UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 24-1509

AMBER LAVIGNE

Plaintiff – Appellant,

v.

GREAT SALT BAY COMMUNITY SCHOOL BOARD, SAMUEL ROY, in his official capacity as a social worker at the Great Salt Bay Community School; KIM SCHAFF, in her official capacity as the Principal at the Great Salt Bay Community School; LYNSEY JOHNSTON, in her official capacity as the Superintendent of Schools for Central Lincoln County School System; JESSICA BERK, in her official capacity as a social worker at the Great Salt Bay Community School,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

BRIEF OF APPELLEES

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INTRODUCTION

Plaintiff-Appellant Amber Lavigne alleges that school personnel in the Great Salt Bay Community School District ("GSB" or the "District") did not inform her about her child, A.B.'s, decision to use a new name, different pronouns, and a chest binder. Lavigne does not argue, nor did she argue below, that her claimed constitutional harm was caused by school officials' alleged acts of referring to A.B. by A.B.'s preferred pronouns or by the social worker providing A.B. with a chest binder; rather, Lavigne argues that her constitutional harm was the "active concealment" of these alleged actions, Blue Br. 25.

Lavigne seeks only municipal liability against the District pursuant to *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978), and she started this case with a "nebulous" theory as to what District policy she sought to challenge as the "moving force" behind her claimed constitutional harm, Add. 46 (Order on Motion to Dismiss, ECF No. 26 ("Order") at 10). Although she attached to her complaint the GSB Community School Transgender Student Guidelines Policy Code JB, that policy specifically provides for parental involvement in addressing the needs of transgender students. Lavigne thus argues instead that an unwritten "withholding policy" is the source of her claimed constitutional harm, theorizing that there is some unwritten, supplemental policy that permits the "active concealment" of "affirmative

actions" taken by school officials that may "affect the mental health or physical wellbeing" of her child. Blue Br. 7, 12-18, 25.

Lavigne's mere suspicion of a District policy that permits or requires school officials to "actively conceal" information of this kind from parents does not, however, meet the pleading standard set out in *Iqbal* and reiterated by this Court. *See Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009); *Frith v. Whole Foods Mkt., Inc.,* 38 F.4th 263, 275-76 (1st Cir. 2022). As the district court concluded, Lavigne's complaint alleges "at most . . . one occasion where a School employee actively withheld information from a parent: when the social worker 'told A.B. that he was not going to tell A.B.'s parents about the chest binder, and A.B. need not do so either." Add. 51. This "at most" singular instance of active concealment is insufficient to state a cognizable claim against the District under 42 U.S.C. § 1983, and Lavigne's attempts to rely on a School Board statement, issued well after she alleges that she obtained the information to which she asserts a constitutional right to receive, cannot remedy that insufficiency. This Court should therefore affirm the decision of the district court because Lavigne cannot state a claim upon which relief can be granted.

STATEMENT OF THE ISSUES

1. Whether the district court properly concluded that Lavigne failed to plausibly plead that the District had adopted an unconstitutional, unwritten custom.

2. Whether the district court properly concluded that Lavigne failed to plausibly plead that ratification by a final policymaker was the moving force behind Lavigne's alleged constitutional harm.

STATEMENT OF THE CASE

I. The Factual Allegations

The Great Salt Bay Community School has adopted Transgender Student Guidelines Policy Code JB ("Guidelines") that are intended to (1) "foster a learning environment that is safe, and free from discrimination, harassment and bullying," and (2) "assist in the educational and social integration of transgender students in our school." App. 037 (Complaint Ex. 6 at 1).

In furtherance of these goals, the Guidelines establish a procedure by which the District will address needs raised by the transgender student, their parent(s)/guardians(s), or both. That procedure requires involvement by both the student and their parent(s)/guardian(s). Thus, the process begins with contact by the student and/or their parent(s)/guardian(s) to a building administrator or guidance counselor, followed by the scheduling of a meeting to discuss the student's circumstances and needs. App. 038 (Complaint Ex. 6 at 2). Although the Guidelines leave open the possibility that any number of people who may be helpful will attend this meeting, they require the following participants: (1) a building administrator; (2) the student; and (3) the student's parent(s)/guardian(s). *Id.* Following that meeting, the Guidelines provide for a plan that "should be developed by the school

in consultation with the student, parent(s)/guardian(s) and others as appropriate." *Id*. In other words, as Lavigne now appears to recognize, the Guidelines specifically provide for parental involvement, rather than parental exclusion, in development of a plan for transgender students.

The Guidelines also provide that they are "not intended to anticipate every possible situation that may occur . . . . Administrators and school staff are expected to consider the needs of students on a case-by-case basis, and to utilize [the Guidelines] and other available resources as appropriate." App. 037 (Complaint Ex. 6 at 1).

Lavigne's minor child ("A.B.") attended the Great Salt Bay Community School. App. 013 ¶ 16. Lavigne alleges that A.B. received counseling from Defendant Samuel Roy, a social worker at Great Salt Bay. App. 010 ¶ 6. Under Maine law, a "school social worker may not be required . . . to divulge or release information gathered during a counseling relation with a client . . . . A counseling relation and the information resulting from it shall be kept confidential consistent with the professional obligations of the counselor or social worker." 20-A M.R.S. § 4008.

Lavigne alleges in the Complaint that in December 2022 she found a chest binder while she was cleaning A.B.'s room and that she was told by A.B. that it had been given to A.B. by Roy. App. 013 ¶ 20. Lavigne alleges, based on "information

and belief," that Roy told A.B. that "he was not going to tell A.B.'s parents about the chest binder, and A.B. need not do so either." App. 014 ¶ 22.

Lavigne further alleges that it was around this time that she learned that, at A.B.'s request, some School officials were referring to A.B. by a name other than A.B.'s birth name and with pronouns that were not consistent with A.B.'s birth sex.[1] App. 014-15 ¶¶ 26, 28. There is no allegation in the Complaint concerning how long the District knew about this information before Lavigne discovered it from A.B., and there is likewise no allegation that Lavigne ever asked the School for any of the information that she alleges the School intentionally concealed from her.

On December 5, 2022, Lavigne met with the School Principal, Defendant Kim Schaff, and the Superintendent, Defendant Lynsey Johnston, each of whom Lavigne alleges expressed sympathy and concern that Lavigne was unaware of the information she discovered. App. 016 ¶¶ 32-33. Lavigne alleges that Superintendent Johnston thereafter informed Lavigne that there had been no policy violation. App. 016 ¶ 34.

On December 12, 2022, shortly after Lavigne made her alleged discoveries, Lavigne withdrew A.B. from the Great Salt Bay Community School. App. 016 ¶ 36.

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[1] Contrary to Lavigne's repeated contention in her opening brief, the District did not admit that this information was withheld from Lavigne. It admitted only that that is what Lavigne alleged. *See* ECF Doc. 13, PageID #: 80 (Answer ¶ 33) ("Defendants admit that Plaintiff alleges the material set forth in paragraph 33 of the Complaint").

Then, on December 14, 2022, Lavigne addressed the school board about what she claimed happened. App. 017 ¶ 38.

Thereafter, the Board issued two separate statements, one on December 19, 2022 and the other on January 14, 2023, after the school had received several bomb threats. App. 017 ¶¶ 40-41; App. 034-35 (Complaint Exs. 3-4). The first statement does not reference the District's transgender policies at all. Rather, the GSB Board Chair referenced the District's policies for making complaints and reaffirmed the District's policy of including parents in these matters, saying "[t]he Board and administrators remain committed to working in partnership with parents, staff, and local law enforcement to ensure that all students and staff continue to have access to a safe educational and working environment." App. 034 (Complaint Ex. 3). In the January 14, 2023 statement, after discussing the bomb threats and rumors in the community, the Board wrote:

> Federal and state law both provide certain rights for parents and students with respect to education. While parents generally have a right to access the educational records of their children, the Board must balance this right with the right of students in Maine who, regardless of age, have the right to access mental health services without parental consent (*22 MRSA Section 1502 – Consent of Minors for Health Services*), and the right to establish their own confidential counseling relationship with a school based mental health services provider (*20-A MRSA § 4008 – Privileged Communications*). All of the Board's policies comply with Maine law, and neither the Board nor school administration are aware of any violation of policy or law which requires further action at this time.

> Our Board is united in our support of students, families, staff, and administration and remains committed to upholding the laws of the State of Maine.

App. 034 (Complaint Ex. 4). Contrary to the allegation in the Complaint, App. 018 ¶ 42, and Lavigne's arguments in her brief, Blue Br. 19-20, the School Board's January 14, 2023 statement said nothing at all about the giving of chest binders or the alleged failure to inform Lavigne of information of any kind.

Finally, on February 26, 2023, Principal Schaff wrote a letter to the GSB school community in which, among other things, she referenced Maine state law that provides confidentiality to school social workers for information received in the context of counseling and outlined steps the school was taking to address ongoing hate speech and threats directed to the School and its staff. App. 036 (Complaint Ex. 5).

II. The District Court Dismissed Lavigne's Complaint for Failure to State a Claim

The district court began its analysis of Lavigne's claims by acknowledging that in order to establish municipal liability for her claim under 42 U.S.C. § 1983 Lavigne must show both that her harm was caused by a constitutional violation and that the municipality is responsible for that violation. Add. 44 (Order at 8). The court went on to explain:

> I first consider the second issue: whether the Complaint adequately pleads facts that could plausibly support municipal liability under section 1983. Concluding that it does not, I need not, and therefore do

> not, address the separate question of whether any of the alleged constitutional violations are adequately pled.

Add. 44 (Order at 8).

The district court looked first at whether Lavigne had plausibly pled municipal liability under a policy or custom theory. Characterizing the policy or custom Lavigne purported to challenge as "somewhat nebulous," Add. 46 (Order at 10), the court began its discussion by pointing out what Lavigne had confirmed in her brief: that Lavigne was not challenging the GSB Board's official policy but rather an unwritten policy that Lavigne called the "Withholding Policy," *see* Plaintiff's Opposition to Defendants' Motion to Dismiss, ECF No. 16 at 8 ("[T]he Guidelines are not the policy Plaintiff challenges.").

The district court then painstakingly reviewed the allegations in the Complaint, separating the numerous conclusory statements from factual allegations and ultimately concluding that, aside from the single incident Lavigne claims occurred with respect to her child, no facts were alleged to support a reasonable inference that the District maintains an unwritten custom or practice of withholding information that is "so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice.'" App. 16 (Order at 16) (quoting *Baez v. Town of Brookline*, 44 F. 4th 79, 82 (1st Cir. 2005)).

The district court next examined and rejected Lavigne's ratification theory for municipal liability, determining that the School Board's January statement "that neither it nor school administrators were aware of a violation of policy or law—without identifying any particular decision or decisions of a subordinate—does not, without more, plausibly show that the School Board 'actively approved' of 'a subordinate's decision and the basis for it.'" Add. 55 (Order at 19). The court also addressed Lavigne's reliance on the fact, not alleged in the Complaint, that Roy's second-year probationary contract was eventually renewed, explaining that, even if that fact were properly alleged, "it would not—in isolation or taken together with the other facts alleged—support a reasonable inference that the School Board affirmatively endorsed the particular conduct that Lavigne challenges." Add. 54 (Order at 18 n.10).

Because Lavigne failed to plausibly allege a basis for municipal liability, the district court entered an Order dismissing Lavigne's complaint. Having already dismissed the individual defendants against whom Lavigne sought no individual liability, Add. 36, the Court thereafter entered judgment for the District.

SUMMARY OF THE ARGUMENT

Lavigne's complaint alleges that she discovered from her child, rather than from the school, that, at her child's request, some school officials were referring to her child by different pronouns and that her child had received a chest binder from a

school social worker, who informed her child that the child was not required to tell Lavigne about it. Assuming Lavigne's allegations that school officials never communicated such information to her are true, Lavigne nevertheless cannot state a cognizable Section 1983 municipal liability claim against the District for the alleged violation of her due process rights. It is not enough for Lavigne "merely to identify conduct properly attributable to the municipality," *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404 (1997), and, even at the pleading stage, she must allege facts from which it is reasonably inferable that the District had an "official policy or custom" that was the moving force of her constitutional injury, which she argues here was the school's alleged "active concealment" of information.

Absent an actual written policy requiring or even permitting such concealment or "withholding," the district court properly concluded that Lavigne's at most singular allegation of the social worker's "active withholding" failed to plausibly allege a municipal policy or custom that is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." Lavigne's ever-evolving attempts to somehow turn this singular instance into an official policy of the District overlook "obvious alternative explanations" for any alleged withholding, *see Frith*, 38 F.4th at 275-76, including the fact that communications between school social workers and students are protected under Maine law, *see* 20-A M.R.S. § 4008.

Having failed to allege a municipal custom or policy, Lavigne cannot salvage her municipal liability claim under a "post hoc ratification" theory either. The School Board statement that Lavigne advances as "ratification" did not constitute active approval, nor could it possibly have been the cause of Lavigne's constitutional injury when the statement was made well after Lavigne removed her child from school after having learned the information to which she claims she was constitutionally entitled to receive.

In the absence of any facts establishing an official policy or custom of "withholding," Lavigne has failed to plead a basis for municipal liability, and the district court's decision should be affirmed without the need to address the constitutional issues raised by Lavigne and her supporting amici.

ARGUMENT

I. Standard of Review

Rule 8 of the Federal Rules of Civil Procedure "does not empower [the plaintiff] to plead the bare elements of [her] cause of action, affix the label 'general allegation,' and expect [her] complaint to survive a motion to dismiss." *Iqbal*, 556 U.S. at 687 (disregarding allegations in a complaint that simply repeat the legal standard against which the complaint is measured); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (explaining that a plaintiff must assert "more than labels and conclusions"). "A plaintiff is not entitled to 'proceed perforce' by virtue of

allegations that merely parrot the elements of the cause of action." *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011). This Court therefore employs a "two-pronged approach" when assessing the sufficiency of the Complaint. First, it identifies and disregards "statements in the complaint that merely offer legal conclusions couched as fact or threadbare recitals of the elements of a cause of action." *Ocasio-Hernandez*, 640 F.3d at 12 (quotation marks and alterations omitted). It is only after disregarding such conclusory assertions that this Court will "accept as true all well-pleaded facts set forth in a plaintiff's complaint." *Burt v. Bd. of Trustees of Univ. of Rhode Island*, 84 F.4th 42, 50 (1st Cir. 2023).

In so doing, this Court reviews *de novo* the granting of a motion to dismiss under Rule 12(b)(6), and it "may affirm an order of dismissal on any ground made manifest by the record." *Id*. Although this Court will "draw all reasonable inferences in [Plaintiff's] favor," the Complaint "must nonetheless contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id*. (quotation marks omitted). This standard demands that the "[f]actual allegations . . . be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "[A] formulaic recitation of the elements of a cause of action will not do." *Id.*; *see, e.g.*, *Gianfrancesco v. Town of Wrentham*, 712 F.3d 634, 639-40 (1st Cir. 2013) (dismissing Section 1983 claims when they consisted of "assertions

nominally cast in factual terms but so general and conclusory as to amount merely to an assertion that unspecified facts exist to conform to the legal blueprint").

Furthermore, the plausibility standard is met only if a complaint includes factual allegations that point in the direction of unlawful conduct and away from lawful, obvious, alternative explanations. *Frith,* 38 F.4th at 275-76 (affirming dismissal of a complaint where "[c]ommon sense" suggested an alternative explanation and plaintiffs "did not plead[] any factual allegations pointing . . . away from the 'obvious alternative explanation'"); *Twombly*, 550 U.S. at 567-68; *see also Foisie v. Worcester Polytechnic Inst*., 967 F.3d 27, 52 (1st Cir. 2020) ("[T]he plausibility standard is not satisfied when allegations of misconduct are equally consistent with some innocent explanation.").

The district court properly entered an order of dismissal because Lavigne's complaint does not meet this plausibility standard. *See Alston v. Spiegel*, 988 F.3d 564, 571 (1st Cir. 2021) ("If the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, dismissal is proper.").

II. Lavigne Fails to State a Cognizable Claim Against the District Under 42 U.S.C. § 1983 Because There are No Well-Pled Facts that Plausibly Support Municipal Liability

It is black letter law that "a municipality cannot be held liable under [42 U.S.C.] § 1983 on a *respondeat superior* theory . . . . Instead, it is when execution

of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 691-94. A plaintiff bringing a Section 1983 claim against a municipality therefore must demonstrate that, "through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." *Bryan Cnty.*, 520 U.S. at 404 (emphasis in original). "[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality." *Id*.

"[M]unicipal liability principles apply to school boards and public education units in Maine," Add. 48, and Lavigne does not dispute her burden to establish an official municipal policy in order to state a claim against the GSB District. On appeal, Lavigne argues, despite the district court's conclusion to the contrary, that she has alleged municipal liability on two bases: (A) an unwritten, secret, "official" policy, custom, or practice that authorizes school officials to conceal or withhold from parents information that affects a child's mental health or physical wellbeing Blue Br. 12-18; and (B) ratification of that so-called withholding policy, Blue Br. 19-22.[2]

[2] Although Lavigne argued below that she had adequately pled municipal liability on the basis of a failure to train, she does not now advance that theory in her opening brief and it is therefore waived. *See, e.g.*, *United States v. Mayendia-Blanco*, 905 F.3d 26, 32 (1st Cir. 2018) ("[I]t is a well-settled principle that arguments not raised by a party in [her] opening brief are waived.").

The district court properly concluded that Lavigne failed to state a claim for institutional liability under either of these theories.

A. The district court properly concluded that Lavigne did not allege a "well-settled" or "widespread" custom or practice of withholding information from parents.

"[A] § 1983 action brought against a municipality pursuant to *Monell* is proper only where the plaintiff pleads sufficient facts to indicate the existence of an official municipal policy or custom condoning the alleged constitutional violation." *Ouellette v. Beaupre*, 977 F.3d 127, 140 (1st Cir. 2020); *see also Abdisamad v. City of Lewiston*, 960 F.3d 56, 60-61 (1st Cir. 2020) (dismissing municipal liability claim where complaint did not allege facts showing that the defendants' actions were consistent with a policy or custom).

Although Lavigne repeatedly casts her argument in terms of the District having an "official" policy of "withholding," Blue Br. 12-13, Lavigne argues that the so-called withholding policy is unwritten, and she points to no actual policy in support of its existence, *cf. Monell*, 436 U.S. at 661 (Department's "official" policy of compelling pregnant employees to take unpaid leave was the moving force behind the constitutional injury). Thus, for her claim to survive, Lavigne must establish an "official policy or custom" only by virtue of a municipal practice that is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Abdisamad*, 960 F.3d at 60 (explaining that unwritten policies will only give rise to

municipal liability where they are "permanent and well settled"); *see also Welch v. Ciampa*, 542 F.3d 927, 942 (1st Cir. 2008) ("[L]iability may not be imposed on a municipality for a single instance of misconduct by an official lacking final policymaking authority."). Lavigne has not done so.

i. Lavigne's unsupported assertions of an unwritten "official policy" or "widespread custom" must be disregarded as conclusory.

Lavigne's complaint is rife with legal conclusions and general allegations that are "couched as fact," *see Ocasio-Hernandez*, 640 F.3d at 12, in an attempt to plead an unwritten municipal policy or custom that is unsupported by sufficient factual allegations, *see* App. 009-10 ¶¶ 3-4 (asserting that Defendants "intentionally concealed" the fact that Lavigne's child was given a chest binder and was being referred to by different pronouns "pursuant to [an] official policy, pattern, and practice"); App. 015 ¶ 29 (stating that there is a "blanket policy, pattern, and practice of withholding and concealing information respecting 'gender-affirming' treatment of minor children from their parents"); App. 022 ¶ 65 (stating that an "official policy and widespread custom of making decisions for students without informing or consulting with their parents established an environment in which giving A.B. a chest binder and instructing A.B. on how to use [it] . . . was not only allowed but considered standard practice"); App. 023-25 ¶ 72-73, 75-76, 80-81 (stating that the School Board has an "official policy" or "widespread custom of making decisions

about students with respect to issues that directly affect the mental health of physical well-being of a child without parental notice or consent").

Such conclusory assertions as to the existence of a "blanket policy," "official policy," or "widespread custom" of withholding information from parents must be disregarded, *see, e.g.*, *Ocasio-Hernandez*, 640 F.3d at 12, and they were therefore properly disregarded by the district court, *see* Add. 48, 51-52.

This Court should also disregard Lavigne's assertions of a policy or custom based only on Lavigne's seemingly inexplicable "information and belief" that such a policy exists. *See* App. 013, 015 ¶¶ 21, 27, 29 (stating that "Plaintiff is informed and believes, and on that basis alleges, that [the withholding of information from her] was the result of the Great Salt Bay School's blanket policy, pattern, and practice of intentional withholding and concealment of such information from all parents"). "Information and belief does not mean pure speculation," and, where a plaintiff asserts a general statement based on second-hand "information and belief," the plaintiff must nonetheless include the specific facts known in support of that general statement. *See Menard v. CSX Transp., Inc.*, 698 F.3d 40, 44 & n.5 (1st Cir. 2012). Here, for example, Lavigne could assert how she was informed or who informed her that it was pursuant to a policy that she was not told about the chest binder or her

child's request to be referred to by a different name; however, she has not done so.[3] Accordingly, Lavigne's assertions of a policy or custom based only on the unexplained contention that she was "informed and believes" as much amount to no more than conclusory legal assertions that must be disregarded.

[3] Lavigne never moved the district court to authorize limited discovery and her arguments to that effect should be deemed waived. Moreover, Lavigne does not need discovery to adequately allege a widespread pattern or practice, and the case law relied upon by Lavigne and her amici to advance this procedural proposition is significantly distinct. *See Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49, 55-56 (1st Cir. 2013); *Garcia-Catalan v. United States*, 734 F.3d 100, 103 (1st Cir. 2013); *Menard v. CSX Transp., Inc.*, 698 F.3d 40, 45 (1st Cir. 2012). In *Rodriguez-Reyes*, this Court determined that the discriminatory motive in a political discrimination case did not have to be pled with specificity when the defendants' knowledge of plaintiff's affiliations with opposing political parties was *inferable from other allegations in the complaint*. 711 F.3d at 55-56. Likewise, in *Garcia-Catalan*, a landowner's actual or constructive knowledge of a dangerous condition need not have been pled with precision when *other allegations in the complaint supported a plausible inference* of such knowledge. 734 F.3d at 103. Here, however, there are no allegations in the complaint that support a plausible inference of a pattern or practice of "withholding" that is "so well-settled" and "widespread." If a widespread pattern or practice was inferable from one single incident, the *Monell* standard would be meaningless at the pleading stage and *Monell* "custom or practice" cases would constitute a niche class of cases to which *Iqbal* incongruously does not apply. Further distinguishable is *Menard*, wherein the personal injury plaintiff was allowed some discovery when he physically lacked precise recollection of the events relevant to the complaint due to his injury. *Menard*, 698 F.3d at 45. Here, conversely, nothing stops Lavigne from asserting the bases of how she was informed of a "withholding policy." The information needed by the plaintiff in *Menard* was also, by contrast, not at all hypothetical: the plaintiff in *Menard* alleged that he was physically struck by a train and he sought limited discovery regarding whether employees, who were near the train, saw his injury occur. Here, the very source of the harm that Lavigne wants to assert—the existence of an intentional "withholding policy"—is precisely what she argues that she should be allowed to discover. *Iqbal* simply does not allow such a searching mission, and to allow as much would be the epitome of a slippery slope.

ii. The district court properly concluded that Lavigne failed to allege non-conclusory allegations from which it is reasonably inferable that the School Board did nothing to end a widespread practice of actively withholding information from parents.

After disregarding the myriad conclusory assertions of an "official policy" or "widespread custom," the well-pled facts in the Complaint fail to assert allegations from which it is reasonably inferable that such a "withholding" policy or custom exists.

To allege an actionable municipal policy, Lavigne must allege facts from which it is reasonably inferable that there exists a custom or practice of withholding information from parents that is "so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice." *Bordonaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989); *see Monell*, 436 U.S. at 691 (explaining that an informal practice must be "so permanent and well settled as to constitute a 'custom or usage' with the force of law.").

The allegations in the Complaint do not come close to clearing this hurdle. As an initial matter, Lavigne draws a distinction between school officials' failure to inform and their active concealment of information. *See, e.g.*, Blue Br. 25-26 (explaining that she does not claim "a right to be informed about how her child is navigating matters related to gender identity"). Yet all that Lavigne alleges is that for some unspecified period of time GSB did not affirmatively notify her of

information she claims she needed to have. This passive conduct does not rise to the level of withholding or concealing information.

In any event, even if this Court were to agree with the district court that the singular allegation regarding the social worker—that the social worker "told A.B. that he was not going to tell A.B.'s parents about the chest binder, and A.B. need not do so either,'" Add. 51 (quoting App. 014 ¶ 22)—sufficiently alleges active withholding of information, Lavigne's claim must fail because, as the district court concluded, such an isolated incident does not support "a reasonable inference that the challenged conduct related to A.B. was in keeping with a custom or practice of withholding information" that is so well-settled and widespread such that it can be said that the School Board was aware of a policy of withholding information and yet did nothing to end that practice. Add. 51-52. In fact, as the district court concluded, this singular incident of potential "active withholding" was insufficient to allege a widespread practice of the same even when taken together with other allegations in the Complaint, such as the fact that Lavigne learned from her child, rather than school officials, that her child had requested to be referred to by a different name and pronouns.

The district court's conclusion that these allegations are insufficient is well supported by case law. *See Abdisamad*, 960 F.3d at 60-61 (dismissing municipal liability claim where complaint alleged that the deprivation was a result of "failure

to follow . . . protocols" and did not allege facts showing that the defendants' actions were consistent with a policy or custom); *see also Thomas v. Neenah Joint Sch. Dist.*, 74 F.4th 521, 524-25 (7th Cir. 2023) (dismissing *Monell* claim because the complaint's "allegations of two isolated incidents fail to plausibly allege that the [School] District has a widespread practice of using excessive force to punish students with behavioral disabilities"); *Saved Magazine v. Spokane Police Dep't*, 19 F.4th 1193, 1201 (9th Cir. 2021) (dismissing claim, based on municipal liability, because the allegations in the complaint "amount[ed] to no more than an isolated or sporadic incident that cannot form the basis of *Monell* liability for an improper custom" and plaintiff's reliance on inference, conjecture, and speculation showed that the challenged municipal practice was of insufficient "duration, frequency, and consistency" (alterations and quotations omitted)); *Walker v. Prince George's Cnty.*, 575 F.3d 426, 431 (4th Cir. 2009) (dismissing municipal liability claim that alleged only the mere possibility of misconduct where plaintiff alleged that a policy could be "inferred" or "presumed" from one officer's common practice).

In her opening brief, Lavigne does not even attempt to argue that these isolated incidents of so-called "withholding" amount to a pattern or practice of intentionally concealing from parents information regarding actions taken by the District with respect to their child's mental health or physical well-being. Instead, Lavigne relies on three statements made by school officials and the renewal of Sam Roy's second-

year probationary contract as sufficient evidence of the policy, and she further argues that the written Transgender Guidelines in fact establish a "de facto policy of withholding" because they require parent participation and yet she was not informed of information related to her child's gender identity. Blue Br. 12-18. None of these arguments cure what is lacking in the Complaint to establish a well-settled custom or practice of withholding information that parents are allegedly entitled to receive under the Constitution.

First, the statements by the Superintendent, School Board, and Principal do not establish facts from which it can be inferred that there is a "well-settled practice" of withholding information from parents.[4] To start, Lavigne did not argue below that any of these statements demonstrate a "pattern or practice" of intentionally withholding information from parents, and this Court therefore need not address this argument now for the first time on appeal. *See, e.g.*, *Saunders v. Town of Hull*, 874

[4] Specifically, Lavigne argues that the following three statements somehow allege a practice of withholding from parents information about school decisions that affect the mental health and physical wellbeing of her child: the Superintendent's alleged December explanation to Lavigne that no policies were violated; the School Board's January 14, 2023 statement in which it addressed recent bomb threats and stated that it was not aware of any policy violation that required further action at the time; and the February 26, 2023 statement of Principal Schaff regarding the safety of the school community. Blue Br. 13-16.

F.3d 324, 331 (1st Cir. 2017) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal.").[5]

In any event, Lavigne's reliance on these statements by school officials is flawed. Lavigne argues that "if no policy was violated by Sam Roy's actions or those of other GSB employees, the logical conclusion is that these actions *were* the policy." Blue Br. 14 (emphasis in original). As a practical matter, this is simply not true: the fact that an employee's conduct does not *violate* a school policy does not mean that such conduct *is* the policy or practice of the District, let alone a policy or practice so well-settled that it can be considered adopted by the policymaker. In fact, Lavigne overlooks any number of "obvious, alternative explanations," such as that contrary to what Lavigne was claiming, she already had the allegedly withheld information, *see, e.g.*, ECF Doc. 13, Page ID: 79 (Answer ¶ 28), or they were taking into consideration confidentiality laws applicable to a school social worker's communications, *see* 20-A M.R.S. § 4008, or that Lavigne simply learned the information in question from her child before the school was able to work out a plan to assist the student in discussing these issues with the parent. *See Frith,* 38 F.4th at

[5] Lavigne instead argued below that the Superintendent's alleged explanation that no policy was violated constituted ratification by a final policymaker. She does not advance this theory on appeal, nor does she argue that the district court erred in determining that she failed to plead facts that suggest that the Superintendent is a final policy-maker. These arguments, which are not raised in Lavigne's opening brief, are therefore waived. *See, e.g.*, *Mayendia-Blanco*, 905 F.3d at 32.

275-76 (determining that allegations did not meet the plausibility standard where there were obvious, alternative explanations).

For the same reasons, Lavigne's argument that the Transgender Guidelines somehow support her suspicion of a supplemental "withholding policy" because they require parent participation and yet she was not informed of the allegedly withheld information, *see* Blue Br. 17-18, fairs no better in establishing a widespread practice or custom, *see Abdisamad*, 960 F.3d at 60 (unwritten policies only give rise to municipal liability where they are "permanent and well settled"). This argument, too, overlooks the same "obvious, alternative explanations." Moreover, Lavigne cannot establish municipal liability by pointing to a *violation* of a policy; instead, she must allege facts from which it can be inferred that a *policy* itself was the moving force behind her alleged injury. *See, e.g.*, *Monell*, 436 U.S. at 694 ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents.").

Further, Lavigne's argument that the January statement of the Board was made in specific reference to the challenged withholding of information related to A.B. is both speculative and unsupported by the statement itself, which Lavigne attaches to the Complaint. That statement makes no reference at all to the challenged actions related to A.B. or the alleged withholding of information from Lavigne. *See* App. 35-36, Complaint Ex. 4. Yet Lavigne alleges, contrary to the Board's actual

statement, that the Board's January "Statement *specifically asserted*, with respect to the giving of a chest binder, the using of a new name and different pronouns, and without informing Plaintiff of these decisions, that 'neither the Board nor school administration are aware of any violation of policy or law which requires further action at this time.'" App. 18 at ¶ 42 (emphasis supplied). This Court should reject Lavigne's attempt to turn this statement into something that it simply is not. *See Yacubian v. United States*, 750 F.3d 100, 108 (1st Cir. 2014) ("[W]hen a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations.").

Second, the fact that Sam Roy was granted a second-year probationary contract likewise fails to fill the void of factual allegations in support of Lavigne's pattern or practice theory. As the district court recognized, *see* Add. 54 at n.10, this allegation is not contained in the Complaint. And although Lavigne now argues for the first time on appeal that such an allegation outside the complaint can be considered at this stage as an "official public record," Blue Br. 6 n.3, there is nothing cited in Lavigne's briefing either here or below that indicates that the School Board endorsed the conduct that Lavigne challenges, *see* ECF No. 16 at 16 n.9; Blue Br. 6 n.3.[6] Nor does the fact that Roy's contract was renewed do anything to establish a

[6] In fact, Lavigne provides only citations to the Board's renewal of Sam Roy's second-year probationary contract, none of which lead to discernible documents and instead lead to error messages. *See* ECF No. 16 at 16 n.9; Blue Br. 6 n.3. This Court

"pattern or practice" of withholding from parents information of any kind. This argument, too, is nonsensical: a school board can renew an employee's probationary contract without adopting as School Board policy every single act done by that school employee.

Lavigne's empty arguments in support of a "custom or practice" confirm that ultimately she relies only on her allegation that she "believes, and on that basis alleges, that [the School] withheld and concealed" from her the alleged information "pursuant to a blanket policy, pattern, and practice of withholding and concealing information respecting 'gender affirming' treatment of minor children." App. 15 at ¶ 29. As the district court agreed, *see* Add. 51, such an assertion is insufficient to state a claim because it is "nominally cast in factual terms but so general and conclusory as to amount merely to an assertion that unspecified facts exist to conform to the legal blueprint." *Gianfrancesco*, 712 F.3d at 639-40.

This Court should therefore reject Lavigne's attempt to create an unwritten municipal policy based on a "pattern or practice" where she has unequivocally failed to allege any widespread pattern or practice. *See Abdisamad*, 960 F.3d at 60-61; *see also Blair v. Appomattox Cnty. Sch. Bd.*, No. 6-23-cv-47, 2024 WL 3165312, at *2-3, *10 n.9 (W.D. Va. June 25, 2024) (dismissing plaintiff-parent's due process claim

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should therefore reject Lavigne's attempt to have these citations considered as "official public records."

against a school board for failure to plead municipal liability when plaintiff could not plead a "widespread custom" of withholding information about students' gender identity despite plaintiff alleging that she was not informed that her child was identifying by different pronouns at school and had been permitted by school officials to use a school bathroom for the opposite sex).

B. The district court properly concluded that Lavigne did not allege well-pled facts from which it can be inferred that a final policymaker ratified any alleged "withholding."

"A plaintiff can establish the existence of an official policy by showing that the alleged constitutional injury was caused . . . by a person with final policymaking authority." *Welch*, 542 F.3d at 941. Generally, "[t]he fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-82 (1986). But if an "authorized policymaker[] approve[s] a subordinate's decision *and* the basis for it, their ratification would be chargeable to the municipality because their decision is final." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (emphasis supplied). There are, however, limiting principles on this so-called ratification doctrine. First, "simply going along with discretionary decisions made by one's subordinates . . . is not a delegation to them of the authority to make policy." *Praprotnik*, 485 U.S. at 130. Second, "the mere failure to investigate the basis of a subordinate's

discretionary decisions does not amount to a delegation of policymaking authority." *Id*. Indeed, *Praprotnik* "draws a line between passive and active approval." *Saunders*, 874 F.3d at 330.

Moreover, this "final policymaker" theory for *Monell* liability does not relieve Lavigne of her burden to establish that the course of action taken by *the final policymaker* was the "moving force" or cause of her harm. *Pembaur*, 475 U.S. at 483; *see also Monell*, 436 U.S. at 694 (requiring that the "official policy" itself must "inflict[]" the alleged injury in order for the municipality to be liable); *Welch*, 542 F.3d at 941 (explaining that the final policymaker must cause the constitutional injury).

For example, in *Pembaur*, the isolated unlawful action was an illegal entry, and the final decisionmaker's course of action was the moving force behind such constitutional harm where that decisionmaker ordered deputies to enter the plaintiff's medical clinic in violation of the plaintiff's Fourth Amendment right. *Id*. at 484-85; *see also Harrington v. Almy*, 977 F.2d 37, 45–46 (1st Cir. 1992) (city manager's single course of action could have been the moving force behind alleged violation where the city manager was the final decisionmaker regarding employment and also the one who required the psychological testing as an unconstitutional condition of employment). Similarly, in the analogous context of "post hoc" ratification, the Fourth Circuit held that a School Board's approval of a student's

suspension could be the moving force behind the student's alleged First Amendment harm when the pro se plaintiff-student alleged that he appealed his suspension to the Board and that the suspension remained on his permanent record as a result of the Board's approval of the suspension. *Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, 28 F.4th 529, 532, 535 (4th Cir. 2022); *see also Brown v. City of Lynchburg*, No. 6:23-cv-00054, 2024 WL 2724191, at *9 n.7 (W.D. Va. May 28, 2024) ("In *Starbuck*, reversing the school board's decision would work to remove the injury done to the student plaintiff.").

On appeal, Lavigne argues for only two bases of "ratification:" (i) the Board's January 14, 2023 statement that it was "not aware of any violation of policy or law which requires further action at this time" and (ii) the fact, not alleged in her Complaint, that the Board gave Roy a second-year probationary contract. Blue Br. 19-21.

Yet Lavigne's "post hoc ratification" theory fails because the Complaint does not allege any facts from which it can be reasonably inferred that the Board, through its January statement or its eventual approval of a probationary contract for Sam Roy, "actively approved" of school officials' alleged withholding of information from Lavigne. *Praprotnik*, 485 U.S. at 127; *see Saunders*, 874 F.3d at 330 (observing that *Praprotnik* draws a line between passive and active approval).

As the district court pointed out in reaching this very conclusion, Add. 55, the Board's written statement does not identify any particular decision or decisions of a subordinate, let alone the basis for those decisions, *cf. Starbuck v. Williamsburg James City Cnty. Sch. Bd.*, 28 F.4th 529, 532, 535 (4th Cir. 2022) (school board could have ratified school officials' suspension of student when the student alleged in his *pro se* complaint that he had submitted a written notice of appeal to the school board and the board not only deemed the suspension proper but also provided a specific reason for the suspension). Nor does the School Board's approval of the second-year probationary contract in any way "support a reasonable inference that the School Board affirmatively endorsed the particular conduct that Lavigne challenges." Add 54 n.10. Again, a Board's renewal of an employee's probationary contract does not constitute its approval, as policy, of every action ever taken by that employee.

Even assuming that the Board's statement was in reference to the so-called "withholding" alleged by Lavigne, the portion of the Board's statement on which Lavigne relies for her ratification theory does not constitute approval of anything at all; rather, it simply states that "the Board nor school administration are aware of any violation of policy or law *which requires further action at this time*." App. 035, (Complaint Ex. 4) (emphasis supplied). Although Lavigne's preferred meaning for this statement is that it signaled the Board's complete agreement with Lavigne's

version of the facts and furthermore its conclusion that such facts were completely consistent with policy and law, Lavigne fails to include allegations in her complaint that point away from a number of other possible readings of the same statement. *See Frith,* 38 F.4th at 275-76 (affirming dismissal of a complaint where plaintiff "did not plead[] any factual allegations pointing . . . away from the obvious alternative explanation").

For example, the Board's statement could be read to mean that it already imposed discipline, that it was still investigating, or that it had investigated and found that Lavigne's version of the facts are false. Lavigne's unsupported allegation that the Board's January statement constitutes a "*post hoc* ratification" in reference to the information allegedly withheld from her, *see* App. 18 at ¶¶ 42-43, thus alleges only, at most, the Board's failure to investigate the decisions of subordinates, which is insufficient to state a claim for municipal liability, *Praprotnik,* 485 U.S. at 130.

Moreover, in addition to her failure to allege active approval by the Board, Lavigne's ratification theory separately fails because, even if there were post hoc ratification, that ratification did not cause her alleged constitutional injury. Indeed, unlike in *Pembaur*, *Harrington*, or *Starbuck*, Lavigne does not allege any facts from which it can be inferred that either the School Board's January 14, 2023 statement or its decision to give Roy a second-year probationary contract were the "moving

force" behind her alleged constitutional injury. *Cf. Pembaur*, 475 U.S. at 483; *Harrington*, 977 F.2d at 45-46; *Starbuck*, 28 F.4th at 535.

The Board's written statement, which primarily addresses the School's response to bomb threats, *see* App. 35, was issued at least six weeks *after* Lavigne alleges that she learned about the purported information that was allegedly withheld from her. In fact, by the time the Board made its January statement that it was aware of no policy violation that *required further action at this time*, *see* App. 35, Lavigne had all of the information that was allegedly unknown to her; she alleges that she had by then met with the Principal and the Superintendent about this very information; and she had already withdrawn A.B. from Great Salt Bay, choosing to homeschool A.B. instead, App. 016 ¶¶ 32-33, 35.

Thus, even assuming again Lavigne's unsupported argument that the Board's statement somehow constituted a response to her specific grievances, the Board's after-the-fact statement did not cause the alleged constitutional harm to Lavigne and therefore cannot be the basis for a final policymaker theory of municipal liability. *See Burgess v. Fischer*, 735 F.3d 462, 470-71, 479 (6th Cir. 2013) (sheriff's after-the-fact approval of an investigation into the alleged use of excessive force could not establish a single-act-theory of Monell liability because the Sheriff's approval was not the moving force behind the alleged injury); *cf. Starbuck,* 28 F.4th at 535 (school board's approval of student's suspension resulted in the suspension remaining on the

student's permanent record). Nor did the Board's eventual decision to give Roy a second-year probationary contract in any way constitute the "moving force" behind the alleged "withholding" of information that Lavigne allegedly discovered in December 2022 and advances as the source of her constitutional harm. *Cf. Starbuck*, 28 F.4th at 535.

A recent Fourth Circuit case demonstrates well the way in which Lavigne's "*post hoc* ratification" theory fails. *See Franklin v. City of Charlotte*, 64 F.4th 519, 527-28, 536-37 (4th Cir. 2023). In *Franklin*, the plaintiff sought municipal liability for alleged excessive force under a ratification theory based on the city manager's conclusion, after an investigation, that a police shooting was justified. Confirming that *Praprotnik* did not eliminate the requirement that the municipal policy must cause the alleged constitutional injury, the court explained that the city manager's approval of the use of force did not fit the ratification theory:

> There is a key distinction between this case and those in which a city policymaker may be liable for ratifying an action. A city employee who suffers an adverse employment action that is later ratified by a city policymaker may trace his or her injury back to that ratification. Repealing the ratification potentially could restore the employee back to the pre-injury status quo. But unlike in *Praprotnik*, [the alleged excessive force here] is not traceable to a subordinate's decision that may be approved as final by a city policymaker.

Id. Like the use of force in *Franklin*, the alleged intentional withholding of information from Lavigne sometime prior to December 2, 2022 "is not traceable to a subordinate's decision" that was approved by a final policymaker. Lavigne has

therefore failed to state a claim against the District based on a "post hoc ratification" theory for institutional liability.

C. Lavigne's failure to plead a basis for municipal liability is dispositive of her claim under 42 U.S.C. § 1983.

Having concluded that Lavigne failed to sufficiently plead a basis for the District's municipal liability, the district court was not required to address whether Lavigne sufficiently alleged a violation of her due process rights. *See, e.g.*, *Abdisamad*, 960 F.3d at 60-61 (dismissing a section 1983 claim against the municipality, without considering whether the complaint sufficiently alleged a constitutional violation, after determining that the complaint failed to plausibly allege a policy or custom); *Thomas*, 74 F.4th at 524 (agreeing that a *Monell* claim against a school district "unravel[ed] at its second step" because plaintiff failed to plead a widespread practice); *Saved Magazine*, 19 F.4th at 1201 (affirming dismissal of *Monell* claim because "even assuming" a constitutional violation, the complaint did not plausibly allege a policy, custom, or practice).

If, as the district court concluded, Lavigne has failed to plead an adequate basis of municipal liability, she has no cognizable claim under section 1983 against the District, regardless of whether she suffered a constitutional injury. *See Masso-Torrellas v. Municipality of Toa Alta*, 845 F.3d 461, 469 (1st Cir. 2017) (affirming dismissal of a Section 1983 claim against a municipality when there were no facts alleged to satisfy *Monell* such that there was no cognizable Section 1983 claim). An

analysis of the alleged constitutional deprivation would have been improper under the well-settled principle of constitutional avoidance: courts are instructed not to "pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Because Lavigne fails to plausibly plead any basis for municipal liability, this Court can affirm the district court's order of dismissal on that singular basis. *See* Add. 58 n.13 (explaining that both substantive and procedural due process claims are subject to municipal liability concepts).

III. This Court Should Not Reach the Merits of Lavigne's Underlying Constitutional Claims

An emerging consensus of case law is unequivocally clear that schools do not have an affirmative duty to inform parents of information concerning their child's gender identity. *See Regino v. Staley*, No. 2:23-cv-00032, 2023 WL 4464845, at *3-4 (E.D. Cal. July 11, 2023) (concluding that the United States Constitution does not create an affirmative duty to inform parents of their child's transgender identity); *John and Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 622 F. Supp. 3d 118, 130 (D. Md. 2022), *vacated and remanded on other grounds*, 78 F.4th 622 (4th Cir. 2023) (determining that parents' constitutional rights do not encompass "a fundamental right to be promptly informed of their child's gender identity, when it differs from that usually associated with their sex assigned at birth"); *Vesely v. Ill.*

Sch. Dist. 45, 669 F.Supp.3d 706, 713-14 (N.D. Ill. 2023) (concluding that a school policy of affirming a minor student's gender identity without parental consent did not implicate a parent's fundamental right to parent, a conclusion that was confirmed, in part, by the mother and father's conflicting views on the school policy); *Doe v. Del. Valley Reg'l High Sch.*, No. 24-00107, 2024 WL 706797, at *6-8, *11-12 (D. N.J. Feb. 21, 2024) (unpublished) (finding it unlikely that state actors have a constitutional obligation either to refrain, absent parent consent, from recognizing students by their preferred gender identity or to notify parents about such a request); *Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Tr.*, 680 F.Supp.3d 1250, 1278 (D. Wy. 2023) (finding it unlikely that school officials have a constitutional obligation to actively disclose to parents information about their child's gender identity and opining that a parents' constitutional rights are implicated only to the extent that school personnel are required either to "refuse to disclose" or to "provide materially misleading or false information" to parents)*; see also Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980) (no deprivation of parents' liberty interests when parents were not notified of child's voluntary participation in county-operated birth control clinic because children have a right to privacy and the state has an interest in the welfare of its inhabitants).

Further, the so-called "withholding" of such information has been deemed to fall below the level of conscience-shocking behavior that would otherwise violate

substantive due process. *See Littlejohn v. Sch. Bd. of Leon Cnty. Fla.*, 647 F.Supp.3d 1271, 1282 (N.D. Fla. 2022), *appeal docketed*, No. 23-10385 (11th Cir. April 12, 2023) (dismissing parents' substantive due process claim when allegations that school staff met with child regarding child's preferred name and pronouns and "wrongfully concealed" that information from parents did not establish conscience-shocking conduct); *Foote v. Town of Ludlow*, No. 22-30041, 2022 WL 18356421, at *8 (D. Mass. Dec. 14, 2022), *appeal docketed*, No. 23-1069 (1st Cir. Jan. 17, 2023) (concluding that school officials' decision to withhold from parents information about their child's request to use different preferred pronouns was not conscience-shocking).[7]

This Court should not, however, reach the similar constitutional questions presented in this appeal.[8] Lavigne's pleading and arguments regarding the nature of

[7] In her opening brief, Lavigne makes a half-hearted attempt to argue that the conscience-shocking standard does not apply. Blue Br. 29-30. In the face of a written policy that requires parental involvement and not a single fact that plausibly pleads that the Board itself adopted a secret withholding policy, there can be no serious contention that Lavigne is, in fact, challenging an executive act.

[8] If this Court were to determine, contrary to the district court's conclusion, that Lavigne has plausibly alleged municipal liability, it should remand this case for the district court to consider in the first instance whether Lavigne has plausibly alleged an underlying constitutional violation. "It is a general rule . . . that a federal appellate court does not consider an issue not passed upon below," and that is particularly true where the parties "did not fully brief those issues on appeal." *U.S. ex rel. Est. of Cunningham v. Millenium Laboratories of Cal., Inc.*, 713 F.3d 662, 676 (1st Cir. 2013) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). Moreover, and to the extent it is even implicated by the constitutional right that Lavigne asserts, the right to be informed about how one's child is navigating matters related to gender identity

her claimed constitutional right are imprecise, unclear, and inadequately briefed.[9] Lavigne has failed to plead or argue the contours of what she believes to be the District's alleged "withholding policy." She further *disclaims*, on the one hand, her "right to be informed about how her child is navigating matters related to gender identity," Blue Br. 25-26, but *claims*, on the other hand, that her constitutional injury is a result of having not been informed of circumstances in which her child voluntarily engaged with school officials regarding issues related to gender identity. Until Lavigne adequately articulates what she claims she is entitled to under the Due Process Clause, the District cannot address, nor can this Court decide, the nuanced

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is the very question currently under advisement by this Court in *Foote v. Town of Ludlow*, No. 22-30041, 2022 WL 18356421 (D. Mass. Dec. 14, 2022), *appeal docketed*, No. 23-1069 (1st Cir. Jan. 17, 2023). Remanding this case, rather than deciding such issues on parallel but separate tracks, is in the interest of both judicial efficiency and the development of case law.

[9] The precise contours of the "withholding" that Lavigne alleges constitute a violation of her rights has shifted repeatedly. In her complaint, Lavigne alleges that information respecting "gender-affirming" treatment of minor children is the type of information that, when intentionally withheld, violates her due process right. App. 012 ¶ 11. Yet in her Opposition to Defendants' Motion to Dismiss, she referred to the type of withheld information even more broadly as "information about actions that school officials are taking with respect to a child's development and education." ECF No. 16 at 7. On that very same page of her Opposition, she once again changed course, referring to the withheld information that causes her constitutional harm as information about "affirmative steps the school is taking with respect to a child's psychosexual development." *Id*. In yet another characterization she referred to such withheld information broadly again as that which concerns "decisions and actions taken regarding vital and intimate issues." *Id*. at 10. On appeal, Lavigne has changed her theory yet again, asserting that the type of information that, when withheld, causes her harm is that which concerns decisions that "affect the mental health and physical wellbeing of her child." Blue Br. 25.

issues of constitutional significance raised by Lavigne's broad-sweeping allegation of "withholding."

CONCLUSION

The district court properly determined that Plaintiff-Appellant Amber Lavigne failed to state a claim upon which relief can be granted because she alleges no basis for municipal liability and therefore has no cognizable claim under 42 U.S.C. § 1983 against the District. The Great Salt Bay Community School District therefore respectfully requests that this Court affirm the district court's Order dismissing the Complaint.

Dated: August 9, 2024

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,627 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using serifs in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2024, I electronically filed the Brief of Appellees with the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered as CM/ECF users and that service will be accomplished by Notice of Electronic filing by CM/ECF system.

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