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 for the Great Salt Bay Community School; JESSICA BERK, in her 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,

Defendants-Appellees.

APPELLANT'S REPLY TO APPELLEES' SUPPLEMENTAL 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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INTRODUCTION

GSB says its written guidelines require parental involvement. GSB's Supp. Br. at 15 n.7. But GSB never involved Appellant in, or even notified her of, its decisions to give her child chest binders, to counsel her child on its use, or to use a different name and pronouns for her child. And given that GSB has consistently maintained that its employees followed all applicable policies, and consistently responded as though no policy was violated, it logically follows that there must be another policy—one GSB *actually* follows in practice—that differs from the written policy. At a minimum, this requires reversal of the district court's determination that Appellant had not pleaded sufficient facts to establish the existence of an official policy.

GSB argues that because Appellant's child voluntarily engaged with school employees there is no due process injury because all that Appellant is challenging is inaction according to GSB. *Id.* at 1, That, however, misunderstands the nature of Appellant's claim. Instead, Appellant contends that GSB violated her right to educate her child by following a policy of withholding information about its employees' actions with respect to her child—information GSB concedes any conscientious parent would want to know, APP. 014 ¶ 25; Answer (Doc. 13) ¶ 25, and which is essential to any parent's exercise of the right choose the best educational options for her child.

To be sure, courts have long held that parents cannot exercise veto control over what goes on in the classroom, *see, e.g., Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), because if parents disapprove, they can choose to send their children to a different school, or a private school, or to home-school. *See Id.* at 102. But a parent cannot make that decision if information is withheld from her about what actions and decisions the school is taking with respect to her child. That is why this case is like *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 143 (3d Cir. 2004), and *Lubke v. City of Arlington*, 455 F.3d 489, 493 (5th Cir. 2006)—cases in which the defendants' withholding of information necessary for the plaintiffs to exercise a right was held to be the equivalent of depriving the plaintiffs of that right.[1]

That is also why GSB's claim that Appellant is trying to dictate internal operating practices of schools, GSB Supp. Br. at 8, is simply false. GSB can do what it likes in schools. It just cannot take affirmative steps to withhold information from parents about *what* it's doing.

Because Appellant's right to direct her child's upbringing is a fundamental right, strict scrutiny applies. *Troxel v. Granville*, 530 U.S. 57 (2000).[2] But even if GSB's unwritten policy were only subject to rational basis review, it still would not

[1] See Appellant's Supp. Br. at 10.

[2] While *Troxel* was a plurality opinion, the one point which garnered a clear majority was that the right in question is fundamental. *See* 530 U.S. at 65 (plurality calling it "fundamental"); *id*. at 80 (Thomas, J., concurring—calling it "fundamental"); *id*. at 87, (Stevens, J., dissenting—calling it "fundamental.").

pass muster because withholding information that any conscientious parent would want to know is not rationally related to the presumed legitimate government interest in ensuring a safe learning environment. Indeed, GSB's policy of not informing parents of information GSB admits a parent would want to know bears no relationship to the in-school environment.

I. Appellant is challenging GSB's policy of withholding information about GSB's employees' actions and decisions, which is not government inaction.

GSB emphasizes *Foote*'s statement that a mere "policy of 'non-disclosure as to a student's gender expression without the student's consent' does not restrict a parent's fundamental right to direct the care, custody, and upbringing of their child." GSB's Supp. Br. 4 (quoting *Foote v. Ludlow Sch. Comm.*, 128 F.4th 336, 357 (1st Cir. 2025). But it is clear from the context that *Foote*'s pronouncement concerned a different set of circumstances.

First, Appellant alleges that GSB's policy violated her right to control and direct the *education* of her child, by depriving her of information (about GSB employees' actions) necessary for Appellant to make decisions about her child's education. Information GSB admits that any parent would want to know. APP. 014 ¶25; Answer (Doc. 13) ¶ 25. Once Appellant learned this information by

happenstance, she withdrew her child from GSB and sought alternative options.[3] By contrast, the *Foote* parents explicitly abandoned any argument that the policy violated their right to direct their child's education. *See* Opening Brief, *Foote v. Ludlow Sch. Comm*., No. 23-1069, 2023 WL 2674553 (1st Cir. filed Mar. 20, 2023) at *24.

Of course, the right of parents to make decisions about the proper education of their children was at the core of *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska,* 262 U.S. 390 (1923). Each involved restrictions of parents' ability to educate their children as they saw fit, whether that be sending their child to a private school or teaching their child German.

Notably, in every description GSB proffers of the right at issue, "education" is absent.[4] This is a key distinction because Appellant specifically alleges that the

[3] Appellant learned this information by happenstance by finding the chest binder in her child's room when cleaning it. APP.013 ¶ 20. Through discussions with her child she then learned that her child was also going by a different name and pronouns at school and that the chest binder had come from the male school social worker. APP.014 ¶ 26. At no point has there been any indication that the school ever would have informed Appellant of these facts, even though they maintain their policy *requires* parental involvement, GSB's Supplemental Brief at 15 n.7., and no individual who has violated this policy has been publicly disciplined and every statement from GSB employees indicate another policy that permits this withholding exits APP. 034-036.

[4] *See* GSB Supp. Br. at 1 ("Like the parents in *Foote*, Lavigne claims that such passive conduct of a public school—here, GSB—implicated her fundamental right to direct the care, custody, and upbringing of her child."); *id*. at 13 ("Lavigne simply has not alleged an infringement on her asserted liberty interest in directing the care, custody, and control of her child.").

withholding of information about GSB's employees' actions with respect to her child—information GSB admits any conscientious parent would like to know. APP.014 ¶ 25; Answer (Doc. 13) ¶ 25—deprived her of the ability to meaningfully decide whether GSB was the best educational environment for her child.

Second, in *Foote*, a teacher informed the parents in early March that their child was presenting as a gender identity different from the child's biological sex, after the child requested this in late February. 128 F.4th at 343. Here, by contrast, nobody from GSB *ever* informed Appellant about its employee giving the child chest binders, or its employees' decision to call the child by a different name and pronouns Appellant here only discovered the actions of GSB by pure happenstance, and there is no indication that any employee at GSB would ever have informed Appellant of its decisions and actions—especially given that GSB has consistently maintained that no policy was violated by this withholding/concealment. App.34-36.

GSB argues that Appellant's child "voluntarily" approached the school social worker and teachers about being called by a different name and pronouns. GSB Supp. Br. at 1. But that is not what this case is about. This case concerns GSB's policy of concealing from Appellant the actions it took with respect to her child—information Appellant needed in order to meaningfully exercise her right to make informed choices about whether GSB remains the best educational environment for her child, especially as she is required under Maine law to send her child to school

and the presumption under Maine law is that she send her child to public school. Me. Rev. Stat. tit. 20-a, § 5001-A(1).

Thus, Appellant is not challenging "passive conduct," as GSB claims, GSB Supp. Br. at 1. Nor the mere "non-disclosure," *Id.* at 4. Instead, she is challenging GSB's policy of not informing Appellant of information that GSB knew and withheld and admits Appellant would want to know. APP. 014 ¶ 25; Answer (Doc. 13) ¶ 25. That policy goes far beyond mere non-disclosure and permits officials to encourage Appellant's child to keep the information from Appellant. *See* APP.014 ¶ 22.

II. GSB is incorrect in asserting that rational basis review applies, but even if it does, GSB's policy fails even under rational basis review.

Strict scrutiny applies to Appellant's claims, because GSB has restricted her fundamental parental rights. Appellant's Supplemental Brief 14-15. But even if the proper standard of scrutiny were rational basis, Appellant has pleaded sufficient facts to show that GSB's policy is not rationally related to a legitimate government interest.

GSB alleges that a policy of withholding this type of information from parents would be rationally related to its "interest in fostering a productive learning environment that is safe, and free from discrimination, harassment and bullying." GSB's Supp. Br. at 2. While these are legitimate interests, the challenged policy bears no relationship to those interests.

First, discrimination, harassment, or bullying on school grounds is not done by parents who do not actually attend school. So any potential discrimination, harassment, or bullying of a transgender student at school will be from another student. Protecting the privacy of a student from other students, or even other teachers or staff will affect the learning environment, but withholding that information from parents can have no effect on *that* risk.

A school's concealment of vital information about a child has serious repercussions for a parent's ability to discharge her "high duty" to educate her child. *Pierce*, 268 U.S. at 535. The California Court of Appeal recognized that in *Phyllis v. Superior Court*, 183 Cal. App.3d 1193 (1986), when the school "engaged in a 'cover up'" of the fact that the child had been sexually assaulted at school. The court found that the school had no right to "[take] it upon themselves to withhold that information" from the parent. *Id*. at 1196-97. Yet by GSB's logic, it could withhold such information, without any regard for parental rights, if it believed that doing so would "foster[] a productive learning environment." GSB Supp. Br. at 2. That cannot be right. There must be *some* balancing of interests. Yet GSB offers none.

The only way that GSB's policy of permitting school officials to withhold information about decisions made and actions taken that directly affect the mental health or physical wellbeing of a child could be rationally related to a legitimate government interest is if the government interest is keeping children in an

environment that respects and supports a child's chosen gender identity. But such an interest is itself unconstitutional as it would deprive a parent of their constitutionally protected *Pierce* and *Meyer* rights.

To reiterate: Appellant does not dispute the legitimacy of GSB's administrative actions in fostering the learning environment it considers proper. Appellant argues that GSB is *actively* depriving her of her right to *educate* her child by taking affirmative steps to withhold and conceal information from her that she needs in deciding where to send her child to school—information GSB admits Appellant would want to know. APP. 014 ¶ 25; Answer (Doc. 13) ¶ 25. That policy cannot satisfy even rational basis scrutiny, let alone the strict scrutiny that properly applies here.

III. GSB's unwritten policy violated Appellant's procedural due process rights.

Foote vindicates Appellant's procedural due process claims. Appellant alleges that the lack of any procedure for determining whether school employees must notify a parent of the actions or decisions it takes with respect to her children violates her constitutional rights. When analyzing a due process claim, courts first "'ask[] whether there exists a liberty or property interest which has been interfered with by the State,'" and second, they consider "'whether the procedures attendant upon that deprivation were constitutionally sufficient.'" *Gonzalez Fuentes v. Molina*, 607 F.3d 864, 886 (1st Cir. 2010) (citation omitted). Appellant's well-pleaded facts support

her procedural due process claim at both steps. Appellants supplemental brief, and the discussion above, sufficiently demonstrate that Appellant's rights were violated in line with the first step.

As to the second, as noted previously, GSB's withholding policy includes *no* individualized review or consideration of facts and circumstances. Appellant alleges it is an across-the-board presumption that GSB employees are permitted to withhold information from parents as they see fit—without any particularized review or evaluation of even probable cause.[5] There's no "impartial and independent adjudicator," which is "'a fundamental ingredient of procedural due process.'" *Gorman v. Univ. of R.I.*, 837 F.2d 7, 15 (1st Cir. 1988) (citation omitted). The lack of any such process to determine whether to keep crucial information from a parent is sufficient to lead to a reasonable inference that GSB violated Appellant's procedural due process rights.

CONCLUSION

This Court should reverse and remand for discovery.

Respectfully submitted this 14th day of March 2025,

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[5] As the Supreme Court made clear in *Stanley v. Illinois*, 405 U.S. 645 (1972), blanket presumptions are *especially* inappropriate in the parent-child setting, where it "needlessly risks running roughshod over the important interests of both parent and child." *Id*. at 657.

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) and this Court's Feb. 21, 2025 Order because this brief does not exceed 10 pages, 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: March 14, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2025, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth 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