

United States Court of Appeals  
for the  
Third Circuit

Case No. 17-3113

JOEL DOE, a minor; by and through his Guardians JOHN DOE and JANE DOE;  
MARY SMITH; JACK JONES, a minor; by and through his Parents JOHN  
JONES and JANE JONES; and MACY ROE,

*Appellants*

– v. –

BOYERTOWN AREA SCHOOL DISTRICT; DR. BRETT COOPER, in his  
official capacity as Principal; DR. E. WAYNE FOLEY, in his official capacity as  
Assistant Principal; DAVID KREM, Acting Superintendent,

*Appellees*

and

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,

*Appellee-Intervenor*

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ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 5:17-CV-01249,  
HONORABLE EDWARD G. SMITH, U.S. DISTRICT JUDGE

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***AMICI CURIAE* BRIEF OF THE NATIONAL PTA, GLSEN, AMERICAN  
SCHOOL COUNSELOR ASSOCIATION, NATIONAL ASSOCIATION OF  
SCHOOL PSYCHOLOGISTS, DELAWARE PTA, NEW JERSEY PTA,  
AND PENNSYLVANIA PTA IN SUPPORT OF APPELLEES**

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL  
INTEREST**

As non-corporate parties, the National PTA, GLSEN, American School Counselor Association, National Association of School Psychologists, Delaware PTA, New Jersey PTA, and Pennsylvania PTA are not required to file a corporate disclosure statement under Fed. R. App. P. 26.1 or 3d Cir. L.A.R. 26.1.

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## **INTERESTS AND IDENTITIES OF AMICI CURIAE**

**National PTA** is a nationwide network of four million families, students, teachers, administrators, and business and community leaders devoted to promoting the education, health, safety and well-being of every child and making every child's potential a reality. National PTA is comprised of 54 state congresses, comprising all 50 states, the District of Columbia, U.S. Virgin Islands, Puerto Rico and the Department of Defense Schools in Europe. Additionally, there are more than 24,000 local PTA units nationwide. PTA serves 16.5 million students across the country.

The overall purpose of PTA is to bring together families, educators and business and community leaders to solve the toughest challenges facing schools and communities and engage and empower families and communities to participate in that mission. For more than 100 years, PTA has been a powerful voice for all children, a relevant resource for families and communities, and a strong advocate for public education.

**GLSEN** is a non-profit education organization that works with students, parents, and educators across the country and around the world to make all schools safe and affirming for all students, regardless of sexual orientation, gender identity, or gender expression. Since 1990, GLSEN has partnered with educators, schools, and districts across the United States to develop, evaluate, and

promulgate LGBT-supportive policies, programs, and practices for K-12 schools. GLSEN's work has contributed to measurable improvements in the school experience of lesbian, gay, bisexual, and transgender students in all 50 states, and is now recognized globally as a key contribution to educational access and opportunity for at-risk youth.

GLSEN's expertise and experience informs the work of UN agencies on the Sustainable Development Goals in Education, legislators and policymakers at all levels in the United States, and individual schools and districts via our network of 40 local chapters in 27 states. GLSEN also conducts quantitative and qualitative research on the experience of LGBTQ students in K-12 schools and advocates in support of a research-based public policy agenda. In addition, GLSEN's student leadership development and student organizing programs have reached hundreds of thousands of students in all 50 states, mobilized via events like GLSEN's Day of Silence and Ally Week or through GLSEN youth summits or student club support programs. Thousands of alumni of GLSEN's student programs have gone on to lives of service, including work as public and elected officials, business leaders and entrepreneurs, and principals, counselors, and teachers.

The **American School Counselor Association (ASCA)** is a nonprofit, 501(c)(3) professional organization based in Alexandria, VA. ASCA

supports school counselors' efforts to help students focus on academic, social, emotional, and career development. ASCA provides professional development, publications and other resources, research and advocacy to more than 34,000 school counselors around the globe.

The **National Association of School Psychologists (NASP)** is the world's largest organization of school psychologists, representing more than 25,000 school psychologists throughout the United States and 25 other countries, with members in every state, the District of Columbia, and Puerto Rico. NASP's vision is that all children and youth thrive in school, at home, and throughout life. To that end, NASP empowers school psychologists by advancing effective practices to improve students' learning, behavior, and mental health. NASP supports that all youth have equal opportunities to participate in and benefit from educational and mental health services within schools regardless of sexual orientation, gender identity, or gender expression. Critical to this effort is fostering positive, safe, and affirming school environments.

The Delaware Congress of Parents and Teachers, also known as the **Delaware State PTA**, is a registered 501(c)(3) non-profit organization made up of volunteers dedicated to improving the lives of Delaware's children. With more than 6,000 members, the Delaware State PTA is Delaware's largest and oldest child advocacy organization. We are a state charter of the National PTA, made up

of local units throughout the State of Delaware. Delaware State PTA prides itself on being a powerful voice for children, a relevant resource for parents, and a strong advocate for public education. Membership in the Delaware State PTA is open to anyone who is concerned with the education, health, and welfare of children and youth, and supports the mission of PTA.

The **New Jersey PTA** is a statewide network of over 115,000 families, students, teachers, administrators, and business and community leaders devoted to making a difference for the education, health, safety and well-being of every child and making every child's potential a reality. New Jersey PTA is comprised of almost 600 school or community-based PTAs.

Founded in 1899, the Pennsylvania Congress of Parents and Teachers, Inc., also known as the **Pennsylvania PTA**, was the second state PTA to be chartered in the nation. Pennsylvania PTA is a membership association made up of local units and councils throughout the Commonwealth. People join to show support of the work done locally and the work we do collectively to help children, families, and schools. With a statewide network today of 45,000 members, Pennsylvania PTA continues its efforts to advocate for all children in the areas of health, safety, welfare and education.

## INTRODUCTION

Amici<sup>1</sup> are a diverse group of national and state education organizations whose membership and constituents are on the front lines every day, doing the hard work of educating students through academic instruction and support, furnishing counseling and guidance and providing opportunities for engagement with peers and others. Critical to this educational mission, Amici seek to build and maintain non-discriminatory learning environments for all students, regardless of their backgrounds, characteristics, or experience.

As educators, parents, families, and education supporters, Amici know that restroom and locker room discrimination against transgender students hurts kids and that the exclusion of transgender students from facilities that match their gender identity is based on unfounded fears and is inhumane. Amici have gained extensive, hands-on experience in what policies and practices best serve all students while providing transgender students with full access to non-discriminatory learning environments. Amici have seen transgender students' capacity for educational success and healthy development when properly supported, and the tragic harms transgender students suffer when that essential support is denied. Amici's experience, which this brief shares with the Court,

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no person or entity other than Amici made a monetary contribution to its preparation or submission. Pursuant to Federal Rule of Appellate Procedure 29(c), all parties consent to the filing of this brief.

supports the District Court’s conclusion that the four student plaintiff-appellants (“Appellants”) in this action failed to establish (i) that they would suffer irreparable harm from the continuation of Boyertown Area School District’s (“Boyertown”) policy “of allowing transgender students to use the bathrooms and locker rooms of the sex to which they identify” (the “Boyertown Policy”), and (ii) that any such harm to Appellants outweighs the “potential injury to the defendant if the injunction is issued.” *Doe v. Boyertown Area School District*, No. 17-cv-1249, 2017 WL 3675418, at \*1, 75 n.77 (E.D. Pa. Aug. 25, 2017).<sup>2</sup>

First, Amici know first-hand the all too common harms transgender students suffer when stigmatized by discrimination, which the Boyertown Policy serves to mitigate. Stigmatizing discrimination includes being forced to use a restroom or locker room that is not aligned with a student’s gender identity or being shunted to a separate restroom or locker room that no other students are required to use. For example, in those situations, nearly 40% of transgender students fast, dehydrate, or otherwise force themselves not to use the restroom

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<sup>2</sup> While the District Court determined that its finding of no irreparable harm to Appellants obviated the need to balance any such harm against the harm to the Appellees from issuance of the injunction, “the court not[ed] that balance of the harms would have favored the defendants because the effect of changing the current practice on the transgender students would be that they will be forced to use the bathroom of their birth sex, with which they do not identify,” which Boyertown’s expert witness, Dr. H.S. Leibowitz, opined would have a “negative effect” on those students. *Boyertown Area School District*, 2017 WL 3675418, at \*75 n.77.

during the school day. See Joseph Kosciw, et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, & Queer Youth in Our Nation's Schools*, GLSEN (2016) (hereinafter "2015 NSCS") (39.4% avoid restrooms and 37.9% avoid locker rooms); see also Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 *Journal of Public Management and Social Policy* 65, 74-75 (2013) (54% of adult transgender students and employees surveyed "reported having some sort of physical problem from trying to avoid using public restrooms").

Transgender students subjected to discrimination also experience elevated levels of severe depression and suicide. *Id.* at 67 ("In the largest survey of trans people to date, transgender and gender non-conforming people reported . . . attempting suicide at alarming rates (41%)."). On the other hand, when transgender students are accorded the dignity they deserve (*e.g.*, when they are addressed with appropriate names and pronouns and permitted to use facilities that conform to their gender identity), transgender students reflect the same, healthy psychological profile as their peers. Lily Durwood, et al., *Mental Health and Self-Worth in Socially Transitioned Transgender Youth*, 56 *Journal of the American Academy of Child & Adolescent Psychiatry* 116, 116 (2017).

Second, schools and school districts across the nation have already developed and successfully deployed practical, effective strategies – much like the Boyertown Policy – to ensure transgender students receive appropriate support and, ultimately, the educational experiences they need to succeed and live healthy, fulfilling lives. This includes allowing *all* students to use the restroom and locker room that matches their gender identity while ensuring that all students’ privacy is protected. The experiences of these schools put the lie to the supposed justifications for discrimination, including those Appellants advance here: that permitting transgender students to use the sex-separated restrooms and locker rooms that align with their gender identity violates the “bodily privacy” of other students, and necessarily subjects them to “embarrassment, humiliation, and loss of dignity.” *Boyertown Area School District*, 2017 WL 3675418, at \*3-4. Consistently, inclusive policies have been implemented with great success and respect for the privacy, human dignity and educational needs of the schools’ entire student populations. Put differently, Amici’s experience teaches that transgender students can be provided full and equal use of restrooms and locker rooms in school without compromising the privacy interests or dignity of other students.

In its civil rights decisions, the Supreme Court has employed “dispositive realities” to reject “self-fulfilling prophecies” that are “routinely used to deny rights or opportunities.” *United States v. Virginia*, 518 U.S. 515, 543

(1996). Here, the dispositive realities include the successful experiences and practices of Amici and other educators throughout the nation in implementing inclusive restroom and locker room policies. The District Court properly rejected Appellants' claim that they suffer irreparable harm from the Boyertown Policy, which seeks to protect Boyertown's transgender students' equal access to a "state-supplied educational opportunity for which they are fit," *id.* at 550-551, while accommodating the privacy interests of *all* students.

### **SUMMARY OF ARGUMENT**

Understanding the enduring harms transgender students suffer when denied the ability to use restrooms and locker rooms aligned with their gender identity is critical in this case. Such harms flow from the very relief Appellants seek: repeal of the Boyertown Policy and prohibition of Boyertown's transgender students from entering restrooms and locker rooms aligned with their gender identity.

As educators throughout the country understand, there is no reason for public schools to harm transgender boys or girls, particularly when based on unfounded fears. Rather, schools can and should help *all* students understand and achieve their full potential so that they become citizens and workers who are productive, engaged, and fulfilled.

Without a school environment that is authentically welcoming and that honors and protects the dignity and best interests of all students—every one of whom is different in some way—many students are harmed. A school that lacks a culture that embraces safety, respect, and inclusion for all, regardless of background and circumstance, injures the disfavored students. See Emily Greytak, et al., *From Teasing to Torment: School Climate Revisited, A Survey of U.S. Secondary School Students and Teachers*, GLSEN (2016), [https://www.glsen.org/sites/default/files/TeasingtoTorment%202015%20FINAL%20PDF%5B1%5D\\_0.pdf](https://www.glsen.org/sites/default/files/TeasingtoTorment%202015%20FINAL%20PDF%5B1%5D_0.pdf). Conversely, maintaining school policies that honor the dignity of all students and expose them “to other students who are different from themselves and the novel ideas and challenges that such exposure brings leads to improved cognitive skills, including critical thinking and problem solving” and teaches students “how to navigate adulthood in an increasingly diverse society.” Amy Stuart Wells, et al., *How Racially Diverse Schools and Classrooms Can Benefit All Students*, The Century Foundation (2016), <https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/>.

As set forth in Section I, the discriminatory denial of equal access to restrooms and locker rooms routinely suffered by transgender students often results in dire educational and life consequences for the individuals affected. Extensive

research shows the myriad harms transgender students experience in discriminatory school settings, including when subjected to restroom and locker room discrimination. Understanding the severity of these harms is critical context for the Court’s consideration of this case. Indeed, as reflected in Supreme Court cases and U.S. Department of Education policies, the contours of federal non-discrimination law have been informed by, and shaped to prevent, real-world harms experienced by students.<sup>3</sup>

As set forth in Section II, the purported bases for subjecting transgender students to the heightened risk of severe harm through restroom and locker room discrimination lack empirical support, and instead are predicated upon unfounded fears. Educators in many places can and do provide transgender students the inclusive and supportive environment they need—including equal access to restrooms and other facilities—without harming other students. Indeed, schools and districts across the country have successfully implemented policies that neither discriminate against transgender students nor harm others. The District

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<sup>3</sup> See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 495 n.11 (1954) (rejecting “separate but equal” doctrine based on extensive social science research and information); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999) (examining the severity of student-on-student harassment sufficient to constitute a Title IX claim on the basis of interference with equal access to educational opportunities); U.S. Dep’t of Education Sexual Harassment Guidance (2001) (explaining in detail, with examples, the harm to students that is an element of federal harassment standards); U.S. Dep’t of Education Racial Harassment Guidance (1994) (same).

Court was therefore correct in concluding that Appellants had failed to show any risk of irreparable harm in allowing the Boyertown Policy to stand. Indeed, given the substantial measures Boyertown implemented to protect the privacy interests of Appellants and all other students, the District Court properly concluded that Appellants failed to establish that they are at risk for any harm at all. *Boyertown Area School District*, 2017 WL 3675418, at \*74.

## ARGUMENT

### I. IN-SCHOOL DISCRIMINATION SERIOUSLY HARMS TRANSGENDER STUDENTS.

Approximately 150,000 transgender students attend grades K-12 schools throughout America.<sup>4</sup> Transgender individuals have a gender identity that differs from the gender assigned to them at birth. National Association of School Psychologists, Position Statement, *Safe Schools for Transgender and Gender Diverse Students* (2014). Transgender students live in all 50 states and U.S. territories, come from different racial, ethnic, and religious backgrounds; are represented in every socioeconomic level; and attend all variety of K-12 schools.

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<sup>4</sup> Transgender persons comprise an estimated 0.6% of the adult United States population (approximately 1.4 million adults 18 or older) and 0.7% of youth ages 13 to 17 (approximately 150,000 youth). Jody L. Herman, et al., *Age of Individuals who Identify as Transgender in the United States*, The Williams Institute (2017).

Listen to transgender student Corey Maison:

*We are just like any other kids. We only want people to accept and love us for who we are.*

Nicole Pelletiere, 'We're Not a Threat': Transgender Teen Shares Powerful Message on Bullying, ABC News (Feb. 8, 2017),

<http://abcnews.go.com/Lifestyle/threat-transgender-teen-shares-powerful-message-bullying/story?id=39752422>. Instead,

*Corey was bullied for being transgender when she was younger. The first incident was when a child pushed her down a hill covered in frozen ice, causing injuries to Corey's face. Eventually, Corey was moved to another school as a result of the bullying. . .*

*"I might look happy now, but I haven't always been. . . I've known I was different all my life. When I was little I loved to play with dolls and play dress up. I loved painting my nails too. Wearing my mom's high heels was my favorite! But only in the house. Never outside...because I was born a boy. I never had many friends. I didn't fit in with girls, and the boys made fun of me. In 5<sup>th</sup> grade I was bullied so bad. Almost every day I came home from school crying. . . . One of the kids told me I should kill myself because no one liked me anyway. He told me no one would miss me if I was dead.*

*Id.*

Sadly, Corey Maison's experience is all too common. At school, transgender students often suffer a variety of serious harms—emotional and physical—not because they *are* transgender but as a result of *how they are treated because they are transgender*. These students are particularly vulnerable in elementary and secondary school settings, where harms inflicted by peers and adults significantly impede their education and their prospects for leading fulfilling

and productive lives. When a school takes no action to ameliorate these conditions, it compounds the harms suffered by transgender students, often leading to tragic consequences.

**A. Transgender students suffer a variety of harms at school due to mistreatment by others.**

As described by Katharine Prescott, who lost her transgender son Kyler to suicide at age 14:

*Kyler struggled to be respected and understood at school because of his gender identity. Administrators and teachers clearly were not supportive of his gender identity, and he was misgendered in front of other students on a number of occasions. Because of this, I pulled him out of the traditional classroom and put him in independent study so that he would not be humiliated in this way. Kyler had always loved school, so it was tragic that this basic right to education was infringed upon. Kyler felt stabbed in the heart every time someone would say 'she.' It's really traumatic to keep getting called something you truly feel you're not.*

Statement from Katharine Prescott to GLSEN (Feb. 26, 2017) (document on file with undersigned counsel); *see also* GLSEN, *Mother of Trans Student Lost to Suicide and Advocate for Title IX Guidance Release Statement*, GLSEN, <http://www.glsen.org/article/glsen-mother-trans-student-lost-suicide-and-advocate-title-ix-guidance-release-statement> (last visited Jan. 16, 2018); Avianne Tan, *California Mother Appeals for Support for Transgender Teens After Losing Son to Suicide*, ABC News (May 27, 2015), <http://abcnews.go.com/US/california-mother-appeals-support-transgender-teens-losing-son/story?id=31338159>.

Kyler's story is by no means unique. “[D]isturbing patterns of mistreatment and discrimination” relating to transgender individuals are well documented. *See, e.g.*, Sandy James, et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (Dec. 2016), <http://www.ustranssurvey.org/report> (hereinafter “USTS”).

Transgender students too often encounter school experiences that cause long-lasting mental, emotional, and socio-economic trauma. In elementary and secondary education, transgender students are subjected to bullying and harassment at alarmingly high rates. *See, e.g.*, Joseph Kosciw, et al., *The 2013 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, GLSEN (2014); Joseph Kosciw, et al., *The Effect of Negative School Climate for LGBT Youth and The Role of In-School Supports*, 12 *Journal of School Violence* 45, 63 (2012). School climates that are unwelcoming or threatening have a direct bearing on students' well-being and safety. *Id.* Of the 40% of USTS respondents who were out as transgender during their K-12 education or believed classmates, teachers, or school staff thought they were transgender: 54% were verbally harassed; 24% were physically attacked; 13% were sexually assaulted; 36% were disciplined for fighting back against bullies; 17% left a school because the mistreatment was so severe; and 6% were expelled from school. USTS at 132.

Compared to transgender students who did not suffer these negative experiences, transgender students who did were more likely to have attempted suicide (52% compared to 37%), more likely to be in serious psychological distress (47% compared to 37%), and more likely to have been homeless (40% compared to 22%). One common and harmful form of discrimination is the refusal to use preferred names or pronouns. An example is calling a transgender boy Stephanie or she rather than Stephen or he. A majority of transgender students (50.9%) report that their schools do not allow them to use their preferred name or pronouns, and many transgender students find that staff or other students intentionally use the wrong name or pronoun. 2015 NCSC at 38. This practice, known as “deadnaming,” causes transgender students psychological harm. *See Singh, et al., Growing Up LGBTQI+: The Importance of Developmental Conceptualizations, Affirmative Counselling with LGBTQI+ People* (Misty M. Ginicola, et al. eds., 2017).

The negative experiences transgender students suffer impede their ability to learn and fully participate in school. For example, surveys have found that 32% of transgender students report missing at least one school day in the previous month because they felt unsafe at school. *See 2015 NSCS at 13.* Without safe and supportive school environments, transgender students also frequently

avoid attending school functions (71.5% report doing so) and participating in extracurricular activities (65.7%). *Id.*

The disruption to education is even worse for those transgender students who are frequently harassed during the school day: 68% of such students reported having missed school because of concerns for their safety. Emily Greytak, Joseph Kosciw, & Elizabeth Diaz, *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools*, GLSEN (2009), <https://www.glsen.org/sites/default/files/Harsh%20Realities.pdf>. These more frequently targeted students also have lower grades, are less likely to plan to attend college, and have lower educational outcomes than transgender students who attend safer schools. *Id.* at 25.

**B. Restroom and locker room discrimination severely harm transgender students.**

Transgender students suffer particular harms when they attend schools that force them to use separate restrooms and locker rooms or to use sex-separated restrooms and locker rooms that do not align with their gender identity. These harms include stigmatization, and increased risk of harassment and assault.

Transgender students who are denied access to restrooms and locker rooms that align with how they live their lives are frequently singled out for unwanted and harmful attention. In some instances, for example, members of the school community find out that fellow students are transgender precisely when

they enter restrooms that do not match their gender identity, or separate facilities than those used by other students. The stigmatization that results from this treatment can have powerfully negative impacts on transgender students' well-being. Evidence shows that denying transgender individuals equal access to such facilities can cause severe psychological distress often leading to attempted suicide. Max Kutner, *Denying Transgender People Bathroom Access Is Linked To Suicide*, Newsweek (Dec. 16, 2016), <http://www.newsweek.com/transgender-bathroom-law-study-suicide-454185>; Kristen Clements-Nolle, Rani Marx, and Mitchell Katz, *Attempted suicide among transgender persons: The influence of gender-based discrimination and victimization*, 51 *Journal of Homosexuality* 53, 63-65 (2006); see also Hayley Sutton, *Transgender college students are also more at risk for suicide when denied access to bathrooms aligned with their gender*, 13(2) *Campus Security Report* 9 (2016).

The stigma imposed by such discriminatory restrictions on transgender students' access to restrooms and locker rooms is so deleterious that, for example, nearly 40% of transgender students at times avoid going to the bathroom by fasting, dehydrating, or otherwise forcing themselves not to use the restroom throughout the school day, even when necessary, and forgo use of locker rooms. 2015 NSCS at 12-13 (39.4% avoid restrooms and 37.9% avoid locker rooms). Such behavior can lead to medical problems and makes it harder to focus

on academic learning in school. Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, 19 *Journal of Public Management and Social Policy* 65, 74-75 (2013) (survey respondents reported that “accessing and using restrooms was disruptive to their daily life at school,” and 54% of survey respondents “reported having some sort of physical problem from trying to avoid using public restrooms”). The opinions of Appellees’ expert Dr. Scott Leibowitz are in accord with this research. *See Boyertown Area School District*, 2017 WL 3675418, at \*40 (an adolescent “barred from a sex-segregated facility matching their gender identity. . . will more frequently refrain from urinating” and data suggests “there are much higher rates of not going to school, leaving school, cutting class, leaving the school to find a bathroom.”).

Forcing transgender students to choose between using separate restrooms or locker rooms and using facilities that do not align with their gender identity impairs their ability to develop a healthy sense of self, peer relationships, and the cognitive skills necessary to succeed in adult life. *See Katherine Szczerbinski, Education Connection: The importance of allowing students to use bathrooms and locker rooms reflecting their gender identity*, 36 *Child. Legal Rts. J.* 153, 153 (2016). Transgender student Drew Adams describes the effects of his experience:

*Forcing me to use a gender-neutral bathroom was an insult to my identity. It was absolutely humiliating to walk halfway across the school, passing several men's rooms, to find one of the gender-neutral bathrooms to use. I practically hid from administrators who would have thought I was skipping class if I had said I was going to the bathroom while walking past one. My school had decided to alienate me, along with every other transgender student at my school.*

Drew Adams, *My School Failed to Protect Trans Students Like Me, So I Did Something About It*, GLSEN (Feb. 22, 2017), <http://www.glsen.org/blog/my-school-failed-protect-trans-students-me-so-i-did-something-about-it>. See also *Boyertown Area School District*, 2017 WL 3675418, at \*40 (citing Dr. Leibowitz's conclusions that denial of equal bathroom access may negatively impact a transgender student's "educational effect, self-esteem and [cause] depression.").

## **II. THE EXPERIENCES OF MANY SCHOOLS ACROSS THE NATION DEMONSTRATE THAT NON-DISCRIMINATORY POLICIES HARM NO ONE.**

### **A. Schools have already successfully implemented non-discriminatory policies that balance the privacy interests of all students.**

The experience of educators across the country demonstrates that inclusion and non-discrimination can be achieved while protecting the privacy interests of all students. Schools already implementing supportive policies have—like Boyertown—offered alternative accommodations to any student who objects to or is uncomfortable with sharing bathrooms or locker rooms with transgender students. See *Boyertown Area School District*, 2017 WL 3675418, at \*56 (“the School District has instituted numerous privacy protections and available

alternatives for uncomfortable students”). For example, in October 2016, Boyertown renovated its locker rooms to install single-user showers with curtains to provide more privacy for students, rather than showers in which students would shower together with no privacy. *Id.* at \*12, ¶ 61. The renovations included the addition of several multi-user bathrooms, all of which have individual stalls with a locking door, in which students can use the restroom or change clothes in greater privacy. *Id.* at \*13, ¶ 67. The alterations also include dividers between the urinals in the boys’ bathrooms. *Id.* at \*13, ¶ 73. These practical measures—along with the right of all Boyertown students to change clothes or use the restroom in one of several single-user facilities—protect the privacy interests of all students without resorting to discriminatory policies and practices. Moreover, the ability of all students to avail themselves of these protections renders wholly unsupportable Appellants’ contention that the Boyertown Policy exposes them to “a pervasive harassing environment.” Appellants’ Br. at 39.

While policies among states and school districts may differ, common across all state and district policies is and must be a commitment to providing a safe and supportive school environment that allows transgender students to pursue their education and thrive without facing the mistreatment, stigmatization, and harms discussed above, including access to facilities that correspond to transgender students’ gender identity.

The experience of Janice Adams, superintendent of the Benicia Unified School District in California, provides an example of how administrators with no prior experiences with transgender students can and do successfully implement inclusive policies:

*One day about eight years ago, a mother came to me and asked what I could do to support her child who would be starting kindergarten in the fall. . . . Toni was assigned male at birth, but her parents were considering letting her start school as a girl, which is how she had been identifying for some time.*

*[. . .]*

*By far the easiest part of the process was the acceptance by Toni's classmates, who embraced her and affirmed her identity. As we worked to balance the need to educate and inform parents while protecting Toni's right to privacy, I met with a small number of concerned parents individually and attended a parent night facilitated by Gender Spectrum. We provided education regarding transgender children to the school's staff, our administrative team and the governing board. For the most part there was a compassionate response to do the right thing. There were people who struggled with changes we put in place, but we continually focused on supporting Toni and doing what was right.*

Janice Adams, Superintendent, Benicia Unified School District in Orr and Baum,

*Schools in Transition: A Guide for Supporting Transgender Students in K-12*

*Schools* (2015), [http://hrc-assets.s3-website-us-east-](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf)

[1.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf).

Typically, inclusive school policies address the following topics: (i) bullying, harassment, and discrimination; (ii) privacy/confidentiality; (iii) media and community communication; (iv) names, pronouns, and school records; (v) access to gender-segregated activities and facilities, including restrooms and locker

rooms; (vi) dress code; (vii) student transitions; (viii) training and professional development; and (ix) publication of the policy. GLSEN Model District Policy on Transgender and Gender Nonconforming Students (2016); *see, e.g.*, Boulder Valley School District Policy <https://www.bvsd.org/policies/Policies/AC-E3.pdf> (“[T]he goal is to ensure the safety, comfort, and healthy development of the students who are transgender or gender nonconforming while maximizing the students’ social integration and minimizing stigmatization of the students.”). Optimally, comprehensive policies and practices also include establishing supportive student clubs (*e.g.*, Gay/Straight Alliance Clubs), training supportive educators, implementing inclusive curricula, and adopting, communicating clearly, and enforcing inclusive policies as well. 2015 NSCS at 53-77.

These approaches are informed by decades of research, collaboration with education and mental health professionals, and prior successes in schools across the nation. Notably, similar inclusive approaches to policy and practice have been endorsed by the Amici organizations and other national educational and medical organizations.<sup>5</sup>

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<sup>5</sup> *See:*

- ◆ The American Academy of Pediatrics at <https://www.aap.org/en-us/about-the-aap/aap-press-room/Pages/AAPOpposesLegislationAgainstTransgenderChildren.aspx>;
- ◆ The American Psychological Association at <http://www.apa.org/pi/lgbt/programs/transgender/>;

A critical element of an effective non-discrimination policy concerns transgender students’ equal access to restrooms and locker rooms that align with their gender identity. As with the Boyertown Policy, many such policies allow *any* student to use a private or single-stall facility, rather than forcing transgender students to endure the stigma of being the only students forced to use a separate facility. *See, e.g.,* Charlotte-Mecklenberg Schools (NC) [http://dig.abclocal.go.com/wtvd/docs/CMS-supporting-transgender-students-training-final\\_5599792.pdf](http://dig.abclocal.go.com/wtvd/docs/CMS-supporting-transgender-students-training-final_5599792.pdf) (“If there’s a request for increased privacy, any student should be provided a reasonable accommodation, such as private or screened area in the same locker room [or] . . . use of a nearby private area.”); El Rancho Unified School District (CA) [http://www.erusd.org/pdf/board\\_policies/5145\\_3.pdf](http://www.erusd.org/pdf/board_policies/5145_3.pdf) (establishing the same policy as to reasonable requests for privacy in locker

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- ◆ American School Counselor Association at <https://www.schoolcounselor.org/magazine/blogs/may-june-2016/transgender-student-support>;
  - ◆ The Association for Supervision and Curriculum Development at <http://www.ascd.org/publications/newsletters/education-update/jan16/vol58/num01/Charting-a-Course-to-Transgender-Inclusion.aspx>;
  - ◆ The National Education Association at [https://www.nea.org/assets/docs/20184\\_Transgender%20Guide\\_v4.pdf](https://www.nea.org/assets/docs/20184_Transgender%20Guide_v4.pdf);
  - ◆ The American Federation of Teachers at <http://www.aft.org/node/11195>;
  - ◆ The National Association of School Psychologists at [https://www.nasponline.org/assets/Documents/Research%20and%20Policy/Position%20Statements/Transgender\\_PositionStatement.pdf](https://www.nasponline.org/assets/Documents/Research%20and%20Policy/Position%20Statements/Transgender_PositionStatement.pdf); and
  - ◆ National PTA at <http://www.pta.org/newsevents/newsdetail.cfm?ItemNumber=4838>.

rooms); Shorewood School District (WI) [http://www.shorewood.k12.wi.us/uploaded/Board\\_Documents/Policies/411\\_Guidelines\\_and\\_Exhibit.pdf?1393865642372](http://www.shorewood.k12.wi.us/uploaded/Board_Documents/Policies/411_Guidelines_and_Exhibit.pdf?1393865642372) (requiring that “[a]ny student who has a need or desire for increased privacy, regardless of the underlying reason may be provided with access to a single-access restroom where such a facility is reasonable available” and in the case of locker rooms, requiring access to a “reasonable alternative changing area” for students desiring increased privacy); *see also*, Atherton High School, Jefferson County (KY) <http://schools.jefferson.kyschools.us/High/Atherton/PDFs/SBDM.pdf> (stating that “[i]f a student desires increased privacy, regardless of the underlying reason, the administrator shall make every effort to provide the student with reasonable access to an alternative restroom such as a single-stall restroom” and requiring “access to a reasonable accommodation” such as a nearby private area or use of a separate restroom stall if a student requests increased privacy in locker room facilities). *See, e.g.*, District of Columbia Public Schools (DC) <https://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/DCPS%20Transgender%20Gender%20Non%20Conforming%20Policy%20Guidance.pdf> (stating that “[a]ny student, transgender or otherwise, who has a need or desire for increased privacy, regardless of underlying reasons, also has the right to access a single-user bathroom, such as a staff restroom or the bathroom in the nurse’s

office” and, as to locker rooms, “*any* student should be offered access to a reasonable accommodation” such as use of a private area in the facility or use of a nearby private area) (emphasis in original).

Similarly, the Boyertown policy establishes that:

No BASH student is required to change clothes in a multi-user locker room; instead, if a student at BASH does not feel comfortable changing in a locker room with a transgender student, the uncomfortable student does not have to change in the locker room. The School District would allow the uncomfortable student to use one of the single-user facilities to change clothes. These facilities are equally available to transgender or cisgender (an individual that is not transgender) students if they feel uncomfortable changing in the locker room.

*Boyertown Area School District*, 2017 WL 3675418, at \*14, ¶ 80.

Importantly, schools may provide transgender students with an option to use a private facility (*e.g.*, a school nurse’s restroom), but such policies make clear that transgender students are not required to use those alternatives. *See, e.g.*, Washoe County School District (NV) [http://www.nvasb.org/assets/washoecsd\\_regulation.pdf](http://www.nvasb.org/assets/washoecsd_regulation.pdf) (“The use of such accommodations shall be a matter of choice for a student.”).

Thus, schools already implementing inclusive restroom and locker room policies have, like Boyertown, obviated privacy, religious, and other concerns by offering alternative accommodations to any student who objects to or is uncomfortable with sharing restrooms and locker rooms with transgender

students. See, e.g., Atherton High School, Jefferson County (KY), <http://schools.jefferson.kyschools.us/High/AthertonPDFs/SBDM.pdf> (privacy within the shared facility); District of Columbia Public Schools (DC) <https://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/DCPS%20Transgender%20Gender%20Non%20Conforming%20Policy%20Guidance.pdf> (option of using a private facility). What schools must not do, though, is what Appellants effectively seek here: to bootstrap a handful of students' (or their parents') fears into a reason to segregate and stigmatize a transgender student or transgender students generally, especially given the well-documented harms that flow from such differential treatment.

Districts and schools that adopt and implement inclusive policies and practices—including restroom and locker room policies—establish physically and psychologically safe schools, resulting in better health and educational outcomes for transgender students. While all LGBT students benefit from these approaches, transgender students benefit even more significantly. Emily A. Greytak, Joseph G. Kosciw, and Madelyn J. Boesen, *Putting the “T” in “Resource”*: *The Benefits of LGBT-Related School Resources for Transgender Youth*, 10 *Journal Of LGBT Youth* 1-2 (2013). In the end, the data validates what educational and other professionals know through their hands-on experiences: “people who are validated and supported in their selfhood are happier, have [fewer] mental health challenges

and are more successful.” Interview with Johanna Olson-Kennedy, Medical Director of the Center for Transyouth Health and Development, Children’s Hospital in Los Angeles on NPR, South Carolina Public Radio (March 23, 2016). This link between LGBT-inclusive policies and improved mental health outcomes is supported by analogous research showing that granting the marriage right to same-sex couples has been associated with reduced suicide rates among adolescent sexual minorities. See Julia Raifman, et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, JAMA Pediatrics (Feb. 20, 2017), <http://jamanetwork.com/journals/jamapediatrics/fullarticle/2604258>.

Corey Maison’s school experience was transformed as a result of the implementation of inclusive policies.

*“[S]chool now is wonderful,” Maison[’s mother] said. “The staff and students are very accepting. She’s treated just like any of the other girls. She’s allowed to use the girls’ bathroom and locker room, and play on the girls’ sports team and cheer team if she wants to.”*



Corey Maison (pictured).

Nicole Pelletiere, *'We're Not a Threat': Transgender Teen Shares Powerful Message on Bullying*, ABC News (Feb. 8, 2017), <http://abcnews.go.com/Lifestyle/threat-transgender-teen-shares-powerful-message-bullying/story?id=39752422>.

**B. Discrimination against transgender students is based on unfounded fears.**

The widespread, successful, and non-disruptive implementation of inclusive policies in schools every day belies the purported bases for restroom and locker room discrimination and exposes them as irrational pretexts. As shown above, for years schools around the country have secured equal access to school facilities for transgender students while protecting the privacy of all students.

The experience of these schools and districts contradicts the insupportable claim that transgender-inclusive restroom and locker room policies disrupt the school environment. For example, a 2015 survey of the 17 largest school districts in the 12 states (plus Washington, DC)<sup>6</sup> that, at that time, had enacted statewide rules prohibiting discrimination on the basis of gender identity found that “[y]ears after implementing their own anti-discrimination policies, none of the schools have experienced any problems.” Rachel Percelay, Media Matters, *17 School Districts Debunk Right-Wing Lies About Protections For Transgender*

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<sup>6</sup> The survey included the District of Columbia and the following states: California, Colorado, Connecticut, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Jersey, Oregon, Washington, and Vermont.

*Students* (June 3, 2015), <https://mediamatters.org/research/2015/06/03/17-school-districts-debunk-right-wing-lies-abou/203867>. Specifically, schools implementing inclusive restroom and locker room policies have not experienced any problems as a result. See Curtis Tate, et al., *These schools let transgender students use the bathroom, and here's what happened*, *Kansas City Star* (June 20, 2016), <http://www.kansascity.com/news/politics-government/article84811367.html>, (“Schools in Missouri and across the nation have quietly made change with little trouble.”). This accords with the District Court’s findings with respect to Boyertown: “[t]he practice of allowing transgender students to use the restrooms and locker rooms aligned with their gender identity has not resulted in any disruption to the education program or activities of the School District.” *Boyertown Area School District*, 2017 WL 3675418, at \*15, ¶ 90 (internal citations omitted).

From Amici’s considerable experience, schools can and do appropriately and effectively accommodate any student’s professed privacy or other concerns with sharing restrooms and locker rooms with transgender students (or any other student) by doing just what Boyertown has done here: offering them access to a single user facility and enhancing privacy protections within shared facilities. Appellants’ proposed alternative—requiring Boyertown’s transgender population to use a sex-separated facility discordant with their gender identity

and/or forcing transgender students uniquely to use a single user facility—would consign Boyertown’s transgender students to continued discrimination and suffering.

### **CONCLUSION**

This Court should affirm the District Court’s denial of Appellants’ motion for a preliminary injunction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this 23rd day of January 2018, I served the foregoing Amici Curiae Brief of the National PTA, GLSEN, American School Counselor Association, National Association of School Psychologists, Delaware PTA, New Jersey PTA, and Pennsylvania PTA in Support of Appellees via the Court's ECF system upon all counsel.

Dated: January 23, 2018

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and U.S. Court of Appeals for the Third Circuit's Local Appellate Rule 31.1(c), the undersigned counsel certifies that:

(i) I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit;

(ii) this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word and is set in Times New Roman font in a size equivalent to 14 points or larger;

(iii) this brief complies with the length requirement of Rule 29(a)(5) because it is 6,432 words;

(iv) this brief complies with the requirement of L.A.R. 31.1(c) because the text of the brief has been filed with the Court in both electronic and paper form and the text of the electronic brief is identical to the text in the paper copies;

(v) this brief complies with the requirements of L.A.R. 31.1(c) because the computer virus detection program System Center Endpoint Protection was run on the electronic version of the brief and no virus was detected.

Dated: January 23, 2018

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