempt. The student was prepared to have this discussion at home but wanted to wait for the right time. The school's involvement unnecessarily forced the conversation to occur in a manner that compounded the stress the family was already experiencing.

between students and trusted adults at school.¹⁹ Such disclosure could also be an overreach into intimate family affairs, especially in cases where a student is at early stages of identity awareness or in cases where students are already in communication with their families. It is not simply the information that is important, but who is the messenger sharing that information.

Moreover, schools must be focused on the impact of their decisions about student privacy beyond one student's circumstances; schools must also remain vigilant about the impact of these decisions on other students in the school community and their perception of whether it is safe for them to share information with adults at school. When school personnel disclose

¹⁹ Research also shows that having a relationship with trusted nonparent adults is connected with better outcomes into adulthood. Hana Lee et al., *Adverse Childhood Experiences, Positive Childhood Experiences, and Adult Health*, 13 J. of the Soc. for Social Work & Research 441, 444-45 (2020). Without the assurance of confidentiality, many young people would forgo seeking help or support to avoid being forced to talk to their parents about sensitive issues before they are ready to do so. Melissa Prober, *Please Don't Tell My Parents: The Validity of School Policies Mandating Parental Notification of a Student's Pregnancy*, 71 Brook. L. Rev. 557, 575 n.108 (2005) (breaching student confidentiality can have a chilling effect, causing students to forgo seeking other health-related services from the school); Carol A. Ford et al., *Foregone Health Care Among Adolescents*, 282 JAMA 2227 (1999); Rhonda Williams & Joseph Wehrman, *Collaboration and Confidentiality: Not a Paradox but an Understanding Between Principals and School Counselors*, 94 NAASP Bull. 107, 110 (2010) ("99% of participants identified confidentiality as essential (53%) or important (46%) in their decision to seek help from a school counselor"); Tina Cheng et al., *Confidentiality in health care: a survey of knowledge, perceptions, and attitudes among high school students*, 269 JAMA 1404 (1993).

information to a parent that a student has asked to remain confidential, that disclosure could undermine trust between the school and other students. Schools have an obligation to maintain a school climate where students feel confident that they can rely on and trust teachers, administrators, and other staff.

A rule of automatic disclosure would also ignore that, in some instances, hopefully rarely, student safety could be jeopardized by the premature disclosure of information about a student to that student's parents. According to data from a 2021 survey, gay, lesbian, and questioning youth are more likely to have been kicked out, to have run away, or to have been abandoned by their parents, while transgender and nonbinary youth may be at an even greater risk. The Trevor Project, *Homelessness and Housing Instability Among LGBTQ Youth* (2021), <https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf>. Although one can always hope for and expect the best, that parents will rise to the inevitable challenges of parenthood, it must remain permissible for schools to take a measured approach.²⁰

²⁰ Nationally, more than one in three adults report that they would not be comfortable if their child came out as transgender or nonbinary. Morning Consult, *U.S. Adults' Personal Knowledge and Comfort with LGBTQ Identities Polling Analysis*, at 13 (Mar. 2022), available at https://www.thetrevorproject.org/wp-content/uploads/2022/03/Embargoed-MC-Polling-Data_3.31.22.pdf. An alarming 13% of LGBTQ students report having been subjected to the harmful and discredited practice of conversion therapy. The Trevor Project, *2021 National Survey on LGBTQ Youth Mental Health* (2021), <https://www.thetrevorproject.org/survey-2021/>.

Young people who have access to spaces that affirm their identity, however, report lower rates of attempted suicide. The Trevor Project, *2021 National Survey on LGBTQ Youth Mental Health* (2021), <https://www.thetrevorproject.org/survey-2021/>. Youth who said that they have at least one accepting adult in their life were 40% less likely to report having attempted suicide. The Trevor Project, *Accepting Adults Reduce Suicide Attempts Among LGBTQ Youth* (June 27, 2019), <https://www.thetrevorproject.org/research-briefs/accepting-adults-reduce-suicide-attempts-among-lgbtq-youth/>. Access to supportive school clubs decreases both symptoms of depression and suicide attempts. GLSEN, *The 2021 National School Climate Survey*, at 131 (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>. Access to supportive school personnel and inclusive curriculum also increases youths' feeling of belonging and decreases the number of missed school days. Wojciech Kaczkowski et al., *Examining the Relationship Between LGBTQ-Supportive School Health Policies and Practices and Psychosocial Health Outcomes of Lesbian, Gay, Bisexual, and Heterosexual Students*, 9 *LGBT Health* 43 (2021).

A supportive environment at school can be essential to a transgender or gender nonconforming student's success later in life. This is central to the objectives of our public schools because "a free government is dependent for its survival on citizens who are able to participate intelligently in the political, economic, and social functions of our system." *Claremont School District* 138 N.H. at 192. The power of schools to implement welcoming and supportive policies must not be unnecessarily constrained.

B. THE CONSTITUTIONALLY PROTECTED RIGHTS OF PARENTS IN NEW HAMPSHIRE PUBLIC SCHOOLS ARE MODULATED BY THE RIGHTS OF EACH YOUNG PERSON AT SCHOOL AND THE SCHOOL’S OBLIGATION TO MANAGE THE EDUCATIONAL ENVIRONMENT CONSISTENT WITH LAW AND POLICY.

Parents have the constitutionally protected right to choose whether to send their children to public school. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *see also Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). While the New Hampshire legislature has commanded parents to ensure their minor children receive an education, *see* RSA 193:1, parents cannot be compelled to send their children to public schools. But the right of parents to direct the upbringing of their children does not extend to “direct *how* a public school teaches their child.” *Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008), quoting *Blau v. Fort Thomas Public School District*, 401 F.3d 381, 395 (6th Cir. 2005) (emphasis in original). The plaintiff-appellant’s rights “must give way to a school’s ability to control curriculum *and the school environment*.” *C.N. v. Ridgewood Board of Education*, 430 F.3d 159, 182 (3d Cir. 2005) (emphasis added).

In *Parker*, the First Circuit considered a challenge to a public school’s use of books about same-sex marriage for students as young as kindergarten due to the plaintiffs’ beliefs that same-sex marriage is morally offensive. 514 F.3d at 90. In determining that the parents had neither a First Amendment nor a Fourteenth Amendment right to opt their children out of materials conveying support for same-sex marriage, the panel noted that “[e]xposure to the materials in dispute here will not automatically and irreversibly prevent the parents from raising Jacob and Joey in the religious belief that gay marriage is immoral,” and that the parents “retain options.”

Id. at 100. *See Brown v. Hot, Sexy & Safer Productions*, 68 F.3d 525, 541 (1st Cir. 1995) (parent’s substantive due process rights not violated by school system’s failure to provide prior notice and exemption for high school assembly on human sexuality).

Similarly, under Policy 100.1, the plaintiff-appellant retains the ability to obtain information from her child, to raise her child with any set of moral or social beliefs about transgender people, and to instruct her child about what name and pronouns the child should tell teachers to use at school. There are no allegations that the policy or school personnel have compelled or coerced students to change their name or pronouns, or compelled or coerced students to withhold their name or pronoun decisions from their parents, leaving the rights of parents fully intact.

Just as a parent does not have a constitutional right “to say to the state, ‘You can’t teach my child subjects that are morally offensive to me,’” *Brown*, 68 F.3d at 534, the plaintiff-appellant cannot prevent a school district from meeting its curricular objectives by fostering an environment where all students are validated as they develop their sense of identity. *Id.* (“If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems . . .”).

Unlike the present case, in *Gruenke v. Seip*, a swimming coach allegedly coerced a student to take a pregnancy test furnished by the coach, in the company of her teammates, after months of gossiping about his

suspensions of her condition while being told by the student to “mind his own business.” 225 F.3d 290, 306-07 (3d Cir. 2000). The panel held that the coach’s coercive conduct was an “example of the arrogation of the parental role by a school” *Id.* at 306. The decision specifically notes that none of the school officials who were aware of the situation took steps to notify the parents, and yet the only conduct that violated the family’s autonomy was that of the coach. *Id.*

Gruenke is of no assistance to the plaintiff-appellant. While that case centered on coercive conduct toward the student with no parental notice, here the school district has a policy to ensure inclusion and a healthy school environment for all students, including allowing all students to state the name and pronouns by which they are identified at school. *Id.* See *Anspach v. City of Philadelphia*, 503 F.3d 256, 264 (3d Cir. 2007) (“[I]t is clear that [parents] cannot maintain a due process violation when the conduct complained of was devoid of any form of constraint or compulsion.”). The policy falls squarely within the realm of the authority of public schools. See *Gruenke*, 225 F.3d at 304 (“[T]here may be circumstances in which school authorities, in order to maintain order and a proper educational atmosphere in the exercise of police power, may impose standards of conduct on students that differ from those approved by some parents.”).

1. New Hampshire public schools do not have an affirmative duty to disclose information to parents about student identity.

Public schools have statutory and other obligations to report certain limited information to parents about their children. For example, parents

have the right to be notified about grades and truancy.²¹ Schools are also obliged to report to parents when a student is alleged to be the victim of certain crimes, *see* RSA 193-D:4; when a student is involved in an incident of bullying, *see* RSA 193-F:4, II (h); or when a non-academic survey will be distributed to students, *see* RSA 186:11, IX (e) (IX-d). Absent a statute, however, there can be no *per se* obligation to report out on student confidences before students are ready to do so themselves.

By framing the policy as “authoriz[ing] school personnel to lie (whether by omission or commission) or mislead, or willfully withhold information from parents of minor children,” Compl. ¶ 59, the plaintiff-appellant has raised the question of whether a school district can violate a person’s constitutionally protected rights by failing to act affirmatively by notifying parents of certain information. This Court has declined to recognize affirmative special duties of school officials in the context of lawsuits alleging negligent failure to notify resulting in bodily harm. *See Gauthier v. Manchester School District*, SAU #37, 168 N.H. 143 (2015) (negligence claim fails because bullying law does not create affirmative special duty to notify parents); *see also Mikell v. SAU #33*, 158 N.H. 723 (2009) (no affirmative duty to prevent student suicide).

This Court has also declined to establish new constitutional torts to establish liability where schools fail to protect students, even when the school’s failure to act resulted in sexual abuse of students by school

²¹ *See* RSA 189:34 (requiring school boards to develop policies of notification to parents about truancy); *see also* Manchester Attendance Policy 101.1 (“The school staff shall contact parents/guardians if a student develops a pattern of absences.”).

employees. *Marquay v. Eno*, 139 N.H. 708, 721 (1995) (“While this court ultimately has the authority to fashion a common law remedy for the violation of a particular constitutional right, we will avoid such an extraordinary exercise where established remedies—be they statutory, common law, or administrative—are adequate.”).

2. *The cases cited by the plaintiff-appellant involve complaints of coercion, which cannot be alleged in this case.*

The plaintiff-appellant has cited only two cases decided by federal courts of appeal where allegations against school officials amounted to violations of parental rights, but both decisions support the defendant-appellee. In *Arnold v. Board of Education*, the plaintiff alleged that school officials coerced a student to have an abortion and coerced the student to withhold that information from her parents, which the court determined was a violation of the rights of the student’s parents. 880 F.2d 305, 312 (11th Cir. 1989). Again, no coercion is or could be alleged in this case, and, in any event, the *Arnold* court explicitly declined to establish a bright-line rule “that counselors notify the parents of a minor who receives counseling regarding pregnancy.” *Id.* (“We hold merely that counselors must not coerce minors to refrain from communicating with their parents.”). The other case is *Gruenke*, discussed *supra*.

While the flexible policy at issue in this case cannot be said to violate any constitutionally protected parental right, the converse—a rigid policy requiring mechanistic and automatic notification of sensitive and private information about students—would easily stray into the realm of government overreach into the spheres of familial and student privacy. A rule requiring schools to monitor and report to parents about a student’s

chosen name and pronouns could result in the violation of constitutionally protected family rights. “The due process right of parental autonomy might be considered a subset of a broader substantive due process right of familial privacy.” *Parker*, 514 F.3d at 102.

3. *The challenges here are endemic to the project of public school education and are best addressed by continued engagement within school communities rather than with blunt rulings about constitutional rights.*

As noted in a perceptive law review article, “[t]here is no way for schools to shield themselves from learning about students’ personal and family lives.” Emily Gold Waldman, *Show and Tell?: Students’ Personal Lives, Schools, and Parents*, 47 Conn. L. Rev. 699, 739 (2015). Once the school has such information, “both possible routes—disclosure and nondisclosure—have the potential to alter the family dynamic as well. . . . When it comes to disclosure . . . *some* distortion of the parent-child relationship is inevitable.” *Id.* at 737 (emphasis in text). Research suggests that “disclosures could potentially undermine the parent/child relationship by depriving students of the chance to share information on their own terms and by making parents aware that their child is concealing information from them.” *Id.* at 735-36 (footnotes omitted) & nn.198-201.

For these reasons, Professor Waldman offers this prescription:

We want schools to ask questions . . . when a student—or her parent—initiates the school’s involvement. In other circumstances, however, the overlapping informational and familial privacy concerns should prompt more restraint on schools’ part to avoid inserting themselves into the delicate family dynamic. . . [The school] should have a wide zone of discretion to decide whether to disclose students’ personal information to their parents, as long as they remain within the corridor of neither pressuring students to keep secrets from

their parents nor disclosing students' personal information without a legitimate reason for doing so.

Id. at 739-40. The author speaks to the reality of school settings in which schools accept everyone in the community. Inevitably school personnel learn about the young people and the families they serve, and they need discretion with respect to how to support each student and also whether, when, and under what circumstances to raise issues with the family without the student's assent.

The defendant-appellee has adopted flexible guidelines, well within its scope of authority, that strikes a balance between its objectives to create a positive school climate and maintain safety, honor student rights, and respect the rights of families to share their values and perspectives. *See Parker*, 514 F.3d at 107 ("Public schools often walk a tightrope between the many competing constitutional demands made by parents, students, teachers, and the schools' other constituents."). Parents have no constitutional right to upend such a policy. *See Foote v. Town of Ludlow*, Civ. No. 22-30041-MGM, 2022 U.S. Dist. LEXIS 236102, at *9 (D. Mass. Dec. 14, 2022); *John & Jane Parents I v. Montgomery County Board of Education*, Civ. No. 8:20-3552-PWG, 2022 U.S. Dist. LEXIS 149021, at *33 (D. Md. Aug. 18, 2022).

4. *Schools must calibrate their actions in light of student privacy rights as well.*

In addition to respecting the interests of parents, schools must also consider the rights of their students, including the right to self-expression. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse

gate.” *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). *Cf. Duffley v. New Hampshire Interscholastic Athletic Association*, 122 N.H. 484, 492 (1982) (right to participate in school sports entitled to due process protections under New Hampshire Constitution).

One’s name—whether the use of a middle name, initials, a nickname, or a chosen name—is central to self-expression. As a matter of *legal* name changes, which are not at issue here, “one may lawfully change his name at will without resort to any legal proceedings if the change is not made for a fraudulent, criminal, or wrongful purpose.” *Cf. Moskowitz v. Moskowitz*, 118 N.H. 199, 202 (1978). It would encroach upon the free speech rights of young people to impose a constitutional mandate. The New Hampshire Constitution cannot abide a bright-line rule precluding public school students from this limited form of expression when its use is potentially of limited duration, at school, and involves no legal name change. *See Erznosnik v. Jacksonville*, 422 U.S. 205, 212 (1975) (“[M]inors are entitled to a significant measure of First Amendment protection.”).

A student’s right to self-expression is no less important when it involves the expression of gender. *See, e.g., Doe v. Yunits*, No. 00-1060-J-638, 2000 Mass. Super. LEXIS 491, at *26 (Mass. Super. Oct. 11, 2000), *aff’d sub nom., Doe v. Brockton School Commission*, No. 2000-J-638, 2000 Mass. App. LEXIS 1128 (Mass. App. Ct. Nov. 30, 2000). In *Yunits*, the Massachusetts Superior Court issued a preliminary injunction, subsequently affirmed by an intermediate appellate court, to protect a transgender girl’s right to wear feminine clothing at school. The judge found the student had a protected right to free expression, reasoning:

[B]y dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender. In addition, plaintiff's ability to express herself and her gender identity through dress is important to her health and well-being Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity.

Id. at *10. The judge concluded that “a school should not be allowed to bar or discipline a student because of gender-identified dress” *Id.* at *15-16.

Manchester School District has a solemn responsibility to protect the right of its students to free expression while attending public school, with narrow exceptions for causing substantial disruption, invading the rights of others, or promoting illegal activity.²² For transgender and gender nonconforming students, that obligation requires allowing students to express their gender identity in a manner that is taken for granted by all other students—by using a name and pronouns associated with the gender with which they identify.

The defendant-appellant also must respect the privacy interests involved with any personal information about students of which school personnel become aware. In *Sterling v. Borough of Minersville*, a police

²² The Supreme Court identified exceptions for speech that causes a substantial disruption or invades the rights of others. *Tinker*, 393 U.S. at 513-14. Other cases have articulated exceptions such as limitations on: lewd speech, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); school-sponsored speech if related to pedagogical concerns, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988); or speech promoting illegal activity, *Morse v. Frederick*, 551 U.S. 393, 409-10 (2007).

officer came upon two young men engaged in sexual activity at night in a parked car. 232 F.3d 190 (3d Cir. 2000). Being acquainted with one young man's grandparents, the officer told the young man that he intended to disclose the young man's sexual orientation to his family. That night, the young man took his own life. That devastating outcome could have been avoided had the police officer refrained from threatening to disclose private information about his sexual orientation to his family. The Third Circuit concluded that the officer's "threat to disclose [the young man]'s suspected homosexuality suffices as a violation of [the young man]'s constitutionally protected privacy interest." *Id.* at 197. *See also Nguon v. Wolf*, 517 F. Supp. 2d 1177 (C.D. Cal. 2007) ("The Court finds that Charlene's home was an insular environment, and that her activities with Trang at school were unlikely to be known to her parent unless they were expressly informed. Thus, the Court finds that Charlene had a reasonable expectation of privacy concerning her sexual orientation at home.").²³ Public school districts like Manchester could face liability for negligently disclosing (or even threatening to disclose) private information if school staff were aware of harm that would likely follow from disclosure.

²³ While the District Court judge found a privacy interest at issue in this case involving a same-sex relationship between two public school students, the judge also determined that the circumstances of disclosure were in service of the legitimate aim of informing a student's parents about the reasons she was suspended—kissing her girlfriend inappropriately on school grounds. *Id.* at 1195. Here, Manchester School District's policy offers the flexibility necessary to accommodate legitimate aims for disclosing private information about students to their parents.

CONCLUSION

The personal and family circumstances of each transgender and gender nonconforming student are unique and no rigid policy could possibly account for every possible outcome that could arise from disclosure or nondisclosure of a student's chosen name and pronouns. For precisely this reason, a constitutional right to automatic disclosure would disturb a flexible policy that supports students by protecting their rights to free expression and privacy, while allowing them time and space to decide how to communicate with their parents about gender.

For these reasons, *amici curiae* ask this Court to affirm the order of the Superior Court.

Respectfully Submitted,

GLBTQ Legal Advocates & Defenders,
American Civil Liberties Union of New
Hampshire, and other *Amici Curiae*

By and through their attorneys,

/s/ Chris Erchull

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February 27, 2023

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)–(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that “no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters.” Counsel certifies that the brief contains 9,151 (including footnotes) from the “Statement of Interest” to the “Conclusion” sections of the brief.

/s/ Chris Erchull
Chris Erchull, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 27th day of February, 2023 through the electronic-filing system on all counsel of record.

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Full Identification of <i>Amici Curiae</i>	47
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 - b. Rachel Blansett – Diversity, Equity, Inclusion & Justice Coordinator for the Oyster River Cooperative School District
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