Case No. 24-1509

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMBER LAVIGNE,

Plaintiff-Appellant,

vs.

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.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the District of Maine
Case No. 2:23-cv-00158-JDL, Hon. Jon D. Levy, presiding

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Fed. R. App. P. 34(a), Appellants respectfully request that oral argument be permitted in this appeal because it would assist the Court in understanding and deciding the complex constitutional questions raised by this case.

INTRODUCTION

This appeal involves a challenge to a Maine school district's policy of making decisions or taking actions that affect the mental health or physical well-being of a child without informing the child's parents of those decisions or actions.

JURISDICTIONAL STATEMENT

This appeal is from the United States District Court for the District of Maine's final judgment dismissing the federal constitutional challenge to the Defendant Great Salt Bay School Board's ("School Board") policy of actively withholding information from parents about actions taken, or decisions made, by the School Board that directly affect the mental health and physical well-being of a child. Appellant filed this action pursuance to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201(a) and 2202. APP.012 ¶ 11. The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 42 U.S.C. § 1988. APP.012 ¶ 12. The District Court entered final judgement on May 3, 2024, the same day it announced its Decision and Order on the Defendant's Motion to Dismiss under Fed. R. Civ. P.

12(b)(6). Addendum at 59. Appellant filed a timely notice of appeal on May 20, 2024. APP.070. This Court's jurisdiction arises from 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Appellant has pleaded sufficient facts to lead to a reasonable inference that Appellee Great Salt Bay School Board has an official, though unwritten, policy, custom, practice, or pattern of allowing school officials to withhold and conceal from parents, information about decisions made and actions taken that directly affect the mental health or physical wellbeing of a child.

2. Whether Appellant has pleaded sufficient facts to lead to a reasonable inference that Appellee Great Salt Bay School Board has ratified the actions of subordinates who withheld and concealed from Appellant their decisions to give her child a chest binder and to affirm her child's transgender status at school.

3. Whether well-pleaded facts supporting *both* the ratification and policy theory for *Monell* liability should weigh in favor of finding plausibility of *Monell* liability sufficient to overcome a motion to dismiss.

4. Whether this Court should decide whether Appellant has pleaded sufficient facts to permit a reasonable inference that her fundamental right to direct the education and upbringing of her child has been violated and order the court below to deny the motion to dismiss.

STATEMENT OF THE CASE

I. Statement of relevant facts

Appellant was helping her 13-year-old child clean the child's room in preparation for a painting project in December 2022, when she discovered a chest-binder—an undergarment worn by biological females to compress their breasts to appear male. APP.013 ¶ 20. Surprised that her child had this undergarment, she asked her child where it came from. *Id*. The child informed her that Samuel Roy, a social worker at the Great Salt Bay Community School ("GSB") had given her the chest binder and instructed her how to use it in his office. *Id*.

During that conversation, Roy told Appellant's child that he was not going to tell Appellant about the chest binder and that she need not do so, either. APP.014 ¶ 22. Later, Appellant learned that Roy had given her child a second chest binder at that same time. *Id*. ¶ 23.[1] Appellant also learned around this time that school officials had been calling her child by a different name and pronouns that matched her child's gender identity rather than biological sex—again without ever informing Appellant. *Id*. ¶ 26.

Appellant, disturbed that a school social worker had given her child a chest-binder, immediately contacted school officials, including Principal Schaff and

[1] This Court must accept Appellant's well-pleaded facts as true, but Defendants admit in the answer they filed that Defendant Roy gave the chest binder to Appellant's child. Answer (Doc. 13) ¶¶ 23–24.

Superintendent Johnston, and set a meeting with them for December 5, 2022. APP.016 ¶ 32. Both initially expressed sympathy and concern that this information had been withheld and concealed from her—a fact Defendants admit.[2] *Id.* ¶ 33. But two days later, on December 7, Superintendent Johnston told Appellant that no school policy had been violated by the school officials who had both given her child the chest binder and withheld this information from her. *Id.* ¶ 34.

Shocked by this response, and no longer able to trust that a partnership existed between her and the school, Appellant removed her child from GSB on December 8, 2022. *Id.* ¶ 35.

Appellant felt compelled to share her story publicly to inform the community, especially parents, about the school's decision to withhold/conceal important information that any parent would want to know. She spoke at the public comment period of the December 14, 2022, School Board meeting. APP.017 ¶ 38. She explained that Appellees had violated her trust by making these decisions and taking these actions for her minor child without ever informing her or including her in the decision-making process. *Id.*

The Board offered no response to Appellant's comments at that time. *Id.* ¶ 39. But due to continued public interest, the Board issued a public statement addressing the controversy on December 19, 2020. APP.034. The statement

[2] Answer (Doc. 13) ¶ 33.

claimed that students have a "right to privacy" regardless of age, and chastised parties—presumably including Appellant—who had publicized the incident. *Id*.

Because the controversy was still brewing due to the Board's refusal to provide any adequate explanation or response, the Board released a second statement on January 14, 2023. APP.035. That statement called Appellant's story a "false narrative," even though the School Board later admitted many of Appellant's allegations in its Answer, including admitting that information was withheld and concealed from her. Answer (Doc. 13) ¶ 33.

The January 14 statement also asserted: "[a]ll 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." APP.035.

Then on February 26, 2023, Principal Schaff issued a statement in her capacity as the GSB Community School principal. She alleged that Appellant misunderstood the laws and policies pertaining to gender identity, effectively asserting that the school had followed its own official policies in all steps relating to the incident. APP.036.

Finally, Samuel Roy—the individual who (Appellees admitted) gave Appellant's minor child the chest binder—was granted a second-year probationary contract by a unanimous School Board vote on May 10, 2023.[3]

II. Procedural history

Appellant filed this federal constitutional challenge in April 2023. APP.009. Appellees filed their Motion to Dismiss and an Answer to the complaint on June 2, 2023. Doc. 12, 13. After oral argument on November 1, 2023, the District Court dismissed the individual defendants (sued in their official capacities) on November 7, 2023. Addendum at 36. Then on May 3, 2024, the Judge filed an order dismissing the case, an opinion explaining that order, and proceeded to enter a final judgment that same day with respect with the May 3 order and the November 7 order. Addendum at 37–59. Appellant filed a notice of Appeal on May 20, 2024. APP.070.

[3] https://tinyurl.com/4a3e3zu7. Appellant presented this information to the court below and it is contained within an official public record. On a motion to dismiss, the court may properly take into account four types of documents outside the complaint without converting the motion into one for summary judgment; these include documents of undisputed authenticity, and documents that are official public records. *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993).

SUMMARY OF THE ARGUMENT

Parents have a fundamental right to control and direct the education and upbringing of their children. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925). This is the oldest right to be recognized as "fundamental" and is included under the Fourteenth Amendment's protection for "liberty." *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

This case is not, as the School Board claimed below, and as the court below believed, about a purported right of parents to be kept "up to speed on how their children are navigating their sexual identity at school." Doc. 12 at 2; Addendum at 57. Rather, this case challenges the School Board's policy of withholding and/or allowing school officials to withhold information from parents and to conceal decisions those officials make and actions they take that directly affect the mental health and physical wellbeing of a child—including decisions to give a 13-year-old a chest binder, and to affirm that child as transgender by calling the child by a name and pronouns that match the child's asserted gender identity rather than biological identity. *See* APP.014 ¶ 22.

This policy—which is official, despite being unwritten—deprives Appellant of her fundamental constitutional rights. A parent cannot meaningfully exercise her "fundamental liberty interest" in directing the upbringing and education of her child if public schools allow school officials to withhold and conceal such

important information from parents. *Troxel*, 530 U.S. at 65. The decision to give Appellant's child a chest binder and recognize that child as transgender without even *informing* Appellant of these decisions and actions—and, indeed, encouraging the child to withhold that information from the parent—prevent Appellant from evaluating her child's educational and psychosocial development, and make decisions regarding the child's best interests.

Appellant does not contend that her constitutional right to control and direct the care, custody, and upbringing of her child extends to dictating a public school's internal operating procedures or curriculum. But it *does* entitle her to be free from the withholding and concealing of information—at least information about the actions school officials are taking that directly affect her child's mental and physical well-being. APP.014 ¶ 25; Answer (Doc. 13) ¶ 25. Appellant's ability to discharge her "high duty" to promote and protect the best interests of her child—including, where appropriate, sending her child to a different school—is fatally undermined by the School Board's policy of withholding and concealing information necessary for her to make such decisions. *Pierce*, 268 U.S. at 535.

Appellant has pleaded sufficient facts at this stage of litigation to permit a reasonable inference that the School Board has a policy that authorizes officials to withhold and conceal that information from parents. Appellant has alleged that the Superintendent—who is charged with knowing and enforcing the school's

policies—officially concluded that no policy was violated by either the giving of the chest binder or the concealing and withholding of information. The School Board released a statement confirming that it was aware of no violations of policy with respect to the incidents; the principal released a statement asserting that the entire situation was the result of *Appellant's* misunderstanding of school policies; and the School Board unanimously approved a second-year contact for Sam Roy—the social worker who gave Appellant's child a chest binder. All of these facts taken together lead to a reasonable inference that Appellant's constitutional harm resulted from a policy that was in fact the official policy at the time, or is now the official policy through ratification.

As Appellant has pleaded sufficient facts to show that the School Board violated her constitutional rights and that the violations resulted from an official, if unwritten, policy, this Court should reverse and remand with instructions to permit discovery.

ARGUMENT

I. Standard of review

Courts of Appeal review motions to dismiss for failure to state a claim de novo. *United States ex rel. Zotos v. Town of Hingham*, 98 F.4th 339, 343 (1st Cir. 2024). This Court must "accept as true all well-pleaded facts set forth in the complaint and construe all reasonable inferences therefrom to the pleader's

behoof." *Id*. A Plaintiff "need not demonstrate that she is likely to prevail, but her claim must suggest 'more than a sheer possibility that a defendant has acted unlawfully.'" *García-Catalán v. United States*, 734 F.3d 100, 102–03 (1st Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

II. Appellant has pleaded sufficient facts at this stage of litigation to permit a reasonable inference that the School Board had a policy of withholding and concealing information about decisions made and actions taken that directly affect the mental health and physical wellbeing of her child.

A. An individual can hold a governmental entity liable under Section 1983 if policies of the entity caused the constitutional harm.

An individual can bring a suit under 42 U.S.C. § 1983 to remedy the harm caused by a constitutional violation by a person acting under the color of state law. In *Monell v. Department of Social Services of New York*, the Supreme Court held that local governing bodies, like school boards, are included within the meaning of "persons," so an individual can sue a local governing body directly under Section 1983 for causing the injury. 436 U.S. 658, 690 (1978). The Court has gone on to define three avenues through which a litigant can prove the existence of a governmental policy sufficient to give rise to liability under Section 1983. Two of those avenues are relevant here.

One is if an "'action pursuant to official municipal policy' caused [the plaintiff's] injury." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (citation omitted). An official policy "includes the decisions of a government's lawmakers,

the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Id*. at 61. This also includes "deprivations visited pursuant to governmental 'custom' even though such a custom had not received formal approval through the body's official decision-making channels," *Monell*, 436 U.S. at 690–91—that is, *unwritten* policies, which include "usage[s]" and "practice[s]." *L.A. Cnty. v. Humphries*, 562 U.S. 29, 36 (2010).

The other relevant way to establish liability is by showing that the entity with policy-making authority—here the School Board—ratified the complained-of action or decision. *See, e.g.*, *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *Saunders v. Town of Hull*, 874 F.3d 324, 330 (1st Cir. 2017). Such ratification shows that an action was, in fact, the official policy of the entity whose subordinate took that action. To succeed on a ratification theory, a plaintiff must prove that the policy-making authority approved not just of the actions but also the basis for them. *Praprotnik*, 485 U.S. at 127. (At this stage of litigation, Appellant must plead facts that lead to a reasonable inference of such ratification.)

A Section 1983 suit for municipal liability will survive a motion to dismiss when a "plaintiff pleads sufficient facts to *indicate* the existence of an official municipal policy or custom condoning the alleged constitutional violations." *Ouellette v. Beaupre*, 977 F.3d 127, 140 (1st Cir. 2020) (emphasis added). Further, this Circuit has explained that because the "precise knowledge of the chain of

events leading to a constitutional violation may often by unavailable to a plaintiff at this early stage of litigation," courts must "draw on [their] 'judicial experience and common sense' as [they] make a contextual judgement about the sufficiency of the pleadings." *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 16 (1st Cir. 2011) (citation omitted).

Making a contextual judgement here, based on the facts in the Complaint, leads only to one conclusion: Appellant's constitutional injuries were the result of GSB's policy, custom, or practice—either through an official (though unwritten) policy or through ratification. Discovery is needed to prove which, but the facts when viewed holistically lead to the reasonable inference that the injury was caused either by the policy (or what is *now* the policy) which authorizes school officials to conceal and/or withhold information from parents about decisions made or actions taken that directly affect the mental health or physical wellbeing of a child—like giving a child a chest binder or affirming a child's transgender status.

B. Appellant has pleaded sufficient facts to lead to a reasonable inference that the School Board has an unwritten policy, custom, practice, or pattern of withholding and concealing vital information from parents.

The court below held that Appellant had not pleaded sufficient facts to permit a reasonable inference that her constitutional injuries resulted from an unwritten, but official, policy, pattern, custom, or practice of withholding / concealment. Under *Monell*, an unwritten policy or practice can lead to liability if

the policy is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." 436 U.S. at 691 (quoting *Adickes v. S.H. Kriss & Co.*, 398 U.S. 144, 167–68 (1970)); *see also Abdisamad v. City of Lewiston*, 960 F.3d 56, 60 (1st. Cir. 2020). Appellant has pleaded sufficient facts at this point to warrant a reasonable inference that the School Board has an unwritten policy or practice whereby school officials make decisions and take actions that directly affect the mental health and physical well-being of a child—like recognizing a child's transgender status—and while concealing and/or withholding that information from parents.

Appellant alleged in her Complaint that the Superintendent, after hearing her complaints on December 5, came back on December 7, and explained that no policies had been violated. APP.016 at ¶¶ 32. 34. The Superintendent was aware of the allegations—*and the School Board admitted in its Answer* (Doc. 13 at ¶ 33)—that information had been withheld and concealed from Appellant. The Superintendent is charged with enforcing the GSB's policies. APP.011 ¶ 9. Thus, it is reasonable to assume that the Superintendent was aware of the policies, both written and unwritten, of GSB. The fact that the Superintendent promptly concluded and announced that no policy had been violated shows that Appellant pleaded sufficient facts to show the existence of an official policy. And if Appellant is permitted to obtain discovery, she will prove that no policy was

violated by the withholding and concealing of information, because such withholding / concealment is, in fact, the official policy—and that following that policy was the direct cause of her constitutional injury.

Obviously 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. Yet the court below did not even consider this allegation. That was a reversible error.

The District Court was aware of the Superintendent's statement; Appellant pointed to it in her briefing. Opposition Brief (Doc. 16) at 17. But the District Court ignored that allegation in the discussion of whether Appellant had pleaded sufficient facts to establish an existing policy and raised the allegation only when considering ratification. Addendum at 54.

That is not the only fact pleaded by Appellant to establish the existence of an unwritten policy, either. Four other facts pleaded by Appellant also support a reasonable inference that the complained-of actions resulted from GSB's unwritten but official policy, pattern, practice, or custom.

First, the School Board released a statement on January 14, 2023, in response to public questions about its actions, which blamed Appellant for bomb threats made against the school (without any evidence to support this accusation), and stating: "[N]either the Board nor school administration are aware of any violation of policy or law which requires further action at this time." APP.035.

Indeed, the Board has taken no (public) action regarding the withholding / concealment. Its January 14, 2023, statement—taken together with the Superintendent's statement that no policy was violated by the giving of chest binders to Appellant's child, the concealment of that fact from Appellant, the encouragement of the child to withhold that fact from Appellant, or by school officials (specifically Sam Roy) employing a different name and pronouns with respect to Appellant's child, without informing Appellant—indicates once again that these actions were, in fact, official School Board policy.

Second, Kim Schaff, principal of GSB, issued a statement on February 26, 2023, which also addressed the publicity surrounding Appellant's accusations. APP.036. That statement declared: "A misunderstanding of these laws pertaining to gender identity and privileged communication between school social workers and minor clients has resulted in the school and staff members becoming targets for hate speech and on-going threats." *Id*. This belies the School Board's argument below that the concealment that the Appellant alleges would actually violate their guidelines. Reply (Doc. 17) 4–5 ("the official written policies require[s] participation of parents and prohibit[s] the keeping secrets from them.") APP.060 ll. 19–21 ("All they have is a policy that very clearly says parents are involved at every single step of the way.") The principal had over two months after the publication of the allegations to make this determination—and instead of saying

that the complained-of actions violated policy, she assured the school community that polices *had been followed*. This lends support to Appellant's allegations that withholding / concealing of information *is* GSB's policy.

Third, the School Board unanimously granted Sam Roy—the individual who gave Appellant's child a chest binder and *told the child not to inform Appellant*—a second-year probationary contract. *See* GSB School Board meeting, May 10, 2023.[4] The Board approved the renewal of Appellee Roy's contact at its May 10, 2023, meeting, a month after the filing of the instant Complaint.[5] If the School Board is correct and Appellant was *required* to be a part of any meeting discussing a gender support plan for her child, APP.060 ll. 19–21, and she was not included or even informed of the decision to give her child a chest binder, then why did the Board unanimously approve the renewal of a contract for an employee who broke that policy by giving a child an undergarment without parental involvement, and counseled the child to withhold this fact from the parent? After all, the Staff Conduct policy explicitly prohibits encouraging students to keep secrets, and the guidelines use mandatory "shall" language requiring punishment for violations of that policy. *See* APP.042–43. Yet not only was Roy apparently[6]

[4] *See supra*, note 3.
[5] *Id.*
[6] Again, this case comes before the Court prior to discovery, and the Court is required to assume Appellant's allegations to be true. If Appellee Roy has been

not punished, but his contract was renewed. The obvious explanation for GSB's choice to renew that contract is that Roy's actions were not only *not* contrary to GSB policy, but were consistent with the actual, *de facto* policy, notwithstanding GSB's *de jure* rules against keeping secrets.

Fourth, and finally, the written policies attached to the Complaint support Appellant's claim. The School Board argues that the Transgender Policy requires parental involvement. Reply (Doc. 17) 4–5 ("the official written policies require[s] participation of parents and prohibit[s] the keeping secrets from them.") APP.060 ll. 19–21("All they have is a policy that very clearly says parents are involved at every single step of the way."). The Conduct policy prohibits staff asking students to keep a secret. APP.042. Appellant alleged in her Complaint, and reaffirms those allegations here: that GSB did not involve her in the determination to give her child a chest binder or recognize her child's transgender status and that Roy encouraged her child to keep a secret from her. These allegations should amount to violations of the transgender policy, and the staff conduct policy. *See* Reply (Doc. 17) at 4–5 ("she must allege facts that support the existence of an official unwritten custom or policy that contradicts the terms of the official written policies requiring participation of parents and prohibiting the keeping secrets from them");APP.059

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subject to discipline, that would presumably be revealed by discovery to which Appellant is entitled.

ll. 1625, APP.060 l. 1 ("I presume became clear that when you read the policy in fact parents *have to* be involved" (emphasis added)). Yet, the School Board has not responded in a way that would have been excepted had such key policies been violated. On the contrary, the School Board's actions show that the Board actually follows a different policy—one that's unwritten, but no less official. That is the most reasonable explanation for the Appellee's actions.

The School Board admitted in its answer that Appellant had information concealed and withheld from her. Answer (Doc. 13) ¶ 34. Both the Superintendent and the School Board said no policy had been violated, and Roy was given a second-year probationary contract after this incident. A reasonable inference (to which Appellant is entitled at this stage of litigation) is that the actions were consistent with an unwritten school policy. *See* Opp'n (Doc. 16) at 16, n. 10; APP.067 AT 15–19.

Appellant has therefore successfully pleaded facts that permit a reasonable inference that the concealing / withholding of information about giving her child a chest binder, the decision to recognize her child's transgender status without informing her, and the encouragement of her child to withhold information from her, all resulted from the School Board's official, if unwritten, policy, custom, practice, or pattern.

C. Appellant has successfully pleaded sufficient facts to permit a reasonable inference that the School Board ratified the withholding and concealing from parents of information about decisions made and actions taken that directly affect the mental health or physical wellbeing of a child.

In addition to demonstrating the existence of an official policy, a plaintiff can also satisfy *Monell*'s policy/custom requirement by showing that an individual or entity with policy-making authority "ratified" the actions of a subordinate who did not possess that authority. Thus one "single decision by a final policymaker can result in municipal liability." *Welch v. Ciampa*, 542 F.3d 927, 942 (1st Cir. 2008).

Of course, to succeed on the merits, Appellant must prove that GSB policy makers actively approved of their employees' actions, rather than just passively going along with them. *Saunders*, 874 F.3d at 330. But for purposes of this appeal, Appellant has pleaded facts to permit a reasonable inference that the School Board did actively approve the unconstitutional conduct that caused her injuries.

First, the School Board's January 14, 2023, statement specifically stated: "neither the Board nor school administration are aware of any violation of policy or law which require further action at this time." APP.018 ¶ 42 (quoting APP.035). Appellant alleges that this statement was in response to her allegations made at the December 14 public GSB School Board Meeting. APP.017 ¶ 39. A reasonable inference from this is that the Board ratified the challenged conduct.

In rejecting the relevance of this statement, the court below seemed to credit the School Board's contention that Appellant had not alleged that the GSB "School Board had any knowledge of a policy violation." Addendum at 54, quoting ECF No. 17 at 7. But the School Board was certainly aware—as Appellant alleged in her Complaint. Appellant specifically alleged that she shared with the Superintendent and the Principal that information had been concealed and withheld from her. APP.016 ¶¶ 32–33. Further, the School Board admitted that information had been concealed and withheld. ECF 13 ¶ 33. Appellant alleged that she spoke at the School Board meeting and stated there how information was withheld and concealed from her. APP.017 ¶ 38. The names of the School Board members and the Superintendent are both on the January statement. APP.035. This all leads to a reasonable inference that the School Board was aware of the allegations when it made the January 14, 2023, statement.

Second, after Appellant filed this suit, the School Board unanimously approved a second-year contract for Sam Roy—despite the School Board's arguments in court that would lead to the conclusion that Roy's actions violated their policies. ECF 17 at 4 (arguing that their official written policies require parental participation and prohibit the keeping of secrets); APP.060 ll. 19–20 (arguing the policies require parents to be involved at *every step of the way*) (emphasis added). Given that the School Board has argued that their polices

prohibit the asking of a student to keep a secret, that their policies require punishment of a staff member who asks a student to keep a secret, and that the written Transgender Guidelines require parental involvement, a reasonable inference from the giving of a second year contract to an individual whom the School Board claims violated these policies is that the School Board actually *ratified* Roy's conduct.

The court below appears to have confused the summary judgment standard with the motion to dismiss standard—requiring Appellant to provide evidence sufficient for the Appellant to prevail on a motion for summary judgment. But since Appellant has not had an opportunity for discovery, that was premature.

The court below said that Appellant's reliance on "the School Board's written 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" was insufficient. Addendum at 55. The court then cited *Saunders*, 874 F.3d at 330, and *Praprotnik*, 485 U.S. at 127, which both address the proof needed to win on the merits. But that is not the standard that applies at the motion to dismiss stage. The District Court also demanded sufficient facts to "establish a de facto municipal policy from which *Monell* liability may arise," Addendum at 55, but, again, Appellant is **not** required to prove a *de facto* policy at this stage of litigation. She is only required to plead enough facts to allow a reasonable

inference that the Appellee School Board ratified the complained of unconstitutional conduct. *Coll. Hill Props., LLC v. City of Worcester,* 821 F.3d 193, 195–96 (1st Cir. 2016); *Román-Oliveras v. Puerto Rico Elec. Power Auth*., 655 F.3d 43, 49 (1st Cir. 2011).

The District Court's confusion regarding these standards was also evident at oral argument, when the court said:

> [The] complaint doesn't give any sort of context or background as to—what the Board was speaking to in issuing—what it had considered, what information was before it, who it had spoken to. It's just a vacuum saying no policies were violated. And from that you're extrapolating saying, "well, that's because they have an unwritten policy." Shouldn't you be required to plead more facts than you have?

APP.058 ll. 17–23. The correct answer is no, and the court's question indicates a confusion over the two standards: the court was asking for evidence to *prove* the allegations in the Complaint—evidence typically available only *after* discovery. Prior to document production, depositions, etc., Appellant cannot have access to all the information the Board considered in making its statements; that information is in Appellees' hands.

Appellant's well-pleaded allegations, specifically the School Board's repeated public statements to the effect that no policy had been violated by the complained-of conduct, and its re-approval of a contract for a social worker who engaged in the complained-of conduct, lead to a reasonable inference of

ratification, which, if proven after discovery, would entitle Plaintiffs to judgment based on a *Monell* ratification theory. That is sufficient for reversal here.

III. This Court should hold that Appellant pleaded sufficient facts to lead to a reasonable inference that her constitutional rights were violated at this stage of litigation and permit discovery.

The court below only answered the question of whether Appellant had pleaded sufficient facts to "plausibly support municipal liability under Section 1983." Addendum at 44. Because the court answered that question in the negative, it did not "address the separate question of whether any of the alleged constitutional violations [were] adequately pleaded." *Id*. This was reversible error. The proper analysis is to address *both* prongs of the *Monell* test—that is, both an official policy and a causal connection between that policy and the plaintiff's injury. The District Court's failure to address the second prong led it to misunderstand the nature of Appellant's Complaint.

This Court, however, can and should resolve whether Appellant has pleaded sufficient facts to lead to a reasonable inference that her constitutional rights were violated. As this is a purely legal question, this Court can answer that question and permit discovery to begin. Courts across the country have done this in the qualified immunity context, when addressing whether a plaintiff pleaded a constitutional violation. *See, e.g., Thompson v. Ragland*, 23 F.4th 1252, 1255–62 (10th Cir.

2022); *Tarabochia v. Adkins*, 766 F.3d 1115, 1121 (9th Cir. 2014). This Court should do likewise.

Appellant has sufficiently established at this stage of litigation that the School Board infringed on her constitutional right to control and direct the education and upbringing of her child by concealing and withholding information about decisions made and actions taken that directly affected the mental health and physical wellbeing of her child. This is shown by the fact that when Appellant learned of the decisions, she chose a different educational program for her child. APP.016 ¶ 35. Without access to the concealed information, Appellant was deprived of the opportunity to make meaningful decisions about how to best educate her child (at least until she finally learned of this information and its concealment). Finally, as the challenged action is a policy and not an executive action, the shock-the-conscience test does not apply.

A. The court below was wrong to not answer the first *Monell* prong.

The Supreme Court has created a two-part test for establishing municipal liability under Section 1983. First, a plaintiff must show a harm "caused by a constitutional violation." *Young v. Providence ex rel. v. Napolitano*, 404 F.3d 4, 25–26 (1st Cir. 2005). Second, a plaintiff must show that the defendant governmental entity is responsible for that violation. *Id.* Unlike the qualified immunity analysis for claims brought against individual government actors sued in

their individual capacities, there is no Supreme Court or First Circuit precedent which explicitly allows a District Court to skip the first step (the constitutional violation prong).

Nevertheless, the court below did just that, and that led the District Court to misunderstand Appellant's claim. It declared that while it was "understandable that a parent, such as Lavigne, might expect school officials to keep her informed about how her child is navigating matters related to gender identity at school," she had no such right. Addendum at 57. But that is not what Appellant is complaining of, and the District Court's misunderstanding of that issue infected its entire analysis.

Appellant does not claim a right to be informed about how her child is navigating matters related to gender identity. Appellant actually specifically rejected that formulation when presented by Appellees. *See* ECF 16 at 2. Instead, she argues that her right to control and direct the education of her child has been violated by GSB's *policy of active concealment* regarding the decisions *it* made and the actions *it* took that directly affect her child's mental health and physical wellbeing. APP.009–10 at ¶ 3; ECF 16 at 2, 10. In other words, Appellant is not claiming that the school must surveil a child and make reports to parents about a child's actions or behavior; she is claiming that when the school takes affirmative actions that will affect the mental health or physical wellbeing of a child it may not

actively conceal that information from the parent—and certainly may not encourage the child to do so, as happened here. APP.014 ¶ 22.

B. Appellant sufficiently pleaded facts to establish her constitutional right to direct the education of her child was infringed by the concealing and withholding of information.

The Supreme Court has consistently recognized that the right of parents to control and direct the education, upbringing, and healthcare of their children is among the fundamental "liberty interests" the Fourteenth Amendment protects. In fact, the Court has called it "perhaps the oldest of the fundamental liberty interests" in constitutional law. *Troxel*, 530 U.S. at 65. This right is a "counterpart of the responsibilities [parents] have assumed." *Lehr v. Robertson*, 463 U.S. 248, 257 (1983). As parents have a "high duty" to prepare a child for adulthood, including a child's future interpersonal relationships and civic responsibilities, they have a right not to be obstructed or interfered with when discharging those responsibilities. *Pierce*, 268 U.S.at 535.

The Court has repeatedly upheld parental rights over states' attempts to interfere with their choices. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). It's clear, then, that this right is "objectively, deeply rooted in this Nation's history and tradition … and implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal marks and citations omitted).

That makes it clear that the right Appellant asserts is not only constitutionally protected but is protected by the very highest degree of legal scrutiny.

The School Board's actions effectively contravened that right. Appellant has alleged that they violated her right by withholding and concealing information from her about decisions they made and actions they took that affect her child's wellbeing. APP.009–10 ¶ 3; ECF 16 at 2. This withholding of information severely limited Appellant's ability to direct the education of her child. A parent cannot meaningfully exercise her fundamental liberty interest in "direct[ing] the upbringing and education of children under their control" if a public school actively conceals important information from her, *Pierce*, 268 U.S. at 534–35, especially information that Appellees admit any reasonable parent would want to know. ECF 13 ¶ 25.

It's true, of course, that parents' *Meyer* and *Pierce* rights do not entitle them to dictate the internal operating procedures of public schools. *See Parker v. Hurley*, 514 F.3d 87, 102 (1st Cir. 2008) (holding that while parents have a constitutional right to choose either a public or private school, the Constitution does not provide a right to "'direct how a public school teaches their child[ren].'" (citation omitted)). *But see C.N. v. Ridgewood Bd. Of Educ.*, 430 F.3d 159, 185 n.26 (3d Cir. 2005) (holding that parental rights include more than the choice of whether to send their

children to public or private schools, and such rights can still be violated by choices a public school makes).

But while parents cannot demand that schools teach only subjects they prefer, when a school goes beyond its obligations to teach and protect children, and actively conceals vital information about its own actions—or encourages the student to do so—it is no longer acting with proper managerial discretion; it is intruding on parents' *Meyer* and *Pierce* rights.

The theory behind *Parker* is that public school officials may implement their own curriculum and operating procedures, and that if parents disapprove of these, they remain free to withdraw their children from public schools and place them in private school, or home-school them, or pursue other alternatives. 514 F.3d at 102. But that theory presumes that the public schools are not *actively hiding information from parents*. When they do that—especially regarding gender identity—it becomes impossible for parents even to know whether to consider such a step. If a child "is not the mere creature of the state," and if parents have a "high duty" to do what's best for their children, then the state has a corresponding obligation not to hinder them in discharging that high duty—by, for example, concealing information from them about what the school is doing. *Pierce*, 268 U.S. at 535.

Although the facts in *Phyllis v. Superior Court*, 183 Cal. App.3d 1193 (1986), were more egregious than the facts here, that case is still instructive. There,

the school actively "engaged in a 'cover up'" of the fact that a girl had been sexually assaulted at the school. *Id*. at 1197. The court found that this violated not only the child's rights, but also those of the parent, because by "[taking] it upon themselves to withhold that information from [the parent]," the school made it impossible for the parent to exercise her right—and discharge her high duty—to protect her daughter. *Id*. at 1196. Thus, the court found that the school had committed a tort against the parent as well as the child.

Similarly, here, by concealing vital information about the actions taken and decisions made with respect to recognizing Appellant's child's transgender status and giving the child a chest binder, the Appellees deprived the parents of their fundamental constitutional right to direct the upbringing of the child. Thus, Appellant has stated a plausible claim for relief, and the court below committed reversible error by dismissing. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

C. The shock-the-conscience test does not apply because Appellant challenges a legislative policy, not an executive action.

Because the challenged policy is legislative in nature—that is, not a case-by-case quasi-judicial determination or a specific act of enforcement, but a rule to which all cases are subject[7]—and deprives Appellant of a fundamental right, the

[7] *Cf. Ross v. Oregon*, 227 U.S. 150, 163 (1913) (describing legislative actions as anything, "whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the state" which governs actions). Even

constitutional question is whether the concealment policy satisfies strict scrutiny. *See Kenyon v. Cedeno-Rivera*, 47 F.4th 12, 24 (1st Cir. 2022). Strict scrutiny places the burden on the Appellees to show that withholding and/or concealing such information is narrowly tailored to advance a compelling government interest. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015). A motion to dismiss is, of course, not the proper place for such an analysis—the point here is simply that the Appellant has pleaded sufficient facts to show she is plausibly entitled to judgment on *that* analysis.

Appellant alleges her injuries result from the School Board's unwritten but *de facto* policy. Because that policy is legislative in nature, the "shock the conscience" test that applies to substantive due process challenges to *executive* action is inapplicable. *Martínez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010).

If, however, the shock-the-conscience standard applies, the historical recognition of rights is still relevant under that test. *See id.* at 63–66.[8] The

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though the policy Appellant challenges is unwritten, an unwritten policy can still be legislative in nature. *See, e.g., O'Donnell v. Harris Cnty*, 251 F. Supp.3d 1052, 1154–55 (S.D. Tex. 2017), *aff'd* 892 F.3d 147 (5th Cir. 2018) (unwritten bail policy was legislative and violated due process); *Knox v. Lanham*, 895 F. Supp. 750, 756 (D. Md. 1995), *aff'd* 76 F.3d 377 (4th Cir. 1996) ("the unwritten policy of the Parole Commission … constitutes a 'law' for ex post facto purposes.").

[8] Appellant preserves for appeal the argument of whether First Circuit precedent is in line with Supreme Court precedent and that the Court of Appeal should overrule cases holding that rights recognizable under the history and tradition test should be evaluated under the shock-the-conscience test

historical recognition of the right violated here—parental rights—weighs in favor of finding that Appellees engaged in conscience-shocking behavior. *See County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998).

In determining whether a specific action shocks the conscience, this Circuit has said that mere negligence does not qualify as conscience-shocking, *González-Fuentes v. Molina*, 607 F.3d 864, 881 (1st Cir. 2010). For one thing, in emergencies such as police confrontations, where split-second decisions must be made, courts do not want to second-guess officers in the field. But here, officials did have time to engage in actual deliberations. And in such cases, the standard is higher: "the defendant may be held to have engaged in conscience-shocking activity by exercising deliberate indifference." *Id.* (internal marks and citation omitted).

The School Board here obviously had time to engage in actual deliberation. This was not a judgment call in the heat of the moment. Yet there is no indication that the School Board even consider a parent's right to control and direct the education and upbringing of her child when making the decision to withhold critically important information from Appellant and *encouraging her child to do the same*. APP.014 ¶ 22.

Deliberate indifference means that a government official "[knew] of the risk" to constitutional rights that his actions were posing, "and disregarded [that

risk].” *Elwell v. Correia*, 585 F. Supp.3d 163, 166 (D.N.H. 2022). If Appellant proves her allegation that the School Board knew that they were withholding information from her that (the School Board concedes) a conscientious parent would want to know, and consciously disregarded the risk to her fundamental rights resulting from their choice to withhold/conceal information, then Appellant would be entitled to judgment. ECF 13 ¶ 25.

The bottom line is that the School Board has a *de facto* policy—through unwritten; and however it may be contrary to their *de jure* statements to the contrary—that allowed officials to give Appellant’s child a chest binder, to recognize and implement the child’s transgender status at school, and to both deliberately withhold/conceal that information from Appellant and to encourage the child to do the same. That constitutes deliberate indifference to Appellant’s rights, and if Appellant’s allegations are proven true, she would be entitled to judgement. Thus, this Court should remand the decision and order the case to proceed to discovery.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court’s order granting the motion to dismiss and remand the case with instructions to deny the motion to dismiss and allow the case to proceed to discovery.

Respectfully submitted this 3rd day of July 2024,

/s/ *Adam Shelton*
Adam Shelton (1207245)
John Thorpe (1212548)

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,558 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

Date: July 15, 2024

/s/ Adam Shelton
Adam Shelton
John Thorpe
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Adam Shelton*
Adam Shelton

INDEX TO ADDENDUM

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

AMBER LAVIGNE,	)	
Plaintiff,	)	
	)	
v.	)	**2:23-cv-00158-JDL**
	)	
GREAT SALT BAY COMMUNITY SCHOOL BOARD et al.,	)	
Defendants.	)	

PARTIAL ORDER ON DEFENDANTS' MOTION TO DISMISS

Plaintiff Amber Lavigne filed a Complaint (ECF No. 1) initiating this action on April 4, 2023. The Complaint names as Defendants the Great Salt Bay Community School Board and four individuals in their official capacities: Samuel Roy, Jessica Berk, Kim Schaff, and Lynsey Johnston. The Defendants filed a Motion to Dismiss (ECF No. 12) on June 2, 2023.

For the reasons stated on the record at the hearing on November 1, 2023, it is **ORDERED** that the Motion to Dismiss (ECF No. 12) is **GRANTED IN PART** and the claims against individual Defendants Samuel Roy, Jessica Berk, Kim Schaff, and Lynsey Johnston are hereby **DISMISSED**. The Motion to Dismiss otherwise remains under advisement.

SO ORDERED.

Dated: November 7, 2023

/s/ JON D. LEVY
CHIEF U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

AMBER LAVIGNE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**2:23-cv-00158-JDL**
	)	
GREAT SALT BAY COMMUNITY SCHOOL BOARD,	)	
	)	
Defendant.	)	

ORDER ON MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Plaintiff Amber Lavigne brings this action against Defendant Great Salt Bay Community School Board.[1] Lavigne's claims center on events that occurred in late 2022 and early 2023 concerning her child, A.B., who was a student at Great Salt Bay Community School in Damariscotta from September 2019 until December 8, 2022. Lavigne's Complaint (ECF No. 1) asserts four constitutional violations: three based on substantive due process rights (Counts I, II, and III) and the fourth based on procedural due process rights (Count IV). The School Board moves to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim (ECF No. 12). A hearing was held on the motion on November 1, 2023, and the parties subsequently submitted additional case citations for the Court to consider (ECF Nos. 24, 25). For reasons I will explain, I grant the School Board's motion and order the Complaint dismissed.

[1] The Complaint also named as Defendants four individuals associated with the School and the Central Lincoln County School System. The individual defendants have been dismissed from the case (ECF No. 23).

I. BACKGROUND

A. Factual Allegations

I treat the following facts derived from the Complaint and its attachments as true for the purpose of evaluating the School Board's motion to dismiss. *See Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 44 (1st Cir. 2012) ("[W]e accept the truth of all well-pleaded facts and draw all reasonable inferences therefrom in the pleader's favor.").

Amber Lavigne ("Lavigne") lives in Newcastle, Maine, and is the mother of three children, one of whom, A.B., was a thirteen-year-old student at Great Salt Bay Community School ("School") at the time of the relevant events. Defendant Great Salt Bay Community School Board ("School Board") is the governing body for the School, which serves children from three Maine communities: Newcastle, Damariscotta, and Bremen.

In early December 2022, Lavigne came across a chest binder—"a device used to flatten a female's chest so as to appear male"—in A.B.'s bedroom. ECF No. 1 at 5, ¶ 20. A.B. told Lavigne that a social worker at the School had both provided A.B. with the chest binder and explained how to use it. Lavigne "is informed and believes, and on that basis alleges," that the social worker simultaneously gave A.B. a second chest binder, explained that he would not tell A.B.'s parents about the chest binders, and said that "A.B. need not do so either." ECF No. 1 at 6, ¶¶ 22-23. The School had not informed Lavigne about the chest binders before she found one in A.B.'s bedroom.

Around the same time, Lavigne learned that A.B. had previously adopted and was using a different name and different pronouns at school. At A.B.'s request, two social workers used A.B.'s self-identified name and pronouns when addressing A.B.

at school; other school officials followed suit. The School had not informed Lavigne about A.B.'s request or the actions of the school staff in response.

Lavigne met with the School's principal and the Central Lincoln County School System's superintendent on or around December 5, 2022. They expressed sympathy and concern that information about A.B. had been withheld and concealed from Lavigne. Two days later, however, the superintendent met with Lavigne and told her that no policy had been violated by giving the chest binders to A.B., or by school officials using A.B.'s self-identified name and pronouns, without first informing Lavigne. Lavigne withdrew A.B. from the School on December 8, 2022, and began homeschooling A.B.

On December 12, 2022, agents from the Maine Office of Child and Family Services visited or met with Lavigne in response to an anonymous report that Lavigne was emotionally abusive toward A.B. The agency conducted an investigation, which it closed on January 13, 2023, having concluded "that the information obtained by the investigation did not support a finding of neglect or abuse." ECF No. 1 at 8, ¶ 36; *see* ECF No. 1-2 at 1.

At the School Board's meeting on December 14, 2022, Lavigne spoke publicly about what had happened regarding A.B., describing "the trust that had been broken by Defendants withholding and concealing vitally important information from her respecting her minor child's psychosexual development." ECF No. 1 at 9, ¶ 38. The School Board and its members did not respond to Lavigne's comments at the meeting.

Thereafter, the School Board and the School's principal issued a total of three written public statements relevant to Lavigne's claims.[2] First, on December 19, 2022, the School Board Chair issued a written statement addressing, among other things, "recent concerns that have been brought to the attention of the administration and Board," and stating that the School Board's policies comply with Maine law, "which protects the right of all students and staff, regardless of gender/gender identity, to have equal access to education, the supports and services available in our public schools, and the student's right to privacy regardless of age." ECF No. 1-3 at 1.

Second, several weeks later on January 14, 2023, the School Board issued a written statement responding to bomb threats and recent controversy affecting the School. The statement addressed "another bomb threat on Friday[,] January 13"; referred to a "false narrative" that had been spread by "certain parties" that had "given rise to the bomb threats"; and affirmed that "[a]ll 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." ECF No. 1-4 at 1.

Finally, on February 26, 2023, the School's principal issued a written statement addressing questions related to school safety. In it she noted that there had been a "misunderstanding of [federal and state] laws pertaining to gender identity and privileged communication between school social workers and minor

[2] The statements are attached as exhibits to the Complaint (ECF Nos. 1-3, 1-4, 1-5). *See Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008) ("Exhibits attached to the complaint are properly considered part of the pleading 'for all purposes,' including Rule 12(b)(6)." (quoting Fed. R. Civ. P. 10(c))).

clients [resulting] in the school and staff members becoming targets for hate speech and on-going threats." ECF No. 1-5 at 1. The letter noted further that state law protects school social workers from being required to share certain "information gathered during a counseling relation with a client or with the parent, guardian or a person or agency having legal custody of a minor client." ECF No. 1-5 at 1 (quoting 20-A M.R.S.A. § 4008(2) (West 2024)).

B. Lavigne's Legal Claims

Lavigne asserts that the School Board and school officials violated her fundamental right as a parent "to control and direct the care, custody, education, upbringing, and healthcare decisions, etc., of [her] children" by providing A.B. with chest binders and using A.B.'s self-identified name and pronouns without prior notice or providing a process through which Lavigne could "express her opinion respecting these practices." ECF No. 1 at 1-2, ¶¶ 2-3. The Complaint contends that the School Board withheld and concealed information from Lavigne regarding the chest binders and A.B.'s use of a different name and pronouns "pursuant to a blanket policy, pattern, and practice of withholding and concealing information respecting 'gender-affirming' treatment of minor children from parents." ECF No. 1 at 7, ¶ 29. The Complaint also asserts that the School Board's actions deprived Lavigne of the opportunity to meaningfully make decisions about A.B.'s care, upbringing, and education.

The Complaint's four counts all assert violations of Lavigne's constitutional rights, actionable under 42 U.S.C.A. § 1983 (West 2024). Three counts allege the School Board and school officials committed substantive due process violations under

the Fourteenth Amendment to the United States Constitution by (1) providing chest binders to A.B. and instructing A.B. on their use without first informing Lavigne (Count I); (2) using A.B.'s self-identified name and pronouns and withholding that information from Lavigne (Count II); and (3) adopting Transgender Students Guidelines that enable staff members to withhold information from parents (Count III). For the fourth count, Lavigne alleges that she was deprived of procedural due process in violation of the Fourteenth Amendment because she was not afforded an opportunity to comment on school officials' decisions to give A.B. chest binders or to use A.B.'s self-identified name and pronouns at school (Count IV).

In her Opposition to the Motion to Dismiss (ECF No. 16), however, Lavigne makes it clear that all counts in her Complaint center on her "right not to have information about decisions actively withheld by Defendants pursuant to the Withholding Policy." *See* ECF No. 16 at 8 (discussing procedural due process claim); ECF No. 16 at 10 (arguing in context of substantive due process claims that "Defendants violated Plaintiff's rights by withholding and even concealing" information from Lavigne). Lavigne's opposition clarifies further that the "Withholding Policy" underlying her claims, though "unwritten," is established by the Defendants' "policy, practice, and custom." ECF No. 16 at 3. Although the Complaint never uses the phrase "Withholding Policy,"[3] it conveys a similar theory, seeking "[a] declaratory judgment by the Court that Great Salt Bay Community School's policy, pattern, and practice of withholding or concealing from parents, information about

[3] The phrase "Withholding Policy" appears for the first time in Lavigne's Opposition to the Motion to Dismiss. *See* ECF No. 16 at 3.

the[ir] child's psychosexual development, including their asserted gender identity, absent some specific showing of risk to the child, violates the Due Process Clause of the Fourteenth Amendment." ECF No. 1 at 20, ¶ A. Lavigne also seeks an injunction, nominal and actual damages, and attorney's fees and costs.

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a complaint "must contain sufficient factual matter to state a claim to relief that is plausible on its face."[4] *Rodríguez-Reyes v. Molina-Rodríguez*, 711 F.3d 49, 53 (1st Cir. 2013) (quoting *Grajales*, 682 F.3d at 44). Courts use a two-step approach to evaluate whether a complaint meets that standard. "First, the court must distinguish 'the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited).' Second, the court must determine whether the factual allegations are sufficient to support 'the reasonable inference that the defendant is liable for the misconduct alleged.'" *García-Catalán v. United States*, 734 F.3d 100, 103 (1st Cir. 2013) (citation omitted) (first quoting *Morales-Cruz v. Univ. of P.R.*, 676 F.3d 220, 224 (1st Cir. 2012); and then quoting *Haley v. City of Bos.*, 657 F.3d 39, 46 (1st Cir. 2011)). A complaint is subject to dismissal if its factual

[4] The School Board's motion is properly evaluated as a Rule 12(b) motion to dismiss, and not a Rule 12(c) motion for judgment on the pleadings, even though the School Board filed its motion to dismiss and Answer (ECF No. 13) on the same day. A post-answer motion to dismiss should be treated as a motion for judgment on the pleadings, *see Patrick v. Rivera-Lopez*, 708 F.3d 15, 18 (1st Cir. 2013), but the School Board here filed the motion to dismiss slightly before the answer. Even if the motion to dismiss is treated as having been filed "simultaneously with the answer, the district court will view the motion as having preceded the answer and thus as having been interposed in timely fashion." 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1361 (3d ed.). In any event, the First Circuit has noted that "[c]onverting the grounds for a motion from Rule 12(b)(6) to Rule 12(c) 'does not affect our analysis inasmuch as the two motions are ordinarily accorded much the same treatment.'" *Rivera-Lopez*, 708 F.3d at 18 (quoting *Aponte-Torres v. Univ. of P.R.*, 445 F.3d 50, 54 (1st Cir. 2006)).

allegations "are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture." *S.E.C. v. Tambone*, 597 F.3d 436, 442 (1st Cir. 2010).

To establish that a municipality is liable under section 1983 for a deprivation of constitutional rights, a plaintiff must show both "that [the] plaintiff's harm was caused by a constitutional violation," and "that the [municipality is] responsible for that violation, an element which has its own components." *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 25-26 (1st Cir. 2005). 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 pleaded.

III. ANALYSIS

A. Municipal Liability for Alleged Constitutional Violations Under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978)

Section 1983 permits a lawsuit against a person who, while acting under color of law, "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C.A. § 1983. The Supreme Court held in *Monell v. Department of Social Services of the City of New York* that municipalities can be proper defendants under section 1983. 436 U.S. 658, 690 (1978) ("Congress *did* intend municipalities and other local government units to be included among those persons to whom [section] 1983 applies."). Section 1983 municipal

liability principles apply to school boards and public education units in Maine, including a community school district such as the Great Salt Bay Community School District. *See, e.g.*, *Doe v. Reg'l Sch. Unit No. 21*, No. 2:19-[cv]-00341-NT, 2020 WL 2820197 (D. Me. May 29, 2020) (applying municipal liability concepts to RSU 21); *Raymond v. Maine Sch. Admin. Dist. 6*, No. 2:18-cv-00379-JAW, 2019 WL 2110498 (D. Me. May 14, 2019) (applying municipal liability concepts to MSAD 6).

Although section 1983 claims can be brought against municipalities, a local government entity such as, in this instance, the Great Salt Bay Community School Board, may be held liable "only where that [entity]'s policy or custom is responsible for causing the constitutional violation or injury." *Abdisamad v. City of Lewiston*, 960 F.3d 56, 60 (1st Cir. 2020) (quoting *Kelley v. LaForce*, 288 F.3d 1, 9 (1st Cir. 2002)); *see Monell*, 436 U.S. at 694. In other words, "a [section] 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). The "policy or custom" requirement applies even where a plaintiff seeks declaratory or injunctive relief, as Lavigne does in part here. *Los Angeles Cnty. v. Humphries*, 562 U.S. 29, 31 (2010). Municipal bodies cannot be held liable under section 1983 for the acts of their employees on a *respondeat superior* theory. *Monell*, 436 U.S. at 691. Rather, "a plaintiff who brings a section 1983 action against a municipality bears the burden of showing that, 'through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged.'" *Haley*, 657 F.3d at 51 (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404 (1997)).

B. The Challenged "Policy or Custom"

The purported municipal "policy or custom" that Lavigne challenges is somewhat nebulous. The School's written "Transgender Students Guidelines" ("Guidelines") are attached as an exhibit to the Complaint (ECF No. 1-6).[5] The stated purposes of the Guidelines are (1) "[t]o foster a learning environment that is safe, and free from discrimination, harassment and bullying; and [(2) t]o assist in the educational and social integration of transgender students in our school." ECF No. 1-6 at 1. The School Board emphasizes, and Lavigne does not dispute, that the Guidelines establish a procedure which calls for the participation of a transgender student's parent(s) or guardian(s).[6] *See* ECF No. 1-6 at 2 ("A plan should be developed by the school, in consultation with the student, parent(s)/guardian(s) and others as appropriate, to address the student's particular needs."). The Complaint does not allege that the School Board or school officials violated the Guidelines.

Lavigne expressly confirms in her Opposition to the Motion to Dismiss that "the Guidelines are not the policy Plaintiff challenges."[7] ECF No. 16 at 8. Instead,

[5] Also attached as an exhibit to the Complaint is the Great Salt Bay Community School District's policy on "Staff Conduct with Students" (the "Conduct Policy"). ECF No. 1-7 at 1. Part of the Conduct Policy's intent is to ensure that staff members and students have interactions "based upon mutual respect and trust." ECF No. 1-7 at 1. Examples of "expressly prohibited" conduct by staff members include: "[a]sking a student to keep a secret" and, for "non-guidance/counseling staff, encouraging students to confide their personal or family problems and/or relationships. If a student initiates such discussions, staff members are expected to be supportive but to refer the student to appropriate guidance/counseling staff for assistance." ECF No. 1-7 at 1. The Complaint does not allege that the School Board or school officials violated the Conduct Policy.

[6] The Guidelines also acknowledge the role of parent(s)/guardian(s) in connection with the disclosure of information from a students' records: "School staff should keep in mind that under FERPA, student records may only be accessed and disclosed to staff with a legitimate educational interest in the information. Disclosures to others should only be made with appropriate authorization from the administration and/or parents/guardians." ECF No. 1-6 at 3.

[7] Lavigne's concession that she does not challenge the Guidelines appears to be at odds with several statements in the Complaint, an inconsistency which suggests that Lavigne's theory of the basis for municipal liability has shifted. For example, the Complaint "seeks a declaration that the [Guidelines]

Lavigne asserts that her alleged injuries have been caused by an unwritten "Withholding Policy," which she describes as "a systematic across-the-board practice which is not specified, but is hinted at, in the written 'Guidelines.'" ECF No. 16 at 8. She contends that the Guidelines "are supplements to the Withholding Policy, and in fact, permit the policy and practice of withholding/concealment." ECF No. 16 at 12 (emphasis omitted). Lavigne does not otherwise address or explain how the Withholding Policy is hinted at in the Guidelines.

In her Opposition to the Motion to Dismiss, Lavigne argues that the School Board's unwritten Withholding Policy consists of "withholding and even concealing from parents information about actions the Defendants take with respect to children's mental and physical wellbeing—information crucial to a child's development, and which . . . any conscientious parent would desire to know." ECF No. 16 at 1. She asserts that the "Withholding Policy consists of a regular pattern, custom, and practice of withholding information from parents in situations where the Defendants believe a child may be transgender—without any consideration of specific circumstances, or whether such withholding/concealment is warranted by particular

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are unconstitutional insofar as they provide for the concealment of, or do not mandate informing parents of, a decision to provide 'gender-affirming' care to a student." ECF No. 1 at 4, ¶ 11. Lavigne also alleges in the Complaint that (1) the "Defendants contend that their actions with respect to all allegations herein were mandated by school board policies—specifically the [Guidelines] and the [Conduct Policy]," ECF No. 1 at 11, ¶ 48, and (2) the "School Board will continue to violate parents' longstanding Fourteenth Amendment rights if it is not enjoined from continuing to enforce [the] Guidelines in the future," ECF No. 1 at 18, ¶ 88. To the extent that the Complaint includes allegations about the Guidelines that are contradicted by the attached exhibit, it is proper to rely on the text of the attachment. *Yacubian v. United States*, 750 F.3d 100, 108 (1st Cir. 2014) ("[I]t 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." (quoting *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 229 n.1 (1st Cir. 2013))). In any event, Lavigne concedes that "the Guidelines are not the policy [she] challenges." ECF No. 16 at 8. Thus, I do not consider the written policy as a possible basis for municipal liability.

facts about a child or parent." ECF No. 16 at 8-9. The Withholding Policy, she contends, "consists of actively keeping information from parents—and even encouraging children to conceal information—about affirmative steps the school is taking with respect to a child's psychosexual development." ECF No. 16 at 7. Lavigne argues that the Withholding Policy, although unwritten, constitutes "a general rule governing all cases" and "an across-the-board practice of always withholding information of this sort from parents." ECF No. 16 at 10-11. The School Board disagrees, arguing that Lavigne cannot point to any written policy to substantiate her claims, and that the Complaint—although it alludes in a conclusory fashion to an unwritten policy of concealing information—fails to adequately plead that such a policy actually exists.

The Complaint repeatedly alleges that the School has a "policy, pattern, and practice" of intentionally withholding and concealing certain information from parents. *See, e.g.*, ECF No. 1 at 2, 6-7, ¶¶ 4, 21, 27, 29. But I do not credit these conclusory statements as adequately pleading that such a "policy or custom" exists. *See Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34, 43 (1st Cir. 2013) ("[C]onclusory allegations that merely parrot the relevant legal standard are disregarded, as they are not entitled to the presumption of truth."); *see also Massó-Torrellas v. Municipality of Toa Alta*, 845 F.3d 461, 469 (1st Cir. 2017) (affirming dismissal of a section 1983 claim despite complaint's assertion that the "[m]unicipality implemented 'customs and policies' which caused the plaintiffs' injuries"). Instead, I read the Complaint as a whole, attachments included, and consider whether Lavigne has alleged sufficient non-conclusory facts to support a reasonable inference that the

municipality is liable for the conduct that Lavigne challenges. *See García-Catalán*, 734 F.3d at 103.

C. Applying Theories of Municipal Liability to Assess the Sufficiency of Lavigne's Complaint

Lavigne's Complaint implicates three possible theories of municipal liability: (1) unwritten policy or custom; (2) ratification by a final policymaker; and (3) failure to train. I consider each theory in turn.

1. Municipal Liability Based on Unwritten Policy or Custom

Unwritten policies can give rise to municipal liability only where those policies are "so permanent and well settled as to constitute a custom or usage with the force of law." *Abdisamad*, 960 F.3d at 60 (internal quotation marks omitted) (quoting *Monell*, 436 U.S. at 691). "Put another way, a municipality can be held liable if an unlawful 'custom or practice' 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.'" *Baez v. Town of Brookline*, 44 F.4th 79, 82 (internal quotation marks omitted) (quoting *Whitfield v. Meléndez-Rivera*, 431 F.3d 1, 13 (1st Cir. 2005)).

Here the Complaint, read as a whole and viewed in the light most favorable to the Plaintiff, does not plausibly establish that the alleged Withholding Policy is a settled custom or practice of the School or the School Board. Paragraphs 20-28 of the Complaint[8] set out the central facts concerning (1) Lavigne's discovery of the chest

[8] Paragraphs 20-28 state:

> 20. On December 2, 2022, Plaintiff was assisting A.B. in cleaning A.B.'s room at home when she discovered a chest binder—a device used to flatten a female's chest so as to appear male. Upon inquiry, A.B. explained that [a social worker] gave it to A.B. at

binders and that the chest binders were provided to A.B. by a social worker who "told A.B. that he was not going to tell A.B.'[s] parents about the chest binder[s], and A.B. need not do so either"; and (2) "that school officials had been calling A.B. by a name not on [A.B.'s] birth certificate and were referring to A.B. with gender-pronouns not

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> Great Salt Bay Community School and instructed A.B. on how to use it. *See* photos attached as Exhibit 1.
>
> 21. Plaintiff had never been informed before that A.B. had been given a chest binder at the school or instructed about its use. Plaintiff is informed and believes, and on that basis alleges, that this 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.
>
> 22. Plaintiff is informed and believes, and on that basis alleges, that [the social worker] gave A.B. the chest binder in his office and 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.
>
> 23. Plaintiff is informed and believes, and on that basis alleges, that [the social worker] gave A.B. a second chest binder at the same time. *See* Exhibit 1.
>
> 24. Chest binders are not medical devices, but there are potential health risks associated with the wearing of such binders, including difficulty breathing, back pain, and numbness in the extremities.
>
> 25. Sexual identity, gender identification, and body image, particularly with respect to such sexual characteristics as the female breast, are vitally important and intimate psychological matters, central to an individual's personality and self-image, and a crucial element in how people relate to the world. The significance of such matters is even greater with respect to young people, particularly teenagers going through puberty. Consequently, any conscientious parent has a legitimate interest in knowing information respecting his or her child's sexual and psychological maturation, including but not limited to, the fact that the child is using a chest-binder, and/or is being identified by names or pronouns not associated with that child's birth sex.
>
> 26. After Plaintiff learned of the chest binder(s) on December 2, 2022, Plaintiff also discovered that school officials had been calling A.B. by a name not on [A.B.'s] birth certificate and were referring to A.B. with gender-pronouns not typically associated with A.B.'s biological sex. Plaintiff had never been informed of these facts.
>
> 27. Plaintiff is informed and believes, and on that basis alleges, that failure to inform Plaintiff regarding the school's use of certain pronouns when referring to A.B 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.
>
> 28. Specifically, Plaintiff is informed and believes, and on that basis alleges, that [two social workers] chose, at A.B[.]'s request, to use a different name and pronouns when speaking to or about A.B., and that other officials at the school, including some teachers, did so afterwards. At no time, however, did any Defendant or any other school official inform Plaintiff of these facts.

ECF No. 1 at 5-7, ¶¶ 20-28.

typically associated with A.B.'s biological sex." ECF No. 1 at 6, ¶¶ 22, 26. These allegations culminate with the following conclusion:

> Plaintiff is informed and believes, and on that basis alleges, that Defendants withheld and concealed this information from her pursuant to a blanket policy, pattern, and practice of withholding and concealing information respecting "gender-affirming" treatment of minor children from their parents.

ECF No. 1 at 7, ¶ 29.

Assertions in a complaint "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" are insufficient to state a cognizable claim. *Menard v. CSX Transp., Inc.*, 698 F.3d 40, 45 (1st Cir. 2012). Here, as I will explain, the Complaint's assertion that there is a "blanket policy, pattern, and practice of withholding and concealing information respecting 'gender-affirming' treatment of minor children from their parents," ECF No. 1 at 7, ¶ 29, states a conclusion unsupported by factual allegations that would plausibly establish the existence of a permanent and well-settled custom.

At most, the Complaint identifies one occasion where a School employee "actively withheld" information from a parent, ECF No. 16 at 8: 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," ECF No. 1 at 6, ¶ 22. The Complaint also alleges that school officials failed to alert Lavigne that some staff members had been using a different name and different pronouns at A.B.'s request. Despite those allegations, there is no fact or set of facts alleged in the Complaint which support a reasonable inference that the challenged conduct related to A.B. was in keeping with a custom

or practice of withholding information "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." *Baez*, 44 F.4th at 82 (quoting *Whitfield*, 431 F.3d at 13). Indeed, the Complaint alleges that the principal and superintendent "expressed sympathy . . . and concern that this information had been withheld and concealed from [Lavigne]," ECF No. 1 at 8, ¶ 33, undercutting the conclusion, required to sustain Lavigne's claim under this theory, that withholding information from parents was a custom so widespread as to have the force of law.

The Complaint frequently references the School Board's "widespread custom" of making decisions without informing parents, including that "[t]he Great Salt Bay Community School Board's 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 a chest binder—without consulting Plaintiff, and afterwards withholding or concealing this information from Plaintiff—was not only allowed but considered standard practice for [the social worker who gave A.B. the chest binders]." ECF No. 1 at 14, ¶ 65; *see also* ECF No. 1 at 15-17, ¶¶ 72, 73, 75, 76, 80, 81. But these conclusory statements are not supported by additional allegations that, if proven, would demonstrate the existence of a custom that could form a basis for municipal liability under *Monell*. Because the Complaint fails to allege facts that, if proven, would plausibly demonstrate that the challenged actions resulted from an unconstitutional unwritten custom, Lavigne's municipal liability claims cannot

proceed on that basis. *See Abdisamad*, 960 F.3d at 60 (concluding that the complaint's "factual allegations do not support a plausible inference that the City Defendants' actions resulted from an unconstitutional policy or custom").

2. Municipal Liability Based on Ratification by a Final Policymaker

Another means by which a plaintiff can satisfy *Monell*'s municipal "policy or custom" requirement is "by showing that 'a person with final policymaking authority' caused the alleged constitutional injury." *Fincher v. Town of Brookline*, 26 F.4th 479, 485 (1st Cir. 2022) (quoting *Rodríguez v. Municipality of San Juan*, 659 F.3d 168, 181 (1st Cir. 2011)). "[A] single decision by a final policymaker can result in municipal liability." *Welch v. Ciampa*, 542 F.3d 927, 942 (1st Cir. 2008). Whether a defendant is a municipal policymaker is a question of state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988); *Walden v. City of Providence*, 596 F.3d 38, 56 (1st Cir. 2010). One way to establish municipal liability is to show that a final municipal policymaker "approve[d] a subordinate's decision and the basis for it." *Praprotnik*, 485 U.S. at 127. "Although *Praprotnik* does not define what constitutes 'ratification,' it draws a line between passive and active approval." *Saunders v. Town of Hull*, 874 F.3d 324, 330 (1st Cir. 2017).

Lavigne argues that the School Board ratified the actions of the two social workers and the principal[9] through the School Board's January statement that

[9] I note that, although Lavigne argues that the School Board's January statement constituted a "*post hoc* ratification of the actions" of the principal, ECF No. 1 at 10, ¶ 43, the Complaint's only allegation about the principal's actions prior to the January statement is that she met with Lavigne on or around December 5, 2022, after Lavigne discovered the chest binder, and "expressed sympathy with Plaintiff, and concern that this information had been withheld and concealed from her," ECF No. 1 at 8, ¶ 33.

neither it "nor school administration are aware of any violation of policy or law which requires further action at this time." ECF No. 1 at 10, ¶ 42 (quoting ECF No. 1-4 at 1); *see* ECF No. 1 at 10, ¶ 43. In support of her ratification theory, Lavigne also points to the Complaint's assertion that "[the superintendent] in a subsequent meeting with Plaintiff explained that no policy had been violated by the giving of chest binders to A.B., or by school officials (specifically [the two social workers]) employing a different name and pronouns with respect to A.B., without informing Plaintiff."[10] ECF No. 1 at 8, ¶ 34. In response, the School Board argues that because "there is no allegation that the Great Salt Bay School Board had any knowledge of a policy violation," no ratification occurred. ECF No. 17 at 7.

The superintendent's alleged statement that no policy had been violated does not itself constitute an actionable policy from which municipal liability might flow because there are no facts pleaded in the Complaint which suggest that the superintendent possessed final policy-making authority for the municipality.[11] "A single decision by a municipal policymaker constitutes official policy 'only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.'" *Freeman v. Town of Hudson*, 714 F.3d 29, 38 (1st Cir. 2013) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986)); *see also Craig v.*

[10] Lavigne contends that ratification is also shown by the School Board's eventual approval of a second-year probationary contract for the social worker who provided the chest binders to A.B. That allegation is not contained in the Complaint; Lavigne explains that the approval occurred after the initiation of this action. Even if that fact was alleged in the Complaint, 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 in a manner that would support municipal liability.

[11] Indeed, the Complaint describes the superintendent's role as ensuring that the School complies with School Board policies and state laws.

Maine Sch. Admin. Dist. No. 5, 350 F.Supp.2d 294, 297-98 & n.2 (D. Me. 2004) (granting motion to dismiss where complaint failed to plausibly allege that superintendent "had policymaking authority" or that the municipal entity "specifically delegated its policymaking functions to" the superintendent); *Praprotnik*, 485 U.S. at 126 ("If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability."). Further, the School Board's written 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 "active[ly] approv[ed]," *Saunders*, 874 F.3d at 330, of "a subordinate's decision and the basis for it" such that municipal liability could follow, *Praprotnik*, 485 U.S. at 127. The single alleged incident of a School staff member "actively with[olding]" information, together with the School Board's vague expression more than one month later[12] that it was not aware of any violation of law or policy, do not, either separately or in combination with other facts alleged in the Complaint, establish a de facto municipal policy from which *Monell* liability may arise.

3. Municipal Liability Based on Failure to Train

Lavigne finally argues that even if the School Board does not have a Withholding Policy, its failure to train the School's employees that the withholding of important information—such as a student's use of chest binders and adoption of a

[12] The School Board also issued the statement a full month after Lavigne spoke at the School Board meeting, and after issuing a separate written statement soon after Lavigne addressed the School Board.

new name and gender pronouns—from the student's parents represents a failure to train on which *Monell* liability may be based.

Under some limited circumstances, a municipality may be liable under section 1983 for "constitutional violations resulting from its failure to train municipal employees." *City of Canton v. Harris*, 489 U.S. 378, 380 (1989). However, the municipality is liable only if its failure to train constitutes "deliberate indifference to the constitutional rights of its inhabitants." *Id.* at 392; *see also Haley*, 657 F.3d at 52 ("Triggering municipal liability on a claim of failure to train requires a showing that municipal decisionmakers either knew or should have known that training was inadequate but nonetheless exhibited deliberate indifference to the unconstitutional effects of those inadequacies."). A plaintiff does not state a claim for municipal liability by pleading "mere insufficiency of a municipality's training program." *Marrero-Rodríguez v. Municipality of San Juan*, 677 F.3d 497, 503 (1st Cir. 2012).

"Deliberate indifference is a stringent standard of fault," and, to prevail on such a claim, a plaintiff must ultimately show "proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (alteration and internal quotation marks omitted) (quoting *Brown*, 520 U.S. at 410). "[A] training program must be quite deficient in order for the deliberate indifference standard to be met: the fact that training is imperfect or not in the precise form a plaintiff would prefer is insufficient to make such a showing." *Young*, 404 F.3d at 27. "A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." *Connick*, 563 U.S. at 62 (quoting *Brown*, 520 U.S. at

409). However, a plaintiff may not be required to establish a pattern if the need to train municipal officers on constitutional limitations is "so obvious" as to support a finding of deliberate indifference. *Canton*, 489 U.S. at 390 & n.10.

Lavigne argues that the School Board did not properly train school officials "about parental rights in the gender identity context" after adopting the Transgender Students Guidelines, including in situations where a student requests to be called by a particular name or pronouns, or where staff members provide chest binders to students. ECF No. 1 at 17, ¶ 79. However, the Complaint does not assert any facts about the actual training that school officials did or did not receive. The Complaint is devoid of alleged facts which could plausibly show a pattern of constitutional violations by untrained staff members, or that the need to train staff members on "parental rights in the gender identity context" was so obvious as to support a finding of deliberate indifference. ECF No. 1 at 17, ¶ 79. Lavigne's conclusory assertions to the contrary are not sufficient to plead deliberate indifference and, therefore, her claims do not withstand the School Board's motion to dismiss.

D. Conclusion Regarding Municipal Liability

It is understandable that a parent, such as Lavigne, might expect school officials to keep her informed about how her child is navigating matters related to gender identity at school. Her Complaint, however, fails to plead facts which would, if proven, establish municipal liability under *Monell* and its progeny based on an unwritten custom, ratification by a final policymaker, or failure to train. The School Board's Motion to Dismiss is, therefore, granted as to all counts, and I do not separately address the School Board's additional arguments that the Complaint fails

to plead facts from which any violation of Lavigne's substantive or procedural due process rights could be found.[13]

IV. CONCLUSION

It is accordingly **ORDERED** that the Motion to Dismiss for Failure to State a Claim (ECF No. 12) is **GRANTED** and the Complaint (ECF No. 1) is **DISMISSED**.

SO ORDERED.

Dated: May 3, 2024

/s/ JON D. LEVY
U.S. DISTRICT JUDGE

[13] My conclusion as to municipal liability applies to all four counts, which encompass both substantive due process and procedural due process claims premised on the same purported "Withholding Policy." *See, e.g.*, *Abdisamad*, 960 F.3d at 60-61 (applying municipal liability concepts to conclude that plaintiff's substantive due process claim against city was properly dismissed); *Bernard v. Town of Lebanon*, No. 2:16-cv-00042-JAW, 2017 WL 1232406, at *6 (D. Me. Apr. 3, 2017) (citing municipal liability concepts as one basis for concluding that plaintiff had failed to state a claim against town for violation of procedural due process rights); *accord Oden, LLC v. City of Rome*, 707 F. App'x 584, 586 (11th Cir. 2017) ("Procedural due process claims brought under [section] 1983 are subject to limitations on municipal liability.").

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

AMBER LAVIGNE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL NO. 2:23-cv-00158-JDL
	)	
GREAT SALT BAY COMMUNITY SCHOOL BOARD, et al.	)	
	)	
	)	
Defendants.	)	

JUDGMENT OF DISMISSAL

In accordance with the Partial Order on Defendants' Motion to Dismiss entered on November 7, 2023 and the Order on Motion to Dismiss for Failure to State a Claim entered on May 3, 2024 by U.S. District Judge Jon D. Levy,

JUDGMENT of Dismissal is hereby entered.

CHRISTA K. BERRY
CLERK

By: /s/ Charity Pelletier
Deputy Clerk

Dated: May 3, 2024

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

_____

AMBER LAVIGNE, CIVIL ACTION

Plaintiff Docket No: 2:23-00158-JDL

-versus-

GREAT SALT BAY COMMUNITY SCHOOL BOARD, et al.,

Defendants

_____

Transcript of Proceedings

Pursuant to notice, the above-entitled matter came on for **Oral Argument** held before **THE HONORABLE JON D. LEVY**, United States District Court Judge, in the United States District Court, Edward T. Gignoux Courthouse, 156 Federal Street, Portland, Maine, on the 1st day of November 2023 at 2:00 p.m. as follows:

Appearances:

For the Plaintiff: Adam C. Shelton, Esquire
Brett Dwight Baber, Esquire

For the Defendant: Melissa A. Hewey, Esquire

Lori D. Dunbar, RMR, CRR
Official Court Reporter

(Prepared from manual stenography and computer aided transcription)

and I quote, the decision to seek parental guidance is a student's own decision to make, and that remains true whether the topic touches on the student's personal identity or the student's decisions about their body image. That is in line with both statements that were released by the board, that was in line with all decisions that have been made after this information became public, after Ms. Lavigne testified about these issues at the December 14th board meeting, and that is in line with further arguments in the motion to dismiss, which also on page 12 allege that a policy that require parental notification would actually violate the due process rights of children. Thank you, Your Honor.

THE COURT: Thank you. Returning to the question of the individual defendants, I'm going to be issuing an order which will dismiss them as named defendants in the case. The -- as has been acknowledged in court today, the plaintiff's not seeking any relief against them, and their availability to provide testimony and the like is certainly -- should not be a problem under the rules of discovery. So that will be by written order shortly.

I'll look forward to receiving the citations you're going to provide. I will very carefully consider the law and the case and I'll issue a written decision.

And, Charity Pelletier, our case manager, is there anything we haven't addressed today that needs to be

addressed.

THE CLERK: No, Your Honor, thank you.

THE COURT: All right. I want to thank the attorneys for all their efforts, and with that we stand adjourned.

(Time noted: 2:26 p.m.)

C E R T I F I C A T I O N

I, Lori D. Dunbar, Registered Merit Reporter, Certified Realtime Reporter, and Official Court Reporter for the United States District Court, District of Maine, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated: May 30, 2024

/s/ Lori D. Dunbar

Official Court Reporter