ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A Professional Law Corporation
Anthony P. De Marco State Bar No. 217815
ADeMarco@aalrr.com
William A. Diedrich State Bar No. 233982
WDiedrich@aalrr.com
20 Pacifica, Suite 1100
Irvine, California 92618-3371
Telephone: (949) 453-4260
Fax: (949) 453-4262

Attorneys for Defendant CHINO VALLEY UNIFIED SCHOOL DISTRICT

[Fee exempt Pursuant to Govt. Code § 6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,, Plaintiff, v. CHINO VALLEY UNIFIED SCHOOL DISTRICT, Defendant.	Case No. CIVSB2317301 **DEFENDANT'S OPPOSITION TO PLAINTIFF'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION** Judge: Hon. Thomas Garza Date: September 6, 2023 Time: 9:30 a.m. Dept.: 27 Complaint Filed: August 28, 2023

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

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ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

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ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

According to the Points and Authorities ("P&As") submitted by the State of California:

- "Transgender and gender nonconforming students, in particular, suffer from psychological, emotional, and physical harassment and abuse." (Pg. 8, lines 17-18.);
- "Eighty-six percent of transgender youth reported suicidal thoughts, and 56 percent of transgender youth reported a previous suicide attempt." (Pg. 9, lines 3-4.); and,

Despite the above data, Plaintiff argues this Court should prohibit professional educators from informing parents/guardians that their children may be at increased risk of psychological, emotional, and physical harassment and abuse, and extremely high rates of suicide and suicide attempts. The Chino Valley Unified School District ("District") respectfully disagrees.

I. INTRODUCTION

Plaintiff seeks emergency relief to enjoin the District from its continued compliance with specific portions of Board Policy 5020.1 ("BP 5020.1"), a parent notification policy adopted by the Board of Education of the District on July 20, 2023. To properly understand BP 5020.1, it must be read in its entirety; focusing only on the sections challenged by Plaintiff results in an inability to appreciate how many different topics of concern are subject to parent/guardian involvement. Plaintiff mischaracterizes BP 5020.1, referring to it as, among other pejoratives, a "forced outing" policy. Plaintiff fails to acknowledge "who" is being "outed" to "whom": through the policy parents and guardians are receiving critical information from professional educators about public actions taken by *their children*. Instead, Plaintiff pleads its case as though BP 5020.1 mandates the professional educators of the District "out" students to the general public, complete strangers, and criminally violent individuals. Plaintiff portrays sharing information with parents and guardians as *discrimination* by the professional educators who are attempting to meaningfully incorporate parents/guardians into the education environment. State and federal laws already require professional educators to interact with parents/guardians on a myriad of complicated issues, and acknowledge the critical role parents and guardians play in assisting professional educators with the education of *their children*. State and federal laws are silent regarding whether a locally adopted policy to share information with parents and guardians is prohibited.

Here, Plaintiff has failed to provide any basis for *ex parte* relief and fails to establish an

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

entitlement to injunctive relief for at least the following reasons:

- Lack of urgency. Plaintiff has known about BP 5020.1 since prior to its adoption on July 20, 2023, and sent a letter attempting to dissuade the Board from adopting it, yet moves this court *ex parte* for injunctive relief on a urgent basis with no explanation why it waited over one month to initiate legal action.
- Case of First Impression. Plaintiff asserts the law is crystal clear, and that success on the merits is assured; yet, Plaintiff fails to acknowledge that (1) Governor Newsome has acknowledged potential legislative action to fill the easily identified gap in the Education Code (see Defendant's Request for Judicial Notice ["RJN"], Exhibit 1;) and (2) experts disagree: "The law on this is unclear, because it is a new issue," said Erwin Chemerinsky, dean of the UC Berkeley School of Law. "The students being minors does make the legal questions more difficult, but even as minors they have privacy rights." (RJN, Exhibit 2.)[1] The Legislature knows how to create laws restricting communication with parents and guardians; they have not done so with respect to the topics covered in the challenged portions of BP 5020.1.[2]
- Alternate Remedies. For each assertion of potential negative outcomes asserted by Plaintiff, there is a different, well-established remedy: (1) complaints of discrimination, bullying, or harassment have statutory and local methods for investigation and resolution as established by the policies and regulations, most of which are subject to review by the California Department of Education upon appeal by either the complainant or respondent; and (2) if an educator has a reasonable belief that abuse or neglect of a child could take place in the home [regardless of the basis for that potential abuse or neglect], there is a statutory process for investigating and addressing whether the parents/guardians should lose their parental rights.

[1] Plaintiff asks the Court for permission to file a brief in excess of the page limit, which would not be necessary if the law was, indeed, crystal clear.

[2] See, e.g., Education Code § 49602 ("Any information of a personal nature disclosed by a pupil 12 years of age or older in the process of receiving counseling from a school counselor as specified in Section 49600 is confidential.") which contains not only the counseling privilege, but exceptions thereto. If and/or when the Legislature takes similar action with respect to topics covered in BP 5020.1, the District will follow the law. Additionally, if Plaintiff's arguments are well-founded (which they are not), why would Section 49602 be necessary? Absent a clear state law similar to Section 49602, locally adopted policies prevail.

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

- Any Rights to Privacy Are Diminished by Public Actions. As a factual matter, the students affected by the parent notification are living their lives in an open and public fashion: they are using chosen names and pronouns consistent with their gender identity; they are accessing school facilities consistent with their gender identity; and they are playing sports and participating in other extra-curricular activities consistent with their gender identity. When records are changed to reflect these actions as requested by the student, parents have a right to inspect those records pursuant to State and Federal laws. When the students are referred to by names and pronouns within the classroom, they are doing so in front of others and in a space where parents and guardians have the statutory right to be present. When they play sports consistent with their gender identity, they are doing so in front of members of the general public. *In its essence, Plaintiff argues the only group of individuals from whom this information must be kept secret are parents and guardians.*
- Sharing Information is Critical to Student Success. As a practical matter, Plaintiff fails to understand that the interaction required by BP 5020.1—interaction between professional educators and the parents/guardians of affected students—serves an important purpose, allowing the professionals to determine, based on their training and experience, whether the parent/guardian is aware of their child's social transition, whether the parent/guardian is sympathetic and supportive of the child's social transition, and whether the parent/guardian may have a positive or negative effect on the child. This specific role of the District, the school and the professional educators closest to students is recognized by experts as a meaningful part of the child's overall transition. Indeed, experts agree that professional educators are in the best position to identify potential issues between parents/guardians and their transitioning children, and to coach and counsel parents/guardians who may be having difficulty processing what their child is going through.[3]

[3] As noted in a recent law review article:

(continued)

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A PROFESSIONAL CORPORATION
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TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

Plaintiff minimizes the positive impact education professionals have on the counseling and guidance of both students *and* parents/guardians. Educators need—and students deserve—parents/guardians to be incorporated into the process of transition.

I. STATEMENT OF FACTS

A. Adoption of BP 5020.1 and the Ensuing Investigation and Lawsuit

BP 5020.1 was recommended by the President of the District's Board of Education, Sonja Shaw, during the June 15, 2023 regular meeting of the Board of Education. (Enfield Decl., ¶ 3, Ex. A.) On July 20, 2023, the Board of Education received a letter from the Attorney General of the State of California, Rob Bonta, attempting to dissuade the Board from adopting BP 5020.1. (Enfield Decl., ¶ 4, Ex. B.) On the same day, July 20, 2023, after lengthy public comment, the Board of Education voted to approve the adoption of BP 5020.1 by a vote of 4 to 1. (Enfield Decl., ¶ 5, Ex. C.) On August 4, 2023, the District was notified that the Office of the Attorney General had opened an investigation into the legality of BP 5020.1 and concurrently issued a subpoena seeking a wide range of documents. (Enfield Decl., ¶ 6, Ex. E.) A second subpoena was issued by the Office of the Attorney General on August 11, 2023. (Enfield Decl., ¶ 8, Ex. F.) The District and the Office of the Attorney General participated in lengthy meet and confer discussions regarding the scope of the subpoenas. (Enfield Decl., ¶ 9.) Pursuant to the agreement of the

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"[T]he distress associated with disclosing one's gender identity is not directly caused by disclosing transgender status but rather people's [anticipated] response to it. Specifically, transgender individuals report that the fear of rejection, bullying, and general mistreatment by others causes gender dysphoria. In other words, it is not the disclosure of one's gender identity that causes the ailments related to gender identity but instead the response--or anticipated response--from others that causes the harm. Thus, the social science research does not suggest that privacy, in and of itself, is necessary, or even sufficient, to protect the safety and well-being of transgender individuals or address gender dysphoria. Instead, privacy serves to temporarily shield transgender individuals from the potential harmful responses to their gender identity, which itself causes gender dysphoria. Keeping one's gender identity private is, at best, a temporary solution to the threat of gender dysphoria.

According to social science, children must freely express their true selves to the public, including their parents, to develop a healthy gender identity. Thus, instead of promoting privacy, social science suggests the ultimate solution to gender dysphoria is to help individuals express their gender identity freely and openly. Offering and promoting privacy, specifically concerning parents, can cause or exacerbate gender dysphoria in children in the long run."

(McLoughlin, *Toxic Privacy: How the Right to Privacy Within the Transgender Student Parental Notification Debate Threatens the Safety of Students and Compromises the Rights of Parents* (2023) 15 Drexel L. Rev. 327, 361-362 [internal citations omitted].)

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

parties, the District produced responsive documents on a rolling basis on August 11, 2023, August 18, 2023, and September 1, 2023. (Diedrich Decl., ¶ 3, Ex. A.)

On August 28, 2023, the Complaint in this action was filed. On the same day, counsel for the District received notice that Plaintiff intended to apply *ex parte* for a temporary restraining order ("TRO") and order to show cause re: preliminary injunction ("OSC") on the very same day, August 28, 2023. (Diedrich Decl., ¶ 4, Ex. B.) Later that day, counsel for the District was informed by the Office of the Attorney General that the hearing date for the *ex parte* application for TRO and OSC re: preliminary injunction had been set by the Court for September 6, 2023. (Diedrich Decl., ¶ 6, Ex C.) A few hours later, around 7:32 p.m. on August 28, 2023, counsel for the District was informed by the Office of the Attorney General that Plaintiff intended to apply *ex parte* for an order setting an earlier hearing date for the TRO and OSC re: preliminary injunction, and that Plaintiff intended to make that application on August 29, 2023. (Diedrich Decl., ¶ 8, Ex. E.) On August 29, 2023, at 11:40 a.m., counsel for the District was informed that Plaintiff would be proceeding with the September 6, 2023 hearing date and would no longer be seeking an order setting an earlier hearing date. (Diedrich Decl., ¶ 11, Ex. H.) At around 2:48 p.m. on August 29, 2023, the District, for the first time, was served with the redacted version of Plaintiff's moving papers.

II. THE CHALLENGED POLICY

As noted above, BP 5020.1 must be read in its entirety to fully appreciate how many different topics professional educators must bring to the attention of parents/guardians. Instead, Plaintiff myopically focuses on only a narrow aspect of the policy.

A. THE POLICY IS CONSISTENT WITH BEST PRACTICES THE LAW

The policy has a stated intent—ignored by Plaintiff—that is entirely consistent with State and Federal law. Specifically, the express intent is "to foster trust between the District and parent(s)/guardian(s) of its students," and "supports the fundamental rights of parent(s)/guardian(s) to direct the care and upbringing of their children, including the right to be informed of and involved in all aspects of their child's education *to promote the best outcomes*." (PRJN, Exhibit 1.) The express intent also includes providing "procedures designed to maintain

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

and, in some cases, restore, trust between school districts and parent(s)/guardian(s) of pupils," to "bring parent(s)/guardian(s) into the decision-making process for mental health and social-emotional issues of their children at the earliest possible time in order *to prevent or reduce potential instances of self-harm*," and to "*[p]romote communication and positive relationships with parent(s)/guardian(s)* of pupils that promote the best outcomes for pupils' academic and social-emotional success." (*Ibid.*) The policy expressly promotes collaboration between school staff and parents "in evaluating the needs of students having academic, attendance, social, emotional, or behavioral difficulties and in identifying strategies and programs that may assist such students in maximizing their potential." (*Ibid.*)

B. PROFESSIONAL EDUCATORS MUST COMMUNICATE WITH PARENTS/GUARDIANS

The express intent of BP 5020.1 does not fit Plaintiff's narrative, so it goes unmentioned in the Application, even though state law expresses the same objectives. "Parents and guardians of pupils enrolled in public schools *have the right* and should have the opportunity, as mutually supportive and respectful partners in the education of their children within the public schools, *to be informed by the school, and to participate in the education of their children*…." (Educ. Code § 51101; Emphasis added).) This provision of law is based on specific legislative findings: "involving parents and guardians of pupils in the education process is fundamental to a healthy system of public education;" "[r]esearch has shown conclusively that *early and sustained family involvement at home and at school* in the education of children results both in improved pupil achievement and in schools that are successful at educating all children;" "[a]ll participants in the education process benefit when schools genuinely *welcome, encourage, and guide families into establishing equal partnerships with schools* to support pupil learning;" and "[f]amily and school collaborative *efforts are most effective when they involve parents and guardians* in a variety of roles at all grade levels, from preschool through high school." (Educ. Code § 51100 (Emphasis added).) Section 51101 lists 16 different parent/guardian rights, and provides 7 examples of how parents/guardians can participate. These rights can only be denied in limited situations that resoundingly supports the same approach in BP 5020.1: "This section does not authorize a school to inform a parent or guardian, as provided in this section, or to permit participation by a parent or

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

guardian in the education of a child, if it conflicts with a valid restraining order, protective order, or order for custody or visitation issued by a court of competent jurisdiction." (Educ. Code § 51101(d).) Yet, Plaintiff seeks through this litigation to force professional educators to violate the requirements in the Education Code to work with parents/guardians.

C. PARENTAL NOTIFICATION POLICIES AND PRACTICES OTHER THAN BP 5020

Plaintiff argues that children have an unfettered right to prevent professional educators form notifying their parents and guardians of a significant part of their education; yet, Plaintiff has no objection to the provision in the policy requiring parental notification when an employee notifies parent/guardians of a student's suicidal intentions based on the student's verbalizations or act of self-harm (Section 3), or of a verbal or physical altercation involving their child, including bullying against their child (Section 4) which would include bullying based upon protected classifications related to gender and gender identity. As established by the District's evidence (declarations in support of the District's defense of BP 5020.1) professional educators regularly discuss with parents/guardians a myriad of highly confidential and sensitive subjects: rape, pregnancy, discipline, grades, fights, and self-harm among them. It is entirely logical and consistent with the express intent of BP 5020.1, and of Education Code sections 51100 and 51101, that parents be notified of these developments. Plaintiff does not argue there should be no notification if, for example, the *reason* their child is victimized by another student is because their child made an open, known request described in Section 1(a) of the policy, or was openly participating in an activity pursuant to Section 1(b) of the policy. Plaintiff makes no suggestion how professional educators explain to parents/guardians why this information was withheld from them, in violation of the law, until something significantly negative has happened.

III. ADDITIONAL ARGUMENT

A. NO EXIGENT CIRCUMSTANCES EXIST TO GRANT PLAINTIFF'S REQUESTED RELIEF

"A court will not grant ex parte relief 'in any but the plainest and most certain of cases.'" (*People ex rel. Allstate Ins. Co. v. Suh* (2019) 37 Cal.App.5th 253, 257.)

It is well settled that to justify *ex parte* relief, "[a]n applicant must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

irreparable harm, immediate danger, or [ ] other statutory basis for granting relief…." (Cal. Rules of Court, rule 3.1202.) This exigency must be made clear in the notice of the application.

"[E]ntry of any type of injunctive relief has been described as a delicate judicial power, to be exercised with great caution." (*Newsom v. Superior Court of Sutter County* (2020) 51 Cal.App.4th 1093, 1097.) "This is doubly true when granting relief on an expedited basis using an ex parte request for a temporary restraining order rather than a properly noticed preliminary injunction." (*Ibid.*) Under Code of Civil Procedure section 527, the default rule is that a request for injunctive relief must be made with the typical notice period set forth in Code of Civil Procedure section 1005. To qualify for a temporary restraining order such as the one Plaintiff seeks here, Plaintiff must establish that "great or irreparable injury will result *to the applicant* before the matter can be heard on notice…." (Code Civ. Proc., § 527, subds. (c)(1) and (c)(2)(A).)

Here, Plaintiff has not established that any exigent circumstances exist. Plaintiff has known about BP 5020 since prior to its adoption and even sent a letter to the District's Board of Education attempting to dissuade the District from adopting BP 5020. (Enfield Decl., ¶ 4, Ex. B.) The bulk of the evidence submitted by Plaintiff in support of its *ex parte* application is inadmissible, and what remains of the evidence fails to demonstrate that BP 5020 has caused actual harm to any student. It is also worth noting that all of the evidence relied upon by Plaintiff was available to Plaintiff even *before* Plaintiff initiated its investigation; none of the relevant evidence submitted by Plaintiff was derived from its investigation. Plaintiff "cannot create a justification for emergency relief by sitting on [its] rights until [it] creates an emergency situation." (*Davenport v. Blue Cross of California* (1997) 52 Cal. App. 4th 435, 455.) Given the ambivalence by Plaintiff for more than a month after it knew the Board was considering adoption of BP 5020.1, Plaintiff cannot now argue this Court must act immediately, on an ex parte basis, because of an emergency created by Plaintiff sitting on its hands.

B. ISSUANCE OF PRELIMINARY INJUNCTION REQUIRES ESTABLISHING IRREPARABLE HARM TO PLAINTIFF AND LIKELIHOOD OF SUCCESS ON THE MERITS

To obtain a preliminary injunction, a plaintiff "is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

adjudication of the merits." (*White v. Davis* (2003) 30 Cal.4th 528, 554.) "Injunction is an extraordinary power and is to be exercised always with great caution and . . . only where it fairly appears upon all the papers presented, before such injunction is granted, that the plaintiff will suffer irreparable injury if it not be granted." (*Tiburon v. Northwestern P. R. Co.* (1970) 4 Cal.App.3d 160, 179 ["The power, therefore, should rarely, if ever, be exercised in a doubtful case"].)

In determining whether to issue a preliminary injunction, a court considers: (1) the likelihood that the plaintiff will prevail on the merits; and (2) the interim harm that the plaintiff is likely to sustain if the injunction is denied compared to the harm that the defendant is likely to suffer if the court grants a preliminary injunction. (*14859 Moorpark Homeowner's Ass'n v. VRT Corp*. (1998) 63 Cal.App.4th 1396, 1401; *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441-442.) A "moving party must prevail on *both* factors to obtain an injunction." (*Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1145.)

1. Board Policy 5020.1 Does Not Violate California Constitution, Article I, Section 1

Plaintiff attempts to apply the elements of a privacy claim laid out in *Hill v. NCAA* (1994) 7 Cal.4th 1, asserting *without authority* that it is clear that we are addressing an "autonomy privacy" interest that must be overcome in the balancing test by a compelling interest. In doing so Plaintiff ignores: judicial recognition of the complexity of privacy inquiries and the need for a full evidentiary record and findings, the nature of privacy rights of minors and the judicially recognized compelling interests present here; and ultimately, therefore, falls far short of clearing the high bar to be entitled to emergency relief. This is an "informational privacy" case, and the Supreme Court has confirmed that the interests in this case are compelling (even though a compelling interest is not required because of the nature of the privacy interest here).

Plaintiff's first error, which is significant and is prevalent throughout, is discounting the complexity of any inquiry into privacy interests, the reasonable expectation of privacy, and the requirement to balance countervailing interests. In *Hill*, the Supreme Court was clear that "[w]hatever their common denominator, privacy interests are best assessed separately and in

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

context," and "[j]ust as the right to privacy is not absolute, privacy interests do not encompass all conceivable assertions of individual rights." (*Id.* at 35.) It is axiomatic that "'[t]he extent of [a privacy] interest is not independent of the circumstances.'" (*Id.* at 36.) Also, the reasonableness of one's expectation of privacy is dependent on factors such as advance notice of actions, customs, practices, physical settings surrounding activities, with reasonableness being based on "an objective entitlement founded on broadly based and widely accepted community norms." (*Id.* at 36-37). This includes "the presence or absence of opportunities to consent voluntarily to activities impacting privacy interests." (*Id.* at 37.) Similarly, on the balancing test, "[t]he diverse and somewhat amorphous character of the privacy right necessarily requires that privacy interests be specifically identified and carefully compared with competing or countervailing privacy and nonprivacy interests in a 'balancing test.'" (*Id.* at 37-38.)

Plaintiff's failure to accept the complexity of the *Hill* analysis leads to citations to cases for sweeping propositions when those decisions — procedurally and substantively — do not stand for those propositions. To cite one example of many, Plaintiff cites *Sheehan v. S.F. 49ers, Ltd.* (2009) 45 Cal.4th 992, for "autonomy privacy," not noting that the challenge in *Sheehan* was to physical pat downs of a person's body, not to the sharing of public information about a child with parents . This is also not a case of parental consent (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307), or about information subject to psychotherapist-patient privilege (*Matthews v. Becerra* (2019) 8 Cal.5th 756), or to a third-party health care disclusure without the employee's consent (*Pettus v. Cole* (1996) 49 Cal.App.4th 402).[4] Indeed, the *only* decision to which Plaintiff cites about the sharing of public information to a student's parents, is *C.N. v. Wolf* (2005) 410 F.Supp.2d 894. *C.N.* does not support Plaintiff's arguments or its request for emergency relief. First, *C.N.* minute order cited by Plaintiff was issued at the pleading stage and was limited to whether the student sufficiently *alleged* a privacy cause of action to survive a 12(b)(6) motion. (*Id.*

[4] Additionally, and importantly, unlike many cases cited the issue before this Court is *not* whether the Complaint alleges sufficient facts to survive a demurrer—the issue is whether Plaintiff has met the substantially high burden necessary for emergency relief. (See, e.g. *Becerra*, 8 Cal.5th at 762 ["we hold that plaintiffs have asserted a cognizable privacy interest under the California Constitution and that their complaint survives demurrer"]; *Sheehan, supra* [decided at pleading stage and only addressed the three *Hill* elements, not the balancing test]; *C.N. v. Wolf* (2005) 410 F.Supp.2d 894, 903 [same].)

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20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

at 903.) Second, the court phrased the alleged privacy interest as informational privacy, not autonomy privacy: "[S]he has sufficiently alleged that she has a legally-protected privacy interest in *information* about her sexual orientation." (*Ibid.*) Third, and most importantly, *after* the pleading stage, and after an 8-day trial to implement the *Hill* analysis the same judge who concluded C.N. had sufficiently *alleged* the three *Hill* elements applied *all* of the *Hill* analysis to a complete record and concluded that there was no violation of the student's privacy:

> The Court does not believe that Wolf overstepped the boundaries of his duty, and thus did not violate the California constitution. California law, like federal law, recognizes that privacy rights are not absolute. *Hill*, 7 Cal.4th at 37, 40 … Wolf was advancing a legitimate state interest with the factually correct and limited disclosure he made to [C.N.'s mother]. There was no violation of [C.N.'s] privacy rights under the California Constitution.

(*Nguon v. Wolf* (2007) 517 F.Supp.2d 1177, 1198 (internal citations omitted).)[5]

Against this backdrop, Plaintiff's Application is unconvincing if not downright misleading. Defendant acknowledges students' constitutionally protected privacy rights, although it is clear (and another thing Plaintiff does not acknowledge) they are not the same in the school setting as they are outside the school setting (*In re William G.* (1985) 40 Cal.3d 551, 558 and n. 6), and they are more generally not equivalent with the privacy rights that are enjoyed by adults. (*Lungren*, 16 Cal.4th at 335, n. 19.) But consistent with the *C.N.* court's conclusion, the case law and the context of this case—providing information to a parent—invoke "informational privacy" interests, not "autonomy privacy." This is an informational privacy case.

As is noted above, the second *Hill* element, a reasonable expectation of privacy *in the circumstances*, is also complex and context-driven. Despite Plaintiff's attempt to imply otherwise, the context and complexity are significant when considering whether an expectation of privacy is objectively reasonable. BP 5020.1 applies to students who *openly request* to be identified or treated as a gender other than their biological sex or gender listed on their birth certificate or other official records. Plaintiff seeks an order from this Court concluding the following scenario describes an objectively reasonable expectation of informational privacy:

[5] The court also confirmed, again, that "[C.N.]'s right to privacy with regard to her sexual orientation falls under the broader right to informational privacy." (*Id.* at 1193.)

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ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

> A student requests to be referred to by a name other than that which appears on their official records. The teacher complies and refers to the student by a different name. As this is a public disclosure, all of the students are aware of at least the effects of the request. Additionally, all school personnel, from the site principal to the school crossing guards and bus drivers, must be aware of the student's request so they do not mis-gender or dead name the child. Parents of the student's classmates could be given sufficient information so they could comply with the student's request. There are literally hundreds to thousands of individuals who will know about the student's request. The only group excluded from this request is the student's parents.

Defendant contends this is not objectively reasonable. Indeed, in *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1702, the Court of Appeal affirmed the dismissal of an invasion of privacy cause of action because the adult plaintiff's sexual orientation was not confidential, and the court concluded that "as a matter of law" the plaintiff "cannot state a claim for infringement of a legally protected informational privacy interest."

In *Wyatt v. Fletcher* (2013) 718 F.3d 496, 499, the Fifth Circuit confronted the ability of professional educators communicating with parents/guardians head on:

> We hold that there is no clearly established law holding that a student in a public secondary school has a privacy right under the Fourteenth Amendment that precludes school officials from discussing with a parent the student's private matters, including matters relating to sexual activity of the student. (*Wyatt v. Fletcher* (2013) 718 F.3d 496, 499.)[6]

Thus, before even getting to the required balancing test, Plaintiff must establish likelihood of establishing an objectively reasonable expectation of privacy. Plaintiff has not done so.

Finally, even if one assumes for the sake of argument that the three *Hill* elements are sufficiently established here, Plaintiff once again fails to sufficiently articulate the law and utterly discounts the duties and discretion of school officials and the rights of parents. Regarding the *Hill* balancing test, Plaintiff offers *one* sentence: "Policy 5020.1 cannot be justified by any compelling interest, and contradicts the aims of any such interest." (App., p. 25.) Plaintiff cites to its argument on a different cause of action, that strict scrutiny applies and the District must establish a

[6] The Fifth Circuit was hearing this case on appeal, and noted that "when the magistrate judge in this case held that there is a constitutional right that bars the unauthorized disclosure by school coaches of a student's sexual orientation to the student's mother, he proclaimed a new rule of law." (*Id.* at 505-506.) As noted by that court: "the Supreme Court has repeatedly admonished courts to avoid finding 'clearly established' law through such a loose method; looking to precedent that is, at best, inconclusive, and, at worst, irrelevant, as *Sterling* did, simply no longer suffices." (*Id* at 509.)

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

compelling state interest and a necessity for a particular classification. That is manifestly *not* the test under *Hill*, which is whether the challenged policy or practice "substantially furthers one or more countervailing interests." (7 Cal.4th at 40; *Becerra*, 8 Cal.5th at 781 [burden is on plaintiff to establish a privacy interest, its extent, and the seriousness of the prospective invasion, and against that is a balancing of "the countervailing interests the opposing party identifies"].) Plaintiff's one-sentence reference to a legal test that is not even applicable is telling, as is Plaintiff's repeated citations to cases involving workers compensation appeals. As is described fully above, BP 5020.1 has an express intent that is consistent with the strong and important public policy regarding the duties and discretion of school officials vis-à-vis parents of the children under their charge. (See, e.g. Educ. Code §§ 51101, 48980 [mandated annual notice to parents regarding multiple rights and responsibilities of parents]; 48911 [communication to parent after suspension of student].) State law thus requires school officials to communicate with parents, and the Legislature has specifically carved out circumstances where student confidentiality is required. (See, e.g. Educ. Code § 49602 [communications of a personal nature between students age 12 and older and school counselors are confidential]; 46010.1 [required notification to parents that students in grades 7 to 12 may be excused from school to obtain confidential medical services without parental consent].) Again, the legislature knows how to establish reasonable parent/guardian disclosure limitations. *It has not done so here.*

2. <u>Board Policy 5020.1 Does Not Violate Discrimination Laws</u>

Plaintiff alleges that it is likely to prevail on the merits of a suit alleging the Policy violates Education Code 200 and Government Code 11135. In support of this, Plaintiff provides virtually no supporting evidence, treating these alleged violations as derivative of its Constitutional claims. However, both statues have clear *prima facie* standards, which while curiously absent from Plaintiff's Motion, warrant further discussion here. Education Code section 220 is only violated by behavior so severe and pervasive that it has a systemic effect of denying the victim equal access to an educational program or activity; a standard specifically meant to limit the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. (*J.E.L. v. San Francisco Unified School District* (N.D.Cal. 2016)

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

185 F.Supp.3d 1196, 1201).

To prevail on a claim for harassment/discrimination under the California Education Code, a plaintiff must prove that: (1) he or she suffered severe, pervasive and offensive harassment, that effectively deprived plaintiff of the right of equal access to educational benefits and opportunities; (2) the school district had actual knowledge of that harassment; and (3) the school district acted with deliberate indifference in the face of such knowledge. (*Videckis v. Pepperdine University* (C.D.Cal. 2015) 100 F.Supp.3d 927, 935.)

Plaintiff has provided a myriad of information denigrating BP 5020.1, and those who support it, but they do not address the policy head on. They fail to provide any facts that a student suffered from severe and pervasive harassment that effectively deprived them the right of access to educational benefits and opportunities. Moreover, the record is devoid of any evidence that the District was aware of any harassment, and acted with deliberate indifference to the harassment. Without providing facts to support these basic elements, there is not sufficient evidence to determine whether Plaintiff would be likely to prevail in this action.

With regard to Government Code 11135, the burden-shifting framework for establishing disparate impact is essentially identical to the analysis under Title VI. A plaintiff establishes prima facie case if defendant's facially neutral practice causes disproportionate adverse impact on protected class. The defendant may then justify challenged practice, and (3) if defendant meets its rebuttal burden, plaintiff may still prevail by establishing less discriminatory alternative. (*Darensburg v. Metropolitan Transp. Com'n* (C.A.9 (Cal.) 2011) 636 F.3d 511, 519).

Plaintiff has not asserted a disproportionate adverse impact, or any adverse impact at all. In fact, Plaintiff takes a very narrow view of the policy, and then extends that view by assuming that BP 5020.1 is discriminatory without any supporting evidence. In reality, BP 5020.1 is a general parental notification policy, mandated by the Education Code. (Cal. Educ. Code 51101). More importantly, the District has legitimate, non-discriminatory reasons for the Policy. Plaintiff's own allegations describe a population of students who are facing considerable challenges, which result in higher rates of depression and suicide. If any other group of students

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

were facing the same obstacles, the District would be obligated to notify the parents.[7] Additionally, as noted in BP 5020.1, in cases of suicidal intentions, the District will hold the student and keep them under supervision, "until the parent/guardian and/or appropriate support agent or agency can be contacted and has the opportunity to intervene." (BP 5020.1). This portion of the Policy is emblematic of the approach the Districts takes with regard to student safety; *parents are involved in the overall intervention plan*. The involvement of parents in the overall health and safety of their children is a long-standing concept that, until recently, was completely non-controversial. However, in this case and this case only, Plaintiff seeks to prohibit professional educators from communicating with parents and guardians, substituting their contributions to the successful transition of their children with that of Plaintiff. To keep parents out of the loop concerning the health and safety of their children is not only ill advised, but could lead to direct harm to the student.

3. PLAINTIFF WILL NOT SUFFER IRREPARABLE HARM

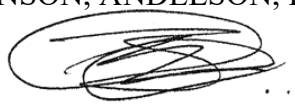
Because Plaintiff is unlikely to succeed on the merits, it is not necessary to address irreparable harm. (*Costa Mesa City Employees' Ass'n v. City of Costa Mesa (*2012) 209 Cal.App.4th 298, 309 [no injunction may issue unless there is at least "some possibility" of success].) Nevertheless, Plaintiff cannot show it will suffer irreparable harm. "Mere possibility of harm to the plaintiffs is insufficient to justify a preliminary injunction." (*Id.* at p. 305.) Plaintiff argues that some students feel unsafe or uneasy in the school environment which exists under revised BP 5020.1. Plaintiff does not indicate whether these same students have been encouraged to speak with administrators, counselors, or other teachers, or that they were told to file complaints for any bullying, discrimination, or harassment that they may be facing. Any alleged harm threatened against or perceived by the students can be addressed regardless of whether BP 5020.1 is in effect.

[7] And perhaps more importantly, this entire lawsuit relies on the false premise that these communications were not already happening even absent the policy—professional educators were already making calls.

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

Dated: September 5, 2023

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

By: 

Anthony P. De Marco
Attorneys for Defendant CHINO VALLEY UNIFIED SCHOOL DISTRICT

ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
20 PACIFICA, SUITE 1100
IRVINE, CALIFORNIA 92618-3371
TELEPHONE: (949) 453-4260
FAX: (949) 453-4262

PROOF OF SERVICE

(CODE CIV. PROC. § 1013A(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 20 Pacifica, Suite 1100, Irvine, California 92618-3371.

On September 5, 2023, I served the following document(s) described as **DEFENDANT'S OPPOSITION TO PLAINTIFF'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION** on the interested parties in this action as follows:

Rob Bonta
Attorney General of California
Delbert Tran
Deputy Attorneys General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 229-0110
Email: Delbert.Tran@doj.ca.gov

Attorney for the People of the State of California

☒ **BY MAIL:** I placed a true and correct copy of the document(s) in a sealed envelope for collection and mailing following the firm's ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☒ **BY EMAIL:** My electronic service address is Emily.Martinez@aalrr.com. Based on a written agreement of the parties pursuant to California Code of Civil Procedure § 1010.6 to accept service by electronic means, I sent such document(s) to the email address(es) listed above or on the attached Service List. Such document(s) was scanned and emailed to such recipient(s) and email confirmation(s) will be maintained with the original document in this office indicating the recipients' email address(es) and time of receipt pursuant to CCP § 1013(a).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 5, 2023, at Irvine, California.

Emily M. Martinez