

No. 16-3522

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ASHTON WHITAKER,

a minor, by his Mother and next friend,

MELISSA WHITAKER,

Plaintiff-Appellee

— v. —

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION
and SUE SAVAGLIO-JARVIS, in her official capacity as Superintendent of the
Kenosha Unified School District No. 1,

Defendants-Appellants

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN*

***AMICI CURIAE* BRIEF OF SCHOOL ADMINISTRATORS FROM
TWENTY-ONE STATES AND THE DISTRICT OF COLUMBIA
IN SUPPORT OF PLAINTIFF-APPELLEE**

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 16-3522

Short Caption: **Whitaker v. Kenosha Unified School District No. 1 Board of Education, et al.**

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):
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 - list any publicly held company that owns 10% or more of the party's or amicus' stock:
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F.R.A.P. 29(a) STATEMENT

No counsel for a party authored this brief, in whole or in part, and no person other than *amici curiae* and their counsel made any monetary contribution to fund the preparation or submission of this brief.¹ All parties have consented to the filing of this brief.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amici curiae are a school district and superintendents, principals, school board members, general counsel, social workers, and other officials from schools and school districts that have inclusive policies and practices for their transgender students. Together, *amici* represent a broad cross-section of schools and districts from twenty-one States plus the District of Columbia, collectively responsible for educating approximately 1.4 million students annually. *Amici* offer valuable perspectives on a number of the issues in this case, based on their broad collective experience with adopting, implementing, and enforcing such policies in their schools. Counsel for *amici* conducted interviews with certain individual *amici* in Fall 2015,

¹ Similar versions of this brief have been submitted in other cases, including *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), *Carcaño v. McCrory*, -- F. Supp. 3d ---, 2016 WL 4508192, (M.D.N.C. Aug. 26, 2016), *Carcano v. McCrory*, Case No. 16-1989 (4th Cir. Oct. 25, 2016), *Board of Education of the Highland Local School District v. United States Department of Education*, -- F. Supp. 3d ---, 2016 WL 5372349 (S.D. Ohio Sept. 26, 2016), and *Evancho v. Pine-Richland School District*, Case No. 2:16-cv-1537-MRH (W.D. Pa. Nov. 23, 2016). In some of those cases, Transgender Law Center was counsel for *amici*. Transgender Law Center did not author this brief in whole or in part and made no monetary contribution to fund the preparation or submission of this brief.

Spring 2016, and Fall 2016 to obtain their input for this brief; synopses of *amici* interviews are on file with *amici*'s counsel Pillsbury Winthrop Shaw Pittman, LLP ("Pillsbury"). *Amici* who were not interviewed or are not quoted in this brief have experiences consistent with those expressed herein. With the exception of *amicus* Washoe County School District, *amici* join this brief in their individual capacities and not as representatives of their respective schools or districts.

Below is a list of *amici*'s background and relevant experience; additional information may be found in Appendix A hereto.

AMICUS	BACKGROUND AND RELEVANT EXPERIENCE
Judy Chiasson, Ph.D.	Program Coordinator for the Office of Human Relations, Diversity and Equity, Los Angeles Unified School District, Los Angeles, California
David Vannasdall, Ed.D.	Superintendent, Arcadia Unified School District, Arcadia, California
Eldridge Greer, Ph.D.	Associate Chief, Student Equity and Opportunity, Denver Public Schools, Denver, Colorado
Diana K. Bruce	Director of Health and Wellness, District of Columbia Public Schools, Washington, DC
Denise Palazzo	Statewide Safe Schools Director for Equality Florida; Former Instructional Facilitator and Diversity and LGBTQ Coordinator, Broward County Public Schools, Broward County, Florida
Jeremy Majeski	Former Principal, Komensky Elementary School, Berwyn, Illinois
Thomas A. Aberli, Ed.D.	Principal, J.M. Atherton High School, Louisville, Kentucky

AMICUS	BACKGROUND AND RELEVANT EXPERIENCE
Howard Colter	Interim Superintendent, Cape Elizabeth School Department, Cape Elizabeth, Maine; former Superintendent, Mount Desert Island Regional School System, Bar Harbor, Maine
Matthew Haney	Principal, Mount Desert Island High School, Bar Harbor, Maine
Ken Kunin	Superintendent, South Portland Public Schools, South Portland, Maine
Robert A. Motley	Principal, Glenwood Middle School, Glenwood, Maryland
Roger Bourgeois	Superintendent-Director, Greater Lowell Technical Regional School District, Massachusetts
Blake Prewitt	Superintendent, Ferndale Public Schools, Ferndale, Michigan
Mary Doran	Former School Board Chair (term ended 12/31/15), Saint Paul Public Schools Board of Education, St. Paul, Minnesota
Washoe County School District	Washoe County School District, Reno, Nevada
James C. Morse, Sr., Ed.D.	Superintendent, Oyster River Cooperative School District, Durham, New Hampshire
Thomas Smith, Ed.D.	Superintendent, Hopewell Valley Regional School District, Mercer County, New Jersey
John O'Reilly	Principal, Academy of Arts and Letters, Public School/Middle School 492, Brooklyn, New York
Heidi Carter	Former Chair (term ended June 2016), Durham Public Schools Board of Education, Durham, North Carolina
Rudy Rudolph	Project Manager, Equity Department, Portland Public Schools, Portland, Oregon
Peyton Chapman	Principal, Lincoln High School, Portland, Oregon
Rachel Santa, Ed.D.	Director of Special Education, Cumberland School Department, Cumberland, Rhode Island

AMICUS	BACKGROUND AND RELEVANT EXPERIENCE
Lindsey Pollock, Ed.D.	Principal, Garden Oaks Montessori Magnet School, Houston, Texas
Brian Schaffer	Principal, Lamoille Union High School, Hyde Park, Vermont
Lisa Love	Manager of Health Education, Seattle Public Schools, Seattle, Washington
Bryan Davis, Ph.D.	Superintendent, Shorewood School District (“SSD”), Shorewood, Wisconsin
Paru Shah, Ph.D.	President, Board of Education, SSD, Shorewood, Wisconsin

SUMMARY OF ARGUMENT

Collectively, *amici* are responsible for the education, safety, and wellbeing of approximately 1.4 million students across the country and have extensive experience developing and implementing inclusive policies for transgender students in a school setting. Some, such as Dr. Chiasson, Ms. Bruce, Ms. Chapman, and Mr. Bourgeois, have many years of experience applying inclusive policies in their schools; others have recently implemented such policies to meet the needs of their schools’ transgender students. As such, *amici* are well-positioned to explain why the district court correctly found the balance of hardships tips in favor of Plaintiff-Appellant Ashton Whitaker.

Amici’s collective experiences refute the hypothetical concerns raised here by Defendants-Appellants Kenosha Unified School District No. 1 Board of Education and Superintendent Sue Savaglio-Jarvis (together, “Appellants”): that allowing all students to access sex-specific facilities and amenities that match their gender identity

will lead to general disruption; will violate the privacy, “dignity,” or “comfort” of other students; or will lead to the abolition of gender-segregated facilities and activities for all students. *Amici* have addressed and in some cases personally grappled with many of the same fears and concerns in their own schools and districts. However, in *amici*’s professional experience, *none of those fears and concerns has materialized in the form of actual problems in their schools*. Instead, inclusive policies not only fully support the reality of transgender students’ circumstances, but also foster a safer and more welcoming learning environment for all students.

ARGUMENT

I. Policies Respectful of Every Student’s Gender Identity Minimize Disruptions and Help Create a Safe, Welcoming, and Productive Learning Environment for All.

At first, we had our concerns – would letting students participate in activities and facilities that were consistent with their gender identity create problems? What would happen?

Ultimately, we decided that we as the adults needed to manage our fears and give students the respect and dignity that they deserved. And I’m pleased to say that none of our fears has materialized.

Dr. Judy Chiasson Testimony to the California Senate Education Committee on A.B. 1266 (June 12, 2013) (“Chiasson Testimony”), available at <https://www.youtube.com/watch?v=Xmq9dIQdsNE>.

As educators who have devoted much of their lives to young people, *amici* recognize that all students deserve equal respect and equal treatment by their educators. The schools and districts with which *amici* are associated allow transgender students access to the same facilities and opportunities as other students.

Amici's collective experience is that inclusive policies are necessary for a learning environment that is accessible, safe, and welcoming, which in turn enhances the educational experience for all students. Respecting students' gender identity eliminates the disruption that results from singling out, stigmatizing, and discriminating against transgender students, and avoids disrupting the normal social interactions involved in use of communal facilities. By contrast, refusing to respect a student's gender identity is "toxic for the student – it says 'you are not welcome,' every day." Robert A. Motley Interview, Oct. 11, 2016.

Appellants appear to be reacting to fears over the imagined consequences of fully integrating transgender students into the school community. *Amici*'s experiences reveal that these fears are unfounded. *Amici*'s experiences with the inclusive policies in place in their schools – some for a decade, or nearly so – have instead been overwhelmingly positive. Far from being disruptive or potentially unsafe, inclusive policies have minimized disruption and safety concerns. The only disruption is caused by a lack of clarity about how to support transgender students. As Ms. Bruce of the District of Columbia observes, "A policy that requires equal treatment is not difficult to implement. Beyond sorting it out at the beginning, it's not an ongoing, lingering issue[.]" Diana Bruce Interview, Oct. 5, 2015.

As educators, "[o]ur goal is to make sure that every young person is as present and as able to engage in academic work as possible. Promoting a safe and welcoming

environment is a way to promote education.” *Id.* (emphasis added). The results have been overwhelmingly positive, not only for transgender students, but for all students, faculty, administrators, and communities as a whole.

A. In Contrast to Adults’ Unfounded Fears, Students’ Experiences in Schools with Inclusive Policies Have Been Positive.

In *amici*’s professional experience, fears and concerns about inclusive policies are almost exclusively held by adults, not students. Students often set a leading example recognizing transgender students’ rightful place in school facilities that match their gender identity. *E.g.*, Howard Colter Interview, June 6, 2016 (“As to the students, I am most impressed. They are very understanding and accepting of their classmates. It feels like the adult community is struggling with it more.”); Bruce Interview (“Young people are pretty savvy and comfortable, and can understand and empathize with someone who just wants to use the bathroom.”); Roger Bourgeois Interview, Oct. 8, 2015 (“Most of the problem is with the adults; the students are pretty accepting of these issues.”); Dr. Eldridge Greer Interview, Oct. 14, 2016 (“Students are much more resilient and forward-thinking than we as adults are.”); Dr. Rachel Santa Interview, May 27, 2016 (“Adults have more issues than the students do.”); Dr. David Vannasdall Interview II, Sept. 9, 2016 (“With the kids, there hasn’t been a problem at all.”). Based on her more than ten years’ experience working with the inclusive policies in place at Los Angeles Unified School District (“LAUSD”), the second-largest school district in the country, Dr. Chiasson recounts:

Our experience has been that the fears of the adults rarely play out. The students are very affirming and respectful of their classmates. Most of the reaction that I've ever encountered has been in response to people's fears, not the students' experiences. The students' experiences have been overwhelmingly positive. I have yet to be called into a situation to respond to an actual incident; I've only had to respond to fears, and the fears are unfounded.

Dr. Judy Chiasson Interview, Sept. 23, 2015 ("Chiasson Interview").

Several *amici* have themselves wrestled with many of the same concerns raised by Appellants here, when first faced with the need to adopt an inclusive policy. Indeed, Dr. Vannasdall's district's initial experience with a transgender student resulted in a complaint and investigation by the U.S. Department of Justice ("DOJ") and the U.S. Department of Education, Office for Civil Rights ("OCR"). Administrators and others within the Arcadia Unified School District were concerned that respecting the transgender student's gender identity by treating him like any other boy would be disruptive and burdensome. Dr. David Vannasdall Interview, Sept. 23, 2015 ("Vannasdall Interview I").

A simple, open conversation between administrators and the student and his family allayed their erroneous assumptions. *Id.* In that conversation, it became "obvious that this student had no intentions of creating a disruption – he just wanted a home and a place to learn, and not worry about which restroom to use." *Id.* Once Arcadia's administrators understood that the student was simply asking to be treated like any other boy, their obligation as educators became clear: to help this student, and all of their students, "come to school ready to learn." *Id.*

If they're worrying about the restroom, they're not fully there to learn, but instead just trying to navigate their day. Give students the opportunity to just be a kid, to use the bathroom, and know that it's not a disruption, it just makes sense.

Id.

Ultimately, Dr. Vannasdall's district reached a voluntary resolution agreement in 2013 with the DOJ and OCR. The resolution agreement included adopting a comprehensive policy respecting students' gender identity covering, among other things, equal access to sex-segregated restrooms and locker rooms consistent with gender identity.² The outcome over the past three years has been "very positive for the school, the district, and the students." *Id.*

Dr. Vannasdall now regularly consults with educators across the country, giving informal advice and guidance on inclusive policies for transgender students.

Id. He well understands what it is like to grapple with the actual and anticipated negative reactions from some parents and community members. But when those are the primary concern, "you have people making decisions from the basis of fear and extremes, and that's never good for kids." Julie Bosman & Motoko Rich, *As*

Transgender Students Make Gains, Schools Hesitate Over Bathroom Policies, N.Y.

² See Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Office of Civil Rights, OCR Case No. 09-12-1020/DOJ Case No. 09-12-1020 (July 24, 2013), *available at* <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>. See also Letter from DOJ and OCR to Arcadia School District (July 24, 2013), *available at* <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf>.

TIMES, Nov. 4, 2015, at A14 (quoting Dr. Vannasdall).³ The “game-changer” for Arcadia and for other districts with which Dr. Vannasdall has consulted on these issues is when educators “remember what we are here to do,” *i.e.*, to help kids learn. Vannasdall Interview I. Dr. Vannasdall believes that generally school administrators new to dealing with transgender students are “overthinking this issue. This doesn’t need to be as tough as some people make it. It can be a good experience for that student and other students as well.” *Id.*

Similarly, Dr. Thomas Aberli of Atherton High School in Louisville, Kentucky was unfamiliar with this issue when it first arose, and had concerns about possible disruptions or privacy issues. But Dr. Aberli tried to understand the student’s request on both a personal level and in terms of the legal obligations of the schools. Dr. Thomas Aberli Interview, Oct. 7, 2015 (“Aberli Interview”). Atherton’s policy was developed through an extensive collaborative effort by Dr. Aberli and a panel of school administrators, teachers and parents, in which “[w]e considered the issue very carefully and thoughtfully, and posted all of the evidence we reviewed online.” Aberli Interview.⁴ Atherton’s policy is based on LAUSD’s policy, which has worked well for

³ A version of this article is available online at: <http://www.nytimes.com/2015/11/04/us/as-transgender-students-make-gains-schools-hesitate-at-bathrooms.html>.

⁴ See also Dr. Thomas Aberli Testimony before the Kentucky Senate Education Committee on S.B. 76 (Feb. 19, 2015) (“Aberli Testimony”), video excerpt available at <https://www.youtube.com/watch?v=QodplMWsEvQ>.

a decade, without any complaints. *Id.* Although there were some comments to the effect that, if the people in his (Kentucky) school district wanted California policies, they would move to California, Dr. Aberli stated unequivocally that empathy and equality do not stop at state borders:

The value of human life is the same in Kentucky as it is anywhere else in this nation. And when we're talking about an issue of civil rights, we're talking about the value we put on human individuals.

Aberli Testimony. Understanding that the policy is about protecting students' basic civil rights has helped clarify the issue.

It helped people to understand that this wasn't about providing a special accommodation or "special rights" – this is about eliminating discrimination. When you tell a person you will do something that makes them stand out from everyone else, *that's* when you start discriminating against them.

Aberli Interview. At the outset, when the issue was new and unfamiliar to many in the community, adults and a handful of students questioned Atherton's new policy.

We had students that opposed the policy originally, and they're still with us. I respect that some people may disagree or even feel uncomfortable with the policy, because honestly, for many people – including myself until a few months ago – they simply weren't knowledgeable, or it wasn't a close enough personal issue in terms of interacting with openly LGBT people to have a comfort level. I acknowledge and respect that. But I am not going to use someone's discomfort as a means for discriminating against a protected population.

The materials Dr. Aberli references as having been posted online are available at <http://schools.jefferson.kyschools.us/High/Atherton/SBDM.html>.

Id. Ultimately, despite the initial opposition, Dr. Aberli reports that in practice he has “received zero complaints regarding a specific incident of concern for a violation of privacy. The concerns raised by individuals have all been philosophical.” *Id.*

Indeed, in *amici*’s experience, “an affirming policy has a positive effect on other students as well. If everyone is taken care of, students see that and they value that.” Denise Palazzo Interview, Oct. 3, 2015. “When kids see that you are respecting all students, then they know that they will be respected. We are showing them how to treat people respectfully and know they will be treated the same.” Santa Interview. As Principal Peyton Chapman of Oregon relates:

Students have high integrity radars – if some youth are made fun of, then they know it could happen to them. These fears keep all students in small boxes. They don’t try things out, engage their creativity and figure out who they are and can be. If schools define “who” students need to be and how they should behave, then they are less free to explore themselves, cultures and communities.

Peyton Chapman Interview, May 27, 2016. A policy respectful of every student’s gender identity, by contrast, fosters mutual respect and “creates open and innovative environments.” *Id.*

B. Frequently-Raised, Hypothetical Concerns Have Not Materialized.

There have not been any issues regarding this policy in locker rooms or bathrooms. But it has brought greater awareness of how we can increase privacy for all students.

Aberli Interview.

No student should be denied access to any gender-specific facilities that are available to other students of the same gender identity solely because he or she is

transgender. As educators and administrators, *amici* have experience with the hypothetical fears and concerns commonly raised when schools integrate transgender students into gender-specific facilities, including the fear that some individuals might use an inclusive policy to gain access to the facilities of another gender for an improper purpose. *Amici* have found such fears and concerns to be wholly unfounded in practice.

1. Concerns about restrooms have not materialized.

“Questions about bathrooms come up in every staff training, and it’s an important thing that school staff want to understand. I think there’s an assumption that there will be disruption around restrooms.” Bruce Interview. But all schools routinely “deal[] with many more adolescent behavior issues than just who’s using the bathroom based on gender identity,” and are adept at addressing those issues. *Id.* As with any behavior issue, “oftentimes disruption in our experience has been around inconsistency by staff – and that’s why clear guidance for schools is important[.].... Our transgender students just want to use the restroom and be safe when they do it, and that’s all they’re trying to do.” *Id.*

Dr. Aberli of Kentucky similarly reports that Atherton has

multiple transgender individuals in our school, and restroom access has not been an issue. . . . [T]here has not been any issue at all with respect to the implementation. It’s not a big deal when you look at it from a standpoint of, we’re dealing with real people, we’re dealing with children. Even at the high school level we’re dealing with people who have had a hard enough time as it is, and they’re just looking for reasonable support from the school in a very challenging

social context, or during a very difficult process, as it is for many of them.

Aberli Interview.

2. Concerns about locker rooms have not materialized.

Although the present appeal focuses on restroom policies, *amici*'s experiences with inclusive locker room policies have also been positive. Diana Bruce explains that “our transgender students are not interested in walking around the locker rooms and checking out anatomy. They’re just trying to get through P.E. safely.” Bruce Interview. Mary Doran of Minnesota concurs: “[W]hen the *coaches* tell me ‘this [transgender policy] isn’t an issue, isn’t a big deal,’ that really says something.” Mary Doran Interview, Oct. 16, 2015.

Indeed, in the rare instances that *amici* have needed to address locker room issues, it has been to ensure the safety of the transgender students. “The sad truth is that our transgender children are significantly more likely to be the targets of student misconduct, rather than the perpetrators of it.” Chiasson Interview; *see also* Ken Kunin Interview, June 10, 2016 (“The real risk is to people who identify as transgender, or gay, or just ‘other.’”). And even there, “[l]ocker rooms aren’t a [special] concern because we are already accustomed to dealing with students who have unique or special needs in the locker room context. This is just one more type of student that may need additional support in that space.” Palazzo Interview.

3. Concerns about students “posing” as transgender to gain improper access to facilities have not materialized.

Amici have also frequently addressed the concern that transgender students might just be “confused,” are likely to change their minds often about their gender identity, or might be falsely claiming to be transgender for some nefarious purpose.⁵ Those concerns have not materialized either. Moreover, *amici*’s policies allow schools to make reasonable assessments of individual requests for accommodation.

As Dr. Chiasson explained in a letter to Dr. Aberli:

It is reasonable to expect that a student will exercise consistency with respect to their identity and access to facilities. Students cannot switch their identity arbitrarily or opportunistically. For example, a student cannot be transgender only during physical education.

If the school strongly suspects that the request is not legitimate, they should provide accommodation for the student while continuing the conversation to better understand the student’s motivation for the request. Being transgender is a deeply rooted identity [...]. It is not subject to arbitrary whims.

Letter from Dr. Judy Chiasson to Dr. Thomas Aberli, May 29, 2014 (“Chiasson Letter”).⁶ Similarly, Mr. Bourgeois explains that at his school in Massachusetts

A student can’t just show up and say, “I’m a male, but I want to start using the girls’ locker room today.” People worry some football player will show up and want to get into the girls’ locker room, but we

⁵ Appellants’ brief hints at these hypothetical concerns by references to a student who “self identifies as the opposite sex,” or “unilaterally designate[s] his or her sex” or “verbally identifies as being transgender.” Appellants’ Brief at 28-29, 44-45.

⁶ A copy of Dr. Chiasson’s letter to Dr. Aberli is included among the materials posted by Atherton. See footnote 4, *supra*.

would not allow that. There's a process we go through to work with them and their families, and verify their identity.

Bourgeois Interview. All *amici*'s schools follow a similar policy, and as a general matter, it is easy to identify genuine requests.

Some people fear someone will masquerade ... as transgender to be predatory. But being transgender is persistent and consistent throughout the day: all classes; all relationships; in and out of the classroom. ... I've never had that happen, where someone has pretended to be transgender for nefarious reasons. It's just plain silly to think that [a male student] is going to come to school for months on end, wear female attire, present as female to all of his friends and teachers, just so he can go into the female locker room.

Chiasson Interview. Indeed, schools are very adept at dealing with instances of misbehavior in restrooms and locker rooms precisely because it is not particularly difficult for a student to gain access to another gender's facilities.

Adolescents can be impulsive, and we have had boys and girls dart into the other bathroom. We find them and deal with them. They certainly don't need to masquerade as transgender to engage in that misconduct.

Id.; see also Greer Interview ("There are easier ways to get into the girls' bathroom [than posing as transgender] – and we have policies and consequences to address that. From a social justice standpoint, it is incredibly offensive to think that our [transgender] students would go through the psychological trauma of transforming their identity just to game the system.").

In other words, schools routinely deal with all sorts of behavioral problems – and *amici* "would have a problem" with any student actively violating another

student's privacy, and would deal with that misconduct as it arises. Brian Schaffer Interview, June 1, 2016. Parents, teachers, and administrators alike are always looking out for the safety of all students. A policy respecting transgender students is far more likely to thwart misbehavior in these spaces than to cause it.

II. Schools Can and Should Fully Respect Both the Gender Identity and the Privacy Concerns of All Students.

Many concerns raised with regard to inclusive policies for transgender students involve perceived threats to the “privacy” or “comfort” of other students. *See, e.g.*, Appellants' Brief at 3, 44-47. As educators, *amici* are respectful of the needs and concerns of all of their students. But *amici* strongly disagree that a school should discriminate against transgender students in order to accommodate complaints that other students are “uncomfortable” with sharing a restroom with a transgender person. That is simply not how educators deal with students' discomfort with others or with themselves. To the extent that a student has concerns about sharing facilities with transgender students, schools must help the student deal with that discomfort in a way that does not impinge upon other students' rights to equal treatment.

One simple solution is to offer private facilities to the student who does not want to use the same facilities as a transgender student. In other words, Appellants could offer those students (if any) use of the gender-neutral bathrooms that they consider a “readily-available alternative” to standard restrooms. *See* Appellants' Brief at 40. Most of *amici*'s schools offer private facilities that may be used by

persons of either gender, in addition to gender-segregated facilities. Ms. Bruce, for example, recounts that in her schools,

[a]ccording to our policy guidance, if a student has a problem, we can make another bathroom available to that student. I haven't heard from our schools, however, of students that have asked to use a different restroom in that circumstance. When I train our school staff, some want to ask hypotheticals, but in our experience, this has not been an issue.

Bruce Interview. Indeed, some students may prefer to use these private facilities for any number of reasons, and are permitted to do so without the need to provide an explanation – including in the rare circumstance that a student might not want to use the same facility as a transgender student. Dr. Chiasson, for example, explains that

any student who, for whatever reason, feels uncomfortable in a communal setting – whether because of weight, personal comfort, body image, social anxiety, or other reasons – we will accommodate that without the need for explanation, and they can use a private setting such as a nurse's room.

Chiasson Interview. Similarly, Dr. Aberli's school

allows any student who wants to use a private restroom to do so. What I have clearly communicated in public is that any student may use the front office restroom. We don't ask why. There's a thousand reasons that a student needs privacy, so it's our responsibility to accommodate any student for any reason. It could be shyness, or trauma.

Aberli Interview.

When separate facilities are not available or practical to meet student requests for additional privacy, there are other means of providing extra privacy to students when needed, such as using a curtain to create a separate area, or allowing a student

to use the locker room before or after other students. Matthew Haney Interview, June 6, 2016. Accommodating individual students' needs is "something educators do every day," and educators have proven themselves "very flexible and adaptable in adopting new policies for their students" in order to meet their needs. Vannasdall Interview II. Providing transgender students what they need to thrive in school is no different.

Even in the rare case where a student might express discomfort with sharing facilities with a transgender student, the solution is not to deny access to the transgender student. Any student expressing such discomfort should be offered alternative facilities or arrangements to address their concerns. As Mr. Bourgeois explains:

[W]e're not going to tell the transgender student they can't go where they're comfortable. I can still remember the remnants of white people being uncomfortable with black people being in same locker rooms and restrooms, so it's not about whether everyone is "comfortable." Just because some people were uncomfortable didn't mean you treated people as second-class citizens.

Bourgeois Interview. Mr. Kunin of Maine agrees that "being uncomfortable doesn't overrule someone's rights," but he also emphasizes that "there are also ways to support the person who is uncomfortable – we would want that person to feel safe and participate, too." Kunin Interview. In short, although the schools should accommodate requests for extra privacy from any student (regardless of the reason),

no transgender student should ever be forced to use separate facilities in order to accommodate the actual or anticipated discomfort of other students.

Particularly in the educational context, policies like that enjoined here single out and create a serious dilemma for transgender students like Ashton – requiring him either to use a separate restroom simply because he is transgender, or to use facilities that are patently inconsistent with his gender. Having to navigate this problem daily seriously interferes with transgender students’ education, impairs their ability to learn and socialize, and results in real physical and emotional harm. Ms. Bruce explains that when transgender students “have reported worrying about whether they can use the restroom that matches their gender identity, they have said they just don’t go to the bathroom at school. That can’t possibly help them learn.” Bruce Interview.

We don’t want them preoccupied with trying not to use the bathroom when they’re supposed to pay attention to trigonometry. ... We want them to know where they can use the restroom, so they can feel more like anyone else in their school and not like an outsider. We want to make sure that all of our students have an opportunity to participate in everything a school has to offer, including social opportunities throughout the campus. When transgender students don’t use the restroom, they’re missing an opportunity to socialize with their peers.

Id. Although, as noted above, *amici* routinely offer separate facilities to any student requesting additional privacy for any reason (including but certainly not limited to transgender students), no student should ever be forced to use a separate facility simply because they are transgender. Dr. Aberli agrees that “making transgender students use the nurse’s room” is no answer at all:

Tell me what we would say to that child – that there’s something so freakish about you, and so many people are uncomfortable with you, that you have to use a completely separate restroom than the one you feel like you should be using?

Aberli Interview. Instead, in *amici*’s experience, all students’ needs are best served when educators can treat all students equally.

III. Gender-Segregated Spaces and Activities are Fully Consistent with School Policies Respecting Every Student’s Gender Identity.

Amici have also addressed the lurking hypothetical concern that permitting individuals to use facilities consistent with their gender identity will lead to the abolition of gender-specific facilities. Contrary to that “slippery slope” argument, however, all *amici* continue to maintain gender-segregated facilities in their schools. In fact, respecting the gender identity of transgender students reinforces the concept of separate facilities for girls and boys. By contrast, requiring a transgender girl to use the boys’ restroom or a transgender boy to use the girls’ restroom undermines the notion of gender-specific spaces.

Dr. Chiasson offers an example from her own district, in which a new student, a transgender male, had been

using the female facilities, incorrectly assuming that because he was a natal female, that he would be required to do so. It was equally uncomfortable for him to use the girls’ facilities as it was for the girls themselves. When the administration learned of the situation, they told the young man that he could use the boys’ facilities. Everyone was relieved.

Chiasson Letter. Mr. O'Reilly similarly commented that, until he considered the effect of forcing a transgender student to use a restroom inconsistent with gender identity, he "hadn't really understood the literal meaning of the word 'misfit.' When forced to use the restroom for the gender they do not associate with, a student literally becomes a *misfit*: someone being forced into a place they don't belong." John O'Reilly Interview, Sept. 20, 2015.

Transgender students (like Ashton here) have not sought to eliminate gender-specific facilities – they merely want to use the facilities that correspond with their gender identity. "Far from being disruptive, our experience has been that those students just want to blend in." Bourgeois Interview. Because respecting transgender students' gender identity solves the "misfit" problem in gender-segregated spaces, "[t]ransgender-affirming policies solve problems, not create them. Even if the law allowed it, forcing a transgender boy to use the female facilities would be extremely uncomfortable for all parties involved." Chiasson Interview.

CONCLUSION

Appellants assume that policies respectful of an individual's gender identity are disruptive and impinge upon the rights and well-being of cisgender individuals. *Amici's* experience as school administrators has proven otherwise: showing respect for each student's gender identity supports the dignity and worth of all students by affording them equal opportunities to participate and learn. Moreover, such policies have not been disruptive – either to the academic climate or to the maintenance of

gender-specific facilities – and instead protect the safety and privacy of all youth.

Amici respectfully request that this Court affirm the district court's order.

Dated: January 30, 2017

Respectfully submitted,

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APPENDIX A: *Amici* Background and Experience

Amici curiae are a school district and superintendents, principals, school board members, social workers, and other officials from schools and school districts that have adopted or are in the process of adopting inclusive policies for their transgender students. They represent a broad cross-section of schools and districts from across twenty-one States plus the District of Columbia, collectively responsible for educating approximately 1.4 million students annually. *Amici* offer valuable perspectives on a number of the issues in this case, based on their broad collective experience with adopting, implementing, and enforcing such policies. Counsel for *amici* conducted telephone interviews with certain individual *amici* in Fall 2015, Spring 2016, and September 2016 to obtain the statements cited and quoted in this brief. The experiences of *amici* not quoted or cited in this brief are consistent with those expressed in the brief. With the exception of *amicus* Washoe County School District, *amici* join this brief in their individual capacities and not as representatives of their respective schools or districts.

Judy Chiasson, Ph.D., is the Program Coordinator for the Office of Human Relations, Diversity and Equity in the Los Angeles Unified School District (“LAUSD”) in Los Angeles, California. LAUSD is the second-largest school district in the country, with more than 732,000 students in more than 1,200 schools, spanning 745 square miles. Dr. Chiasson helped author LAUSD’s

guidance documents on transgender students, and has overseen the implementation of LAUSD's policy since it was adopted a decade ago. Dr. Chiasson has given legislative testimony based on LAUSD's approximately ten years of experience with its policies,¹ and has consulted with other school administrators across the country on transgender and other diversity issues.

David Vannasdall, Ed.D., has worked in the education field for twenty-two years, and been Superintendent for Arcadia Unified School District ("Arcadia") in Arcadia, California since July 2014, having previously served as Arcadia's Deputy Superintendent for two years and principal of Arcadia High School for eight years. He developed Arcadia's policy for supporting transgender students. Dr. Vannasdall has consulted with school officials nationally on transgender issues, and has presented on Arcadia's policy to other superintendents. Arcadia has approximately 10,000 students, and has three years of experience with inclusive policies for transgender students.

Diana Bruce is the Director of Health and Wellness for the District of Columbia Public Schools ("DCPS"), a district that educates approximately 46,500 students across 111 schools. DCPS has provided transgender students access to facilities in accordance with their gender identity since 2006, and Ms. Bruce led

¹ Dr. Chiasson's 2013 testimony to the California Senate Education Committee ("2013 Chiasson Testimony") is available at: *LAUSD's Judy Chiasson's Testimony on AB 1266*, YouTube (June 12, 2013), <https://www.youtube.com/watch?v=Xmq9dlQdsNE> (last visited Jan. 26, 2017).

the effort surrounding the school district's adoption of a policy providing in-depth guidance in June 2015. Ms. Bruce consults with administrators across the country about DC's nearly decade-long experience with inclusive policies for transgender students.

Denise Palazzo is the statewide Safe Schools Director for Equality Florida and in her role consults with the 67 school districts across Florida about LGBTQ² needs, challenges, best practices and resiliency. She offers district leadership professional and technical assistance such as professional development trainings, crisis consultation, GSA support and structural implementation design and direction. Ms. Palazzo is a past Instructional Facilitator and Diversity and LGBTQ Coordinator for Broward County Public Schools ("BCPS") in Broward County, Florida, where she had previously taught for fourteen years. BCPS is the sixth-largest public school system in the United States and the second-largest in the state of Florida, with more than 265,000 students. Ms. Palazzo spearheaded BCPS's effort to adopt a formal policy allowing transgender students access to programs and facilities in accordance with their gender identity, which has now been finalized. The policy enhances the recommendations and guidance that BCPS adopted in 2012. Ms. Palazzo also advises officials throughout the country about

² The acronym "LGBTQ" stands for lesbian, gay, bisexual, transgender, and questioning.

inclusive policies for transgender students, and continues to consult with BCPS and other school districts throughout Florida and the nation.

Jeremy Majeski is a former principal of Komensky Elementary School (“Komensky”) in Berwyn, Illinois. He has been an educator for thirteen years and was Komensky’s principal for four years. Mr. Majeski directed the development and implementation of an inclusive policy at Komensky after a transgender student requested support, and then helped to direct implementation of the policy throughout Berwyn South School District 100 (“Berwyn”), which educates approximately 4,000 students. Berwyn was honored by the Illinois Safe Schools Alliance as the Ally of the Year for 2015.

Thomas Aberli, Ed.D., is the Principal of J.M. Atherton High School (“Atherton”), which educates approximately 1,300 students in Louisville, Kentucky. Atherton has had a formal policy of respecting students’ gender identity since June 2014. Dr. Aberli oversaw the adoption of this anti-discrimination policy through a thoughtful process that engaged the public, a twelve-member decision-making council, and the superintendent. Dr. Aberli also testified about Atherton’s policy before the Kentucky Senate Education Committee.³

³ A video excerpt from Dr. Aberli’s testimony (Aberli Testimony) is available at: KET – Kentucky Educational Television, *Principal Thomas Aberli on Transgender Student Policy Legislative Update KET*, YouTube (Feb. 19, 2015) <https://www.youtube.com/watch?v=QodplMWsEvQ> (last visited Jan. 26, 2017).

Howard Colter is the Interim Superintendent of the Cape Elizabeth School Department, in Cape Elizabeth, Maine, and the former Superintendent of Mount Desert Island Regional School System (“MDIRSS”). **Matthew Haney** is Principal of Mount Desert Island High School in Bar Harbor, Maine. MDIRSS serves eleven schools and over 1,500 students, including approximately 571 students at Mount Desert Island High School. In 2015, the policy committee of the MDIRSS board forwarded to its individual schools recommended guidelines that aim to foster a learning environment that is safe and free from discrimination, harassment, and bullying and to assist in the educational and social integration of transgender students in its schools. Mr. Colter has worked in education for forty-four years and obtained a Master’s Degree in Education and School Administration Credentials. He has been a superintendent for thirty-three years in school systems in California, Massachusetts, New Hampshire, and Maine, with sixteen years at MDIRSS before becoming the Interim Superintendent at Cape Elizabeth in 2016. He has also served as a principal at the elementary, middle, and high school levels, although mostly in high schools. Mr. Haney, now completing his sixteenth year in education, began as a collegiate coach and athletic director. Since then, he has served for eight years as an assistant principal and for three years as a principal at Mount Desert High School. Before becoming principal, Mr. Haney was dean of

curriculum at Mount Desert Island High. Mr. Haney holds a Master's Degree in Educational Leadership.

Ken Kunin is the Superintendent of South Portland Public Schools ("South Portland") in South Portland, Maine, a district that includes eight schools and educates over 3,000 students. Mr. Kunin began as Superintendent in August 2015, and previously served as principal of one of the most diverse high schools north of Boston for five years, and as middle and high school principal of an international school in Rome, Italy, for four years. Mr. Kunin holds a Master's degree in Special Education and a Certificate of Advanced Studies in Educational Leadership.

Roger Bourgeois is the Superintendent-Director of Greater Lowell Technical Regional School District, a single-school district that educates approximately 2,200 students in Massachusetts. Mr. Bourgeois has eight years of experience as a superintendent with schools that allow students to access facilities and programs in accordance with their gender identity. Mr. Bourgeois serves by appointment of the governor on the Massachusetts Commission on LGBTQ Youth, for which he currently serves on the Safe Schools Committee. He also participates in school trainings through the Massachusetts Department of Education's Safe Schools Program, and has testified at state legislative hearings involving transgender youth issues.

Blake Prewitt, Ed.S. is the Superintendent of Ferndale Public Schools in Ferndale, Michigan. Mr. Prewitt has been in the education field for over twenty years, and has served as a principal, assistant principal, and curriculum director before becoming superintendent in July 2014. Ferndale Public Schools educates over 3,000 students each year and operates an early childcare center, two elementary schools, an intermediate school, a middle school, two high schools, one alternative education program, and one adult education school. In April 2016, the Ferndale Schools Board of Education unanimously agreed to support the proposed state guidelines for LGBT youth that would allow transgender and gender non-conforming students to use the facilities in accordance with their gender identity, citing their Strategic Plan grounded in the values of trust, respect, and inclusion.

Mary Doran is the former chair of the Saint Paul Public Schools (“SPPS”) Board of Education; her term-limited term ended December 31, 2015. She served on the Board of Education for four years, including the last two years as chair, during which she led the effort to craft, pass, and implement the SPPS Gender Inclusion Policy, which passed with unanimous support from Board of Education members in March 2015 and was implemented at the start of the 2015-16 academic year. SPPS is one of Minnesota’s largest school districts, with more than 39,000 students, over fifty-eight schools, and more than 5,300 full-time staff members, including over 3,100 teachers.

Washoe County School District (WCSD) is a public school district providing public education to students in Washoe County, Nevada, including the cities of Reno and Sparks, and the unincorporated communities of Verdi, Incline Village, and Gerlach. WCSD is the second-largest school district in Nevada with approximately 63,000 students enrolled in ninety-three schools. In February 2015, WCSD adopted Administrative Regulation 5161, which provides that transgender students shall have access to restrooms, locker rooms, and other use facilities that correspond to the gender identity expressed by the student and asserted at school.

James Morse, Sr., Ed.D., is the Superintendent of Schools for the Oyster River Cooperative School District, serving approximately 2,100 students across four schools in Durham, Lee, and Madbury, New Hampshire. Before serving as Superintendent for Oyster River, Dr. Morse served as the superintendent for the Portland School District—Maine’s largest school district. Dr. Morse has worked in public education for forty years, including thirty years as a superintendent, three years as an assistant superintendent, and seven years as a principal. In September 2015, Dr. Morse implemented the state’s first public school policy that defines the terms “gender identity,” “gender expression,” “transgender,” and “cisgender” and provides for a written plan related to privacy and gender identity disclosure. The policy also provides transgender students access to bathrooms and locker rooms in

accordance with their gender identity, and provides alternative, private facilities for all students should they choose to use them.

Thomas Smith, Ed.D., is the Superintendent of Schools at Hopewell Valley Regional School District, a comprehensive regional public school district serving approximately 4,000 students in preschool through twelfth grade from three communities in Mercer County, New Jersey. Dr. Smith has worked in the education field for over twenty years and has been Superintendent at Hopewell for over six years. Hopewell has provided transgender students access to facilities in accordance with their gender identity since at least 2009, and Dr. Smith has consulted with administrators throughout the state about Hopewell's experience with inclusive policies for transgender students.

John O'Reilly is the Principal of the Academy of Arts and Letters, Public School/Middle School 492 ("A&L") in Brooklyn, New York (part of the New York City Department of Education ("NYC DOE"), which serves 1.1 million students in over 1,800 schools). A&L educates students from kindergarten through the eighth grade, and adopted an inclusive policy for transgender students four years ago. After Mr. O'Reilly implemented A&L's policy, the NYC DOE issued similar guidelines requiring equal opportunity and access for transgender students.

Heidi Carter is the former chair of the Durham Public Schools Board of Education in Durham, North Carolina. She served as chair for the past four years,

and on the board for a total of twelve years until the end of her term in June 2016. Durham Public Schools is one of the ten-largest school districts in North Carolina, comprising over forty schools and educating approximately 33,500 students from pre-kindergarten through high school. It is one of the top-thirty school districts in the nation for employing National Board Certified Teachers, and two of its schools were included on *US News & World Report's* "Best High Schools" list in 2015. The Durham Public Schools Board of Education approved a resolution opposing H.B. 2, and in April 2016 revised its non-discrimination policy to prohibit discrimination based on gender identity.

Rudy Rudolph is a longtime administrator for the Portland Public Schools ("PPS") in Portland, Oregon, the largest school district in the state with eighty-five schools and approximately 49,000 students. Ms. Rudolph is currently a Project Manager for the Equity Department for PPS. She has spearheaded a group of administrators and allies in the district to facilitate the full inclusion of LGBTQ students, and continues to work closely with schools throughout PPS in supporting the inclusion and success of all students, including transgender students. Ms. Rudolph is also involved in the ongoing development, implementation, and improvement of support for transgender students, staff, and families.

Peyton Chapman has been the principal of the 1,700-student Lincoln High School in Portland, Oregon for ten years. She has also been a vice principal at

another high school, and taught grades 6-12 for eight years, in both high- and low-poverty schools. Ms. Chapman holds a Master's Degree in Teaching and a *Juris Doctor* degree. She has worked closely with School Psychologist Jim Hanson to expand Lincoln's community-based "Health Action Network" stakeholder group, implement gender equity professional development for staff, coaches and parents, and to empower student voices through diversity clubs such as Lincoln's Queer Straight Alliance. Ms. Chapman has been interviewed by the Associated Press and a local NBC television affiliate regarding her experience with policies that support transgender students.

Rachel Santa, Ed.D., is the Director of Special Education for the Cumberland, Rhode Island School District, which serves approximately 4,500 students. Dr. Santa has worked in special education since 1990 and has over twelve years of experience in school administration and providing services for students in the public school setting. The Rhode Island Interscholastic League policies provide transgender students access to bathrooms and locker rooms and participation in team sports in accordance with their gender identity. Dr. Santa was an integral part of Cumberland School District's unanimous passage of an official district-wide policy this year that gives all students an opportunity to use alternative facilities should they feel uncomfortable using a gender-designated facility for any reason. Dr. Santa works in collaboration with school committees in

developing policies, processes and procedures that support the equitable education of all students.

Lindsey Pollock, Ed.D., is the Principal of a Montessori magnet school in Houston, Texas that serves approximately 760 students from pre-kindergarten through eighth grade. She has served as principal of her school since July 2008. In 2014, Dr. Pollock provided an interview to the cable news outlet CNN regarding her school's policy supporting transgender students. *6 Ways to Embrace Gender Differences at School* (Oct. 3, 2014), available at <http://www.cnn.com/2014/10/03/living/children-gender-inclusive-schools/> (last visited Jan. 26, 2017).

Brian Schaffer is the Principal of Lamoille Union High School in Hyde Park, Vermont. Mr. Schaffer has sixteen years of experience as an educator and school administrator, including nine years as Principal. He was selected as the 2016 Vermont Principal of the Year by the National Association of Secondary School Principals and as the 2015 Outstanding Educator of the Year by Outright Vermont.

Lisa Love is the Manager of Health Education for Seattle Public Schools ("SPS"), a school district which educates approximately 53,000 students in ninety-seven schools. Ms. Love's position with SPS includes providing technical assistance to families and staff seeking support for LGBT students, training staff

on LGBT issues, and developing district policies and procedures. Ms. Love has been in the field of education for almost twenty years, and directed the efforts that led to SPS's adoption in 2012 of a formal superintendent procedure that respects students' gender identity.

Bryan Davis, Ph.D., is Superintendent of Shorewood School District, which serves approximately 2,000 students in Shorewood, Wisconsin. Dr. Davis has eighteen years of experience in the education field, including six years as a superintendent and eight years as a principal. **Paru Shah, Ph.D.**, is President of Shorewood's Board of Education. Dr. Shah has been a school board member since January 2014 and an associate professor at the University of Wisconsin-Milwaukee since September 2011. In February 2014, the Shorewood School Board approved Policy 411- Equal Educational Opportunities as well as Guideline 411- Nondiscrimination Related to Students Who Are Transgender and Students Nonconforming to Gender Role Stereotypes. In May 2016, the U.S. Department of Education cited the Shorewood School District in a report highlighting school districts across the nation that are at the forefront of emerging policies and practices for supporting transgender students.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G) and Circuit Rule 29, I, Kyle A. Palazzolo, an attorney, certify that this brief has been prepared using Times New Roman style, with 14 point font, have complied with the above-referenced rule, and that according to the word processor used to prepare this brief, Microsoft Word, this brief contains 5,291 words, excluding the items identified in Federal Rule 32(f), and therefore complies with Circuit Rule 29.

Dated: January 30, 2017

/s/ Kyle A. Palazzolo

Kyle A. Palazzolo

CERTIFICATE OF SERVICE

I hereby certify that, on January 30, 2017, I filed the foregoing AMICI CURIAE BRIEF OF SCHOOL ADMINISTRATORS FROM TWENTY-ONE STATES AND THE DISTRICT OF COLUMBIA IN SUPPORT OF PLAINTIFF-APPELLEE with the Clerk of the Court using the CM/ECF system, which, per the Court's Electronic Case Filing Procedures, constitutes service on all counsel of record.

/s/ Kyle A. Palazzolo

Kyle A. Palazzolo

Counsel for *Amici Curiae*

School Administrators