LIBERTY JUSTICE CENTER
Emily Rae (State Bar No. 308010)
erae@libertyjusticecenter.org
440 N. Wells Street, Unit 200
Chicago, Illinois 60654
Telephone: (312) 637-2280

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
Telephone: (949) 453-4260
Fax: (949) 453-4264

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 CHINO VALLEY UNIFIED SCHOOL DISTRICT'S OPPOSITION TO PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION** Judge: Hon. Michael A. Sachs Date: October 13, 2023 Time: 8:30 a.m. Dept.: S28 Complaint Filed: August 28, 2023

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If a student is injured, bullied, or exhibits suicidal behavior at school, but does not want their parents/guardians[1] to know, will a school hide this information from parents? Of course not. If a student breaks their arm, hits their head, or develops a fever, the school will immediately tell the student's parents. If a student is bullied or involved in a verbal or physical fight, the school will tell the parents. If a student expresses a desire to hurt or kill themself, the school will tell the parents. So, too, must a school tell parents if a student says that they are experiencing gender incongruity or possibly gender dysphoria.

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

- "[t]ransgender and gender nonconforming students, in particular, suffer from psychological, emotional, and physical harassment and abuse" (*id.* at 8:17–18); and
- "[86] percent of transgender youth reported suicidal thoughts, and 56 percent of transgender youth reported a previous suicide attempt." (*Id.* at 9:3–4.)

Despite this data, Plaintiff argues this Court should prohibit schools from informing parents 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 (the "District") respectfully disagrees.

I. INTRODUCTION

Plaintiff seeks to preliminarily enjoin the District from its continued compliance with specific portions of Board Policy 5020.1 ("BP 5020.1"), a parent notification policy the Board of Education of the District adopted 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 discounts how many different topics of concern are subject to parental involvement. Plaintiff mischaracterizes BP 5020.1, referring to it as, among other pejoratives, a "forced outing" policy.

But Plaintiff fails to acknowledge "who" is being "outed" and to "whom": this policy ensures that parents and guardians receive critical information from professional educators about public actions taken by *the parents' own children*. Instead, Plaintiff pleads its case as though BP 5020.1

[1] The terms "parents" and "guardians" are used interchangeably herein—a reference to one is intended to be a reference to both.

mandates that schools in the District "out" students to the general public, complete strangers, and criminally violent individuals. Plaintiff portrays sharing information with parents, aiming to meaningfully incorporate parents into the education environment, as *discrimination*. But state and federal laws (1) already require schools to interact with parents on a myriad of complicated issues because of the critical role parents play in assisting professional educators with the education of their children, and (2) do not prohibit local policies that require schools to share gender-related information with parents.

Here, Plaintiff fails to establish that it is entitled to an injunction for at least the following reasons:

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 Newsom 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.) The Legislature knows how to create laws restricting communication with parents, but they have not done so with respect to the topics covered in the challenged portions of BP 5020.1.[2]

Alternate Remedies. For each of Plaintiff's assertions of potential negative outcomes, there is an alternative, 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

[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.").) If the Legislature ever 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 (they are not), why would Section 49602 be necessary? Absent a clear state law similar to Section 49602, locally adopted policies prevail.

abuse or neglect—there is a statutory process for investigating and addressing whether the parents should lose their parental rights.

Any Rights to Privacy Are Diminished by Public Actions. As a factual matter, the students affected by the parent notification policy are living their lives in an open and public fashion. They are using chosen names and pronouns consistent with their professed 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 at a student's request, parents have a right to inspect those records pursuant to California 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 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. Thus, Plaintiff argues that the *only* individuals from whom this information must be kept secret are *parents*.

Sharing Information is Critical to Student Success. Plaintiff fails to understand that the interaction required by BP 5020.1—between schools and the parents of affected students—serves an important purpose. This interaction allows the professionals to determine, based on their training and experience, whether a parent is aware of their child's social transition, whether a parent is sympathetic and supportive of the child's social transition, and whether a parent 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 and their transitioning children, and to coach and counsel parents who may be having difficulty processing what their child is going through. (*See* 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, 361–62.)

Plaintiff ignores the positive impact education professionals have on the counseling and guidance of both students *and* parents. Educators need—and students deserve—parents to be

involved in the process of transition.

II. STATEMENT OF FACTS

The President of the District's Board of Education, Sonja Shaw, recommended BP 5020.1 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), and 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 Office of the Attorney General informed the District that it 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.) The Office of the Attorney General issued a second subpoena 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 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, Plaintiff filed its Complaint in this action. On August 29, 2023, Plaintiff filed an Ex Parte Application for Temporary Restraining Order ("TRO") and Order to Show Cause Re: Preliminary Injunction, which was heard on September 6, 2023. Though the judge who heard that application acknowledged during the hearing he had not read the District's briefing opposing Plaintiff's request for a TRO, he nonetheless ordered the District refrain from enforcing BP 5020.1 pending a full hearing on Plaintiff's request for a preliminary injunction.

III. ARGUMENT

Under California's permissive education code, school districts have "flexibility to create their own unique solutions" to their address their own "diverse needs unique to their individual communities and programs." (Educ. Code § 35160.1.; CAL. CONST. art. XI, § 7 (granting local governments—including school districts—legislative power).) In fact, according to the California Department of Education, "more local responsibility is legally granted to school districts and

county education officials than to other government entities and officials." (Cal. Dep't. Ed., *Local Control – Districts and Counties* (Nov. 16, 2022), https://www.cde.ca.gov/re/lr/cl/localcontrol.asp; *see also* Educ. Code § 35160.)

Further, the Supreme Court "has long recognized that school boards have broad discretion in the management of school affairs." (*Dawson v. E. Side Union High Sch. Dist.* (1994) 28 Cal.App.4th 998, 1019 (citing *Bd. of Educ. v. Pico* (1982) 457U.S.853, 866).) "Therefore, local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values" and "it is generally permissible and appropriate for local boards to make educational decisions based upon their personal social, political and moral views." (*Id.* (internal quotation marks and citations omitted).)

Here, the District properly adopted BP 5020.1 because it values the role parents play in the educational process and understands that giving parents access to important information about their own children is in students' best interests. And the District's goal of ensuring transparency between schools and parents is consistent with United States Supreme Court decisions "historically and repeatedly declar[ing] that parents have a right, grounded in the Constitution, to direct the education, health, and upbringing, and to maintain the well-being of, their children." (*Mirabelli v. Olson* (S.D. Cal. Sept. 14, 2023) No. 3:23-cv-00768-BEN-WVG, 2023 U.S. Dist. LEXIS 163880, at *26–31 (collecting cases).)

Because BP 5020.1 is consistent with California and federal laws, and because Plaintiff cannot meet its high burden to show it is likely to succeed on the merits and will suffer irreparable harm absent a preliminary injunction, the Court should find in favor of the District and deny Plaintiff's request for a preliminary injunction.

A. BP 5020.1 is consistent with California law, which requires schools to communicate with parents about their children's education and experiences at school.

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

1. The purpose of BP 5020.1 is to allow schools and parents to collaborate to ensure the best possible outcomes for students.

BP 5020.1's stated intent—which Plaintiff ignores—is entirely consistent with California and federal law. Specifically, the express intent is "to foster trust between the District and parent(s)/guardian(s) of its students," and "support[] 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*." (RJN, Exhibit 1 (emphasis added).) The express intent also includes providing "procedures designed to maintain 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." (*Id.* (emphasis added).) 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." (*Id.*)

The express intent of BP 5020.1 does not fit Plaintiff's narrative, so it goes unmentioned in the Application, even though California 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 [PK-12]." (Educ. Code § 51100 (emphasis added).)

Section 51101 lists 16 different parental rights and provides 7 examples of how parents can participate. These rights can only be denied in limited situations, which supports the District's decision to take 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 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 schools to violate the Education Code's requirements that schools work *with* parents, not behind their backs. Plaintiff's position defies common sense, applicable law, and firmly established constitutional law principles.

Indeed, just last month a federal district court in California addressing substantially similar issues—i.e., whether schools may conceal information about a student's gender identity from their parents—found *in favor of parental notification*. (*Mirabelli*, 2023 U.S. Dist. LEXIS 163880.) While *Mirabelli* differs slightly from this case because it involves a policy *prohibiting teachers from notifying parents* about a student's gender identity absent explicit permission from the student (essentially the inverse of the policy at issue here), the decision is still instructive.

In *Mirabelli*, teachers challenged a district policy mandating that teachers keep secrets from parents about a student's gender identity preferences unless the student consents, alleging the policy violates their First Amendment rights. (*Id.* at *3.) Relying heavily on the expert medical opinion of Dr. Erica Anderson—who has also submitted a declaration supporting the District's position in this case—and case law affirming parents' constitutional rights to direct the upbringing of their children, the court granted the teachers' motion for a preliminary injunction and prohibited the school from enforcing its secret-keeping policy against the teachers. (*Id.* at *19–31; Declaration of Dr. Erica Anderson.)

This case, like *Mirabelli*, centers on a parent's right to know critical information about the health and well-being of their children, as well as a school's responsibility to provide parents that

information and work with parents to ensure the safety of students.

2. Schools must already notify parents about a wide range of issues involving their children, which Plaintiff does not dispute.

Plaintiff argues that children have an unfettered right to prevent schools from notifying their parents of a significant part of their education. Yet Plaintiff does not object to the provision in the policy requiring parental notification 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 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 fails to explain how schools should tell parents why this information was withheld from them, in violation of the law, until something significantly negative has happened to their child.

B. <u>A preliminary injunction is not warranted because Plaintiff is unlikely to succeed on the merits and cannot show irreparable harm.</u>

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 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. Nw. Pac. R.R. Co.* (1970) 4 Cal.App.3d 160, 179 ("The power . . . 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. Bd. of Supervisors* (1989) 49 Cal.3d 432, 441–42.) 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. Plaintiff will not prevail on the merits because BP 5020.1 does not violate student privacy rights.

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 this case implicates an "autonomy privacy" interest that must be overcome in the balancing test by a compelling interest. In doing so, Plaintiff ignores: (1) judicial recognition of the complexity of privacy inquiries and the need for a full evidentiary record and findings; and (2) the nature of privacy rights of minors and the judicially recognized compelling interests present here. Therefore, Plaintiff ultimately falls far short of clearing the high bar to be entitled to a preliminary injunction. 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 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 Plaintiff to cite inapposite cases for sweeping propositions they do not support. To cite one example of many, Plaintiff cites *Sheehan v. S.F. 49ers, Ltd.* (2009) 45 Cal.4th 992, to argue that this case involves "autonomy privacy"—not noting that, in *Sheehan*, plaintiffs challenged physical pat downs of a person's body, not the sharing of public information about a child with parents. This is also not a case about parental consent (*Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307), or information subject to psychotherapist-patient privilege (*Matthews v. Becerra* (2019) 8 Cal.5th 756), or a third-party health care disclosure without the employee's consent (*Pettus v. Cole* (1996) 49 Cal.App.4th 402).

Indeed, the *only* decision to which Plaintiff cites about the sharing of public information with a student's parents is *C.N. v. Wolf* (C.D. Cal. 2005) 410 F.Supp.2d 894, which also does not support Plaintiff's arguments. First, the *C.N.* minute order Plaintiff cites 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*. 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." (*Id.*) Third, and most importantly, *after* the pleading stage, and after an 8-day trial to implement the *Hill* analysis, the same judge who concluded that 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.

Indeed, the court stated it did 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*

(C.D. Cal. 2007) 517 F.Supp.2d 1177, 1198 (internal citations omitted).)[3]

Against this backdrop, Plaintiff's Application is unconvincing (if not downright misleading). Although students have some constitutionally protected privacy rights, it is clear such rights 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, 558 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 invokes "informational privacy" interests, not "autonomy privacy." This is an informational privacy case.

As noted above, the second *Hill* element—a reasonable expectation of privacy *in the circumstances*—is also complex and context-driven, which is 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:

> 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 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.

The District contends this is not objectively reasonable. Indeed, in *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1702, the Court of Appeals 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."

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[3] The *Wolf* 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.)

In *Wyatt v. Fletcher* (5th Cir. 2013) 718 F.3d 496, 499, the Fifth Circuit confronted the ability of schools communicating with parents 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.[4]

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

Finally, even if the three *Hill* elements were established here, Plaintiff's argument would still fail because, once again, Plaintiff fails to properly 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 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; *see also Becerra*, 8 Cal.5th at 781 (the burden is on the 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 are Plaintiff's repeated citations to cases involving workers compensation appeals.

BP 5020.1 has an express intent that is consistent with the strong and important public policy regarding school officials; duty to communicate with parents about the children under their charge. (*See, e.g.*, Educ. Code §§ 51101, 48980 (mandating annual notice to parents regarding multiple rights and responsibilities of parents); 48911 (communicating to parent after suspension of

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[4] The Fifth Circuit 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 505–06.) "[T]he 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.)

student).) 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 (requiring notification to parents that students in grades 7 to 12 may be excused from school to obtain confidential medical services without parental consent).) *It has not done so here*.

2. Plaintiff will not prevail on the merits because BP 5020.1 does not discriminate based on gender identity.

Plaintiff alleges that it is likely to prevail on the merits here because it (falsely) claims BP 5020.1 is discriminatory and therefore violates Article I, Section 7 of the California Constitution, Education Code 200, and Government Code 11135. Yet, Plaintiff provides virtually no evidence to support this claim. Plaintiff also improperly treats the alleged statutory violations as derivatives of its constitutional claim. But both statutes have clear prima facie standards, which—while curiously absent from Plaintiff's Motion—warrant further discussion here.

California Constitution Article I, Section 7. BP 5020.1 does not discriminate against students based on their gender identity—the policy applies equally to children who (1) wish to socially transition from their birth gender to a different gender and (2) transgender children who have already registered at school as a gender different from their birth gender who wish to detransition back to their gender assigned at birth. Rather, the policy affirms the constitutional rights that parents already have to "direct the upbringing and education of children under their control." (*Pierce v. Soc'y of Sisters* (1925) 268U.S.510, 535.) Plaintiff does not claim that the policy discriminates because it requires schools to notify parents if their child is being bullied, even though the policy treats bullied children differently than children who haven't been bullied. Plaintiff doesn't cry "discrimination" because the policy requires a school tell a parent if their child is suicidal, even though it treats those children differently than children who are not suicidal. Equally absurd is Plaintiff's claim that it is "discriminatory" to notify parents when their child is expressly requesting to be treated in a way that is consistent with gender incongruity or gender dysphoria. Indeed, this policy would only discriminate against transgender children if it allowed schools to *hide* this important health-related information from parents, as children facing other health or psychological issues would benefit from parent collaboration, but transgender children

would not); *see also* Anderson Decl. (discussing the benefits of involving parents when a child wants to socially transition).) Here, however, the District rightly determined that whether to relay critical information to parents about the health and safety of their child should not depend on a child's gender identity.

Education Code Section 220. The District did not discriminate in violation of the Education Code because Section 220 only applies to 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) 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 Univ.* (C.D .Cal. 2015) 100 F.Supp.3d 927, 935.) Plaintiff fails to provide any evidence that any student has suffered from severe and pervasive harassment that effectively deprived them the right to access educational benefits and opportunities. Moreover, the record is devoid of any evidence that the District was aware of any harassment or acted with deliberate indifference to the harassment. Without evidence to support these basic elements, Plaintiff has failed to establish that it is likely to prevail on its Education Code claim.

Government Code Section 11135. As with the burden-shifting framework for determining disparate impact under Title VI, a plaintiff can only establish a prima facie case for a violation of Government Code Section 11135 if a defendant's facially neutral practice causes disproportionate adverse impact on a protected class. The defendant may then justify the challenged practice and, if a defendant meets its rebuttal burden, a plaintiff may still prevail by establishing a less discriminatory alternative. (*Darensburg v. Metro. Transp. Com'n* (9th Cir. 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 fact, BP 5020.1 is a general parental notification policy that is mandated by the Education Code (Educ. Code § 51101), and was enacted for legitimate, non-discriminatory reasons. Plaintiff's own allegations describe a population of students who are facing considerable challenges that result in higher rates of depression and suicide. If any other group of students were facing the same obstacles, the District would be obligated to notify parents. 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 District takes with regard to student safety: *involving parents in the overall intervention plan*. The involvement of parents in the overall health and safety of their children is a longstanding 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, instead substituting their contributions to the successful transition of children with those of Plaintiff. To keep parents in the dark about the health and safety of their children is not only ill-advised, it could directly harm students.

3. Plaintiff will not suffer irreparable harm absent a preliminary injunction.

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 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 whether 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.

Dated: October 2, 2023

LIBERTY JUSTICE CENTER

By: Emily Rae

Emily Rae
Attorney for Defendant
Chino Valley Unified School District