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

SUPPLEMENTAL BRIEF OF APPELLEES

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STATUTES

Defendant–Appellee Great Salt Bay Community School Board ("GSB" or the "District") submits this supplemental brief in response to this Court's Order, dated February 21, 2025, directing supplemental briefing addressing the impact of *Foote v. Ludlow Sch. Comm.* – F.4th – , 2025 WL 520578 (1st Cir. Feb. 18, 2025) on the disposition of this case. As an initial matter, the *Foote* decision need have no impact on this case because, as explained in the District Court's decision and in GSB's principal brief, the Complaint should be dismissed because Lavigne failed to allege a basis for municipal liability under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

If, however, this Court decides to move past the *Monell* issue and focus on the merits of the Plaintiff's claims, the *Foote* decision is dispositive. In this case, as in *Foote*, Appellant Amber Lavigne alleges injury of her constitutional right to due process as a result of having not been informed of circumstances in which her child, A.B., voluntarily engaged with school officials regarding issues related to gender identity.[1] Like the parents in *Foote*, Lavigne claims that such passive conduct of a public school—here, GSB—implicated her fundamental right to direct the care, custody, and upbringing of her child. *See Foote,* 2025 WL 520578, at *8-9 (citing *Troxel v. Granville*, 530 U.S. 57; *Meyer v. Nebraska*, 262 U.S. 390; and *Pierce v.*

[1] Specifically, A.B. decided to use a new name, different pronouns, and a chest binder, which Lavigne alleges is a non-medical device "used to flatten a female's chest so as to appear male," App. 013-14 ¶¶ 20, 24.

Soc. Of Sisters, 268 U.S. 510, to explain that the fundamental right at issue is the parent's right to direct the care, custody, and upbringing of one's children); Blue Br. 26-27 (asserting Lavigne's rights under *Troxel*, *Meyer*, and *Pierce*). Lavigne's allegations do not plausibly allege any restriction of this fundamental right.

I. Lavigne's Constitutional Grievances Fail to State a Claim

This Court is "not bound by the district court's reasoning" and can affirm "on any ground made manifest by the record." *Foote,* 2025 WL 520578, at *5 (quoting *Burt v. Bd. of Trs. of Univ. of R.I.*, 84 F.4th 42, 50 (1st Cir. 2023)). GSB argued in its Motion to Dismiss that "substantive due process is not implicated by Plaintiff's assertion of rights" and that "Plaintiff cannot satisfy her burden to demonstrate that the alleged government infringement is not rationally related to a legitimate government purpose." ECF No. 12 at PageID #: 13-17. This Court's decision in *Foote* makes that conclusion unequivocally clear, and this Court can affirm the dismissal of the Complaint on this alternative basis: any "withholding" policy plausibly alleged by Lavigne is rationally related to GSB's legitimate government interest in fostering a productive learning environment that is safe, and free from discrimination, harassment and bullying.

A. Lavigne Challenges Only the So-Called "Withholding Policy"

Despite asserting in the Complaint three different counts for substantive due process violations and one additional count for a procedural due process violation

under the Fourteenth Amendment of the United States Constitution, Lavigne made clear in the trial court that all of her claims are based on her "right not to have information about decisions actively withheld by Defendants pursuant to the Withholding Policy," Pl.'s Opp. to Defs.' Mtn. to Dismiss (ECF No. 16) at PageID #: 94, and she did not argue otherwise in her Opening Brief to this Court.

Lavigne does not challenge, nor has she ever challenged, the individual acts of the school employees named in the Complaint. *See* App. 046 ("The Court: Do you agree that these individuals do not face individual liability in this action? Mr. Shelton: That is correct. These individuals do not face individual liability in this action."); Blue Br. 9-32 (making no argument as to claims against the individual employees or as to any error in their dismissal). Lavigne therefore does not argue on appeal, 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.

Nor has Lavigne ever challenged the Transgender Guidelines, attached to her Complaint, as the source of her alleged constitutional harm. *See*, *e.g.*, Pl.'s Opp. to Defs.' Mtn. to Dismiss (ECF No. 16) at Page ID #: 98 ("[T]he 'Guidelines' are not the Withholding Policy that Plaintiff complains of . . . . [T]hese 'Guidelines' are *supplements to* the Withholding Policy" (emphasis in original)). Rather, Lavigne challenges only the School Board's alleged violation of her right to substantive and

procedural due process resulting from a so-called "Withholding Policy" that Lavigne suspects is a supplemental, "official, if unwritten, policy." Blue Br. 9.

B. Even Assuming Lavigne's Suspicion of a "Withholding Policy," Lavigne Fails to State a Substantive Due Process Claim.

Unlike the school in *Foote*, GSB has never admitted that it has an unwritten policy of not sharing information about a student's gender identity with that student's parents, and the Transgender Guidelines attached to the Complaint plainly contradict such a contention. Although GSB contends that Lavigne failed to plausibly allege an unwritten policy or practice of "withholding," *see* Red Br. 13-35, such alleged non-disclosure—even assuming it is a GSB policy—fails to state a substantive due process violation pursuant to this Court's decision in *Foote*.

i. Any Plausibly Alleged "Withholding Policy" Does Not Implicate Lavigne's Fundamental Right to Parent.

This Court held in *Foote* that a school policy of "non-disclosure as to a student's gender expression without the student's consent" does not restrict a parent's fundamental right to direct the care, custody, and upbringing of their child. *Foote*, 2025 WL 520578, at *16. If Lavigne has plausibly alleged an unwritten withholding policy at all, she has alleged nothing more than the policy of non-disclosure embraced by the Town of Ludlow and characterized by this Court in *Foote* as one of "deference to the student." *Id.* at *12. As the basis for the "nebulous" withholding policy advanced by Lavigne, she merely alleges that, as to only her

child, the school did not immediately disclose to her that school officials were referring to A.B. by a name other than A.B.'s birth name and with pronouns inconsistent with A.B.'s birth sex and that, in the course of a confidential relationship with A.B., a school social worker told A.B. that he would not tell A.B.'s parents about the chest binder.[2] As in *Foote*, these allegations as to the mere non-disclosure of information related to a child's gender identity do not restrict Lavigne's fundamental right to parent. *Id.* at *12-15.

In fact, Lavigne acknowledged in her principal brief, consistent with this Court's holding in *Foote*, that she does not claim in this case "a right to be informed about how her child is navigating matters related to gender identity." Blue Br. 25. Instead, she argued that her fundamental right to parent was implicated only by "GSB's *policy of active concealment* regarding decisions it made and the actions it took that directly affect her child's mental health and physical wellbeing." *Id.* (emphasis in original). Yet the Complaint unequivocally fails to plausibly allege an official policy of "active concealment." *See Foote*, 2025 WL 520578, at *13 (rejecting the parents' theory of 'deliberate deception' based on the parents' general and unsupported allegations that educators were directed to 'intentionally misinform and lie' to the parents). First, Lavigne does not allege that she ever requested

[2] Lavigne does not challenge the social worker's alleged action of providing a chest binder to her child, nor does she allege or argue that the school had an official policy of doing so.

information about her child's gender identity such that information could have been "actively concealed" from her to begin with.

Second, the social worker's alleged notice to A.B., in the course of a confidential relationship—that he would not disclose information to A.B.'s parents and that A.B. need not do so either—merely alleges the social worker's explanation of non-disclosure; it does not allege "active concealment" to the point of government action that constitutes a restraint on parental rights. *See Anspach ex rel. Anspach v. City of Phila., Dep't of Pub. Health*, 503 F.3d 256, 261-62 (3d Cir. 2007) (holding that a clinic's provision of emergency contraception medication to a minor, without encouraging the minor to consult with her parents, did not infringe on parental rights because it did not "compel[] interference in the parent-child relationship" and the minor's decision to use emergency contraception was voluntary); *see also Foote*, 2025 WL 520578, at *13-14 (discussing *Anspach* to explain that government action that "merely instructs" the non-disclosure of information does not infringe on parental rights).

Lavigne does not allege that the social worker, or anyone, *required* A.B. to engage in the counseling relationship, to wear a chest binder, or to withhold information from Lavigne. *See Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980) (county-operated clinic's distribution of contraceptives to minors without parental consent did not violate parental rights when the clinic never required the minors to

use its services nor did its distribution of contraceptives prevent parents from participating in their children's decisions); *see also Foote*, 2025 WL 520578, at *14 (citing *Irwin* to explain that, under Supreme Court precedent, an infringement on parental rights occurs when the state is requiring or prohibiting some activity).

Third, the existence of a confidential relationship between the social worker and A.B. pursuant to 20-A M.R.S. § 4008 implicates A.B.'s countervailing right to privacy and to health services, which further underscores the way in which the social worker's mere alleged explanation of non-disclosure to A.B. did not constitute "active concealment" of information from Lavigne. *See Anspach*, 503 F.3d at 262 (reasoning that any imposition of "a constitutional obligation on state actors to contact parents of a minor or to encourage minors to contact their parents" would "undermine the minor's right to privacy and exceed the scope of the familial liberty interest"); *see also* 22 M.R.S. § 1502 (providing minors with the right to consent to treatment for health services, including those for emotional problems).

Fourth, even if it is considered "active withholding" of information, the allegation regarding the social worker's notice to A.B. of non-disclosure is "at most . . . one occasion where a School employee actively withheld information from a

parent," which is insufficient to allege an official municipal policy under *Monell* against the District.[3] Add. 51.

Lavigne has therefore failed to allege anything more than the mere non-disclosure of information to her; thus, any plausibly alleged policy or practice of so-called "withholding" goes no farther than the government action at issue in *Foote*. And, as was also true in *Foote*, Lavigne remains free, "[o]utside school," to "obtain information about [A.B.'s] relationship to gender in many ways," *Foote,* 2025 WL 520578, at *14; in fact, Lavigne did just that when she learned the purportedly "withheld" information about her child's gender identity upon inquiry of her child after Lavigne discovered the chest binder in her child's room, App. 013 ¶ 20. Lavigne also remained free "to strive to mold [her] child according to [her] own beliefs," *Foote*, 2025 WL 520578, at *14, which is exactly what she did when she removed A.B. from the District and decided to homeschool A.B. instead, App. 016 ¶ 35. Lavigne concedes that the Supreme Court cases on parental rights "do not entitle [parents] to dictate the internal operating procedures of public schools;" Blue Br. 26-27; yet that is all that Lavigne's claims seek to do.

ii. Lavigne Cannot Satisfy Constitutional Scrutiny

[3] Lavigne alleges that the social worker informed A.B. of these facts based only on "information and belief," which this Court need not credit.

Because Lavigne alleges, if at all, an official policy of mere non-disclosure of information about her child's gender identity, Lavigne's fundamental right to parent is not implicated and this Court presumes "the challenged conduct is valid so long as it is rationally related to a legitimate state interest." *Foote,* 2025 WL 520578, at 15. In *Foote*, the school's non-disclosure policy was rationally related to the school's interest in "cultivating a safe, inclusive, and educationally conducive environment for students," *Id.* at *16. "State actors have a compelling interest in protecting the physical and psychological well-being of minors," and that "interest is at its apex when a school board seeks to protect children who are particularly vulnerable, such as transgender minors." *Id.* (citing *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989)).

As stated in the District's Transgender Guidelines, attached to the Complaint, the District has an interest in "foster[ing] a learning environment that is safe, and free from discrimination, harassment and bullying." App. 037. The District is aware "that transgender and transitioning students may be at higher risk for being bullied or harassed." App. 040. Thus, like the Protocol in *Foote*, the District's Transgender Guidelines and any plausibly alleged unwritten, supplemental, non-disclosure policy "endeavor[] to remove psychological barriers for transgender students and equalize[] educational opportunities." *Foote*, 2025 WL 520578, at *16. The District also has an interest in respecting students' rights and complying with both federal and state

anti-discrimination laws.[4] Any alleged policy of non-disclosure about a student's gender identity therefore "bears a rational relationship to the legitimate objective of promoting a safe and inclusive environment for students," and "[r]ational basis review requires nothing more." *Id*.

Yet, here, there is even more: students have countervailing rights and interests that are significant, too. *See Foote*, 2025 WL 520578, at *15 n.22 (noting, for purposes of rational basis review, that there is also a "potential tension between the rights of the Parents and the rights of the Student"); *see also Parker v. Hurley*, 514 F.3d 87, 107 (1st Cir. 2008) ("Public schools often walk a tightrope between the many competing constitutional demands made by parents, students, teachers, and the schools' other constituents."). Students have a right to privacy; a right to be free from discrimination in education, including from discrimination on the basis of gender identity, 5 M.R.S. § 4061; a right to "attend public schools that are safe,

[4] Among these laws are the Equal Protection clauses of the Federal and Maine Constitutions, *see* U.S. Const. amend XIV, § 1; Me. Const. art I, § 6-A, Title IX of the Education Amendments of 1972, *see* 20 U.S.C. § 1681 (prohibiting bias on the basis of sex, sexual orientation, and gender identity), the Maine Human Rights Act, *see* 5 M.R.S. § 4601 (establishing the right to be free from discrimination in education, including from discrimination on the basis of gender identity), and the Maine Civil Rights Act, *see* 5 M.R.S. § 4684-A (prohibiting bias based on gender and sexual orientation); *see also Doe v. Regional Sch. Unit 26*, 2014 ME 11, 86 A.3d 600 (holding that a school was liable under the Maine Human Rights Act for discrimination against a transgender student based on the student's sexual orientation).

secure and peaceful environments," 20-A M.R.S. § 6554(1); a right to a confidential counseling relationship with a school counselor, 20-A M.R.S. § 4008; and a right to express themselves in school, 20-A M.R.S. § 6554(1).[5]

While the state interest here alone is enough to survive rational basis review, the students' countervailing rights even further swing the pendulum towards the constitutionality of any alleged non-disclosure policy.

C. Lavigne Failed to Plausibly Plead a Procedural Due Process Violation

Although *Foote* involved substantive due process, it is nonetheless also instructive on Lavigne's procedural due process claim pled in Count IV of the Complaint.

The procedural due process analysis proceeds in two steps. The first step "asks whether there exists a liberty or property interest which has been interfered with by the State." *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 886 (1st Cir. 2010). The second "examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Id*. In considering the second question, the balancing of three factors determines what process is due: (i) the private interest that will be affected by the official action; (ii) the risk of an erroneous deprivation of such

[5] Students' rights to expression are implicated here; indeed, Lavigne alleges that "gender identification" is a "vitally important and intimate psychological matter, central to an individual's personality and self-image, and a crucial element in how people relate to the world." App. 014 ¶ 25.

interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (iii) the Government's interest, including the function involved. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

A procedural due process claim fails at the first step if there has been no interference with a liberty or property interest to begin with. *See, e.g.*, *Perrier-Bilbo v. United States*, 954 F.3d 413, 434 (1st Cir. 2020) (explaining that it was "unnecessary to address whether any deprivation occurred without constitutionally adequate process" when no liberty or property interest was implicated).

That is the exact case here, where Lavigne has failed to allege any infringement on her asserted liberty interest. Just like her substantive due process claims, Lavigne's procedural due process claim against the District challenges only the purported unwritten "withholding policy." *See* Pl.'s Opp. to Defs.' Mtn. to Dismiss (ECF No. 16) at Page ID #: 92-94; App. 027 ¶ 91 (alleging that the "policy, pattern, and practice" of the GSB with respect to transgender students includes "no mechanism allowing a parent to participate in, or comment on" issues related to a student's gender identity).

For all of the reasons discussed above, *see* Argument I(B)(i), *supra*, any plausibly alleged official policy goes no farther than the non-disclosure policy in *Foote*. Such a policy is one of deference to the student's actions; it does not implement state action at all, let alone state action that would require procedural

safeguards.[6] *See Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 8 (1st Cir. 1986) (summarizing that Supreme Court precedent requires "rigorous procedural safeguards" when "the state seeks to change or affect the relationship of parent and child in furtherance of a legitimate state interest, such as in cases involving termination of parental rights, . . . determining paternity, . . . and deciding whether an unwed father may retain custody of his children after their mother's death."). Although the substantive due process analysis as to fundamental rights and liberties can be "more demanding," *Gonzalez-Fuentes*, 607 F.3d at 880 n.13, "[t]he [Supreme] Court has never held that governmental action that affects the parental relationship only incidentally . . . is susceptible to challenge for a violation of [procedural] due process," *Valdivieso Ortiz*, 807 F.2d at 8.

Lavigne simply has not alleged an infringement on her asserted liberty interest in directing the care, custody, and control of her child when she has not alleged that she requested the allegedly withheld information such that any information was actually withheld from her, nor can she allege that she had no other means to learn or discern such information. Lavigne furthermore remains free to remove her child from the District, as she ultimately did here. As this Court explained in *Foote*:

[6] Lavigne's contention that she was "deprived of any opportunity to be a part of the decision-making process for the specific actions" of school personnel "in response to her child's gender identity," App. 027 ¶ 92, assumes that school personnel were making decisions for her child. This assumption finds no support in Lavigne's allegations.

> [T]he [non-disclosure] Protocol operates only in the school setting, where – as we have explained – parents have less authority over decision-making concerning their children. Outside school, parents can obtain information about their children's relationship to gender in many ways, including communicating with their children and making meaningful observations of the universe of circumstances that influence their children's preferences, such as in clothing, extracurricular activities, movies, television, music, internet activity, and more.

Foote, 2025 WL 520578, at *14; *cf., e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (requiring procedural due process when the state sought to terminate parental rights). Lavigne's right to direct the care of her child is furthermore not absolute, and students have rights, too.

If process is due here at all, it is minimal and sufficient. "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss." *Santosky*, 455 U.S. at 758; *see also Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979) ("[T]he quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error."). Here, the School's interest remains "compelling," *Foote*, 2025 WL 520578, at *16, while the possibility of "grievous loss" is low when Lavigne is free to remedy any purported "loss" through acquiring information about her child's gender identity in myriad other ways, *see id.* at*14. Lavigne, like all members of the public, is afforded

a mechanism to comment on school policies through filing complaints or speaking at school board meetings, which she alleges she did here.[7]

This Court should therefore affirm the dismissal of the Complaint for either the same reasons as the district court or on the alternative bases that are now evident after this Court's decision in *Foote*.

Dated: March 7, 2025

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[7] The Transgender Guidelines also directly contradict Lavigne's allegation that the school has no mechanism for parental involvement regarding a child's gender identity. *See Yacubian v. United States*, 750 F.3d 100, 108 (1st Cir. 2014) ("It is a well-settled rule that when a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations."). Those Guidelines, which are public, provide for parental involvement and inform the reader of privacy considerations with respect to the student's plan.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation in this Court's February 21, 2025 Order, 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.

Dated: March 7, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2025, I electronically filed the forgoing document 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.

Dated: March 7, 2025

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