

No. 18-13592-EE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

—————>—————
DREW ADAMS, a minor, by and through his next friend and mother,
ERICA ADAMS KASPER,

Plaintiff-Appellee,

v.

SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,

Defendant-Appellant.

—————
On Appeal from the United States District
Court for the Middle District of Florida, Jacksonville Division
Honorable Timothy J. Corrigan
Case No. 3:17-CV-00739-TJC-JBT

**EN BANC *AMICI CURIAE* BRIEF OF SCHOOL ADMINISTRATORS
FROM TWENTY-TWO STATES AND THE DISTRICT OF COLUMBIA
IN SUPPORT OF APPELLEE AND AFFIRMANCE**

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AMICI'S CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1 through 26.1-3, the undersigned certifies that the following persons and entities have an interest in the outcome of this appeal as *amici curiae*:

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IDENTITY AND INTERESTS OF *AMICI CURIAE*¹

The *Amici Curiae* School Administrators collectively have decades of experience with the development and implementation of student-focused school policies that are inclusive of their communities' transgender students. Because they have managed and closely monitored these policies' implementation, the *Amici Curiae* School Administrators are uniquely positioned to describe the process of developing such policies and their impact on school communities. *Amici* have witnessed firsthand not only the need for school policies that are inclusive of transgender students, but also the benefits that flow from such inclusive policies—not only for their transgender students but also for the student communities at large. The *Amici Curiae* School Administrators share their experiences with this Court on behalf of the Plaintiff-Appellee because they

¹ Counsel for *amici*, Cleary Gottlieb Steen & Hamilton LLP (“CGSH”), have prepared and filed this brief, with no participation by counsel for any party. This brief on behalf of *amici* is based upon similar briefs submitted in other cases regarding policies toward transgender students, which were prepared and filed by Boies Schiller Flexner LLP, Pillsbury Winthrop Shaw Pittman LLP, and Lambda Legal Defense and Education Fund, Inc. With the exception of *amici* San Diego Unified School District and Washington Central Unified Union School District, *amici* join this brief in their individual capacities based on their experiences as school administrators and not as representatives of their respective schools or districts.

No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

recognize the importance of student-focused, inclusive policies to their educational mission, and wish to see such policies adopted more widely.

The *Amici Curiae* School Administrators comprise two public school districts; eight current or former school board members, in their individual capacities; and thirty-two current or former school administrators, including superintendents, principals, social workers, directors of curriculum, and other officials from schools and school districts, in their individual capacities. *Amici* file this brief pursuant to 11th Cir. R. 35-8 and Federal Rule of Appellate Procedure 29(a)(3)–(a)(5). Below is a list of *amici* who join in this brief of the *Amici Curiae*

School Administrators:

Thomas A. Aberli, Ed.D., Former Principal, J.M. Atherton High School, Louisville, Kentucky

Will Baker, Former Vice Chair, Doty Memorial School Board, Worcester, Vermont

Roger Bourgeois, Retired Superintendent-Director, Greater Lowell Technical Regional School District, Tyngsborough, Massachusetts

Diana Bruce, Former Director of Health and Wellness, Office of Student Wellness, District of Columbia Public Schools, District of Columbia

Karen Carney, Head of School, Chicago Friends School, Chicago, Illinois

Heidi Carter, Former Chair, Durham Public Schools Board of Education, Durham, North Carolina

Peyton Chapman, Principal, Lincoln High School, Portland, Oregon

Judy Chiasson, Ph.D., Coordinator, Human Relations, Diversity and Equity, Los Angeles Unified School District, Los Angeles, California

Howard Colter, Former Interim Superintendent, Cape Elizabeth School Department, Cape Elizabeth, Maine

Sherri Cyra, Deputy Superintendent, Middleton-Cross Plains Area School District, Middleton, Wisconsin

Lizbeth DeSelm, Member, Melrose School Committee, Melrose, Massachusetts

Flor Diaz Smith, Chair, School Board, Washington Central Unified Union School District, Montpelier, Vermont

Arthur DiBenedetto, Retired Superintendent of Schools, Hopatcong Borough Schools, Hopatcong, New Jersey

Mary Doran, Former School Board Chair, Saint Paul Public Schools Board of Education, St. Paul, Minnesota

Jill Gurtner, Principal, Clark Street Community School, Middleton, Wisconsin

Matthew Haney, Principal, Mount Desert Island High School, Bar Harbor, Maine

Kellie M. Hargis, Ed.D., Executive Principal, Hume-Fogg Magnet High School, Nashville, Tennessee

Sherie Hohs, Former LGBTQIA+ Lead and Former Social Worker, Madison Metropolitan School District, Madison, Wisconsin

Leah Fregulia, Head of School, Arizona School for the Arts, Phoenix, Arizona

Mónica García, Board of Education Member, Los Angeles Unified School District, Los Angeles, California

Tim Kenney, Principal, Shorewood High School, Shorewood, Wisconsin

Ken Kunin, Retired Superintendent, South Portland School Department, South Portland, Maine

Laura H. Love, Ed.D., Director of High School Education, Middleton-Cross Plains Area School District, Middleton, Wisconsin

Lisa Love, Manager, Health Education, Seattle Public Schools, Seattle, Washington

Jeremy Majeski, Ed.D., Former Principal, Komensky Elementary School, Berwyn, Illinois

Craig McCalla, Principal, Anchor Elementary School, Dexter, Michigan

Gregory Meece, Former School Director, Newark Charter School, Newark, Delaware

Wendi Miller-Tomlinson, Ph.D., Deputy Superintendent, Division of Teaching, Learning, Leadership, & Research, Las Cruces Public Schools, Las Cruces, New Mexico

James C. Morse, Sr., Ed.D., Superintendent, Oyster River Cooperative School District, Durham, New Hampshire

Ziad W. Munson, Ph.D., Former Member, School Board, East Penn School District, Emmaus, Pennsylvania

John O'Reilly, Principal, Arts & Letters 305 United, Brooklyn, New York

Denise Palazzo, Statewide Safe Schools Director, Equality Florida; Former Instructional Facilitator and Diversity and LGBTQ Coordinator, Broward County, Florida Public Schools

Lindsey Pollock, Ed.D., Retired Principal, Garden Oaks Montessori Magnet School, Houston, Texas

Wendy Ranck-Buhr, Ph.D., Instructional Support Officer, San Diego Unified School District, San Diego, California

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Rachel Santa, Ed.D., Director of Special Education, Cumberland, Rhode Island Schools

Monica Schommer, Principal, Park Elementary School, Middleton-Cross Plains Area School District, Middleton, Wisconsin

Paru Shah, Ph.D., President, Board of Education, Shorewood School District, Shorewood, Wisconsin

DeLois Cooke Spryszak, Assistant Principal, Ernest W. Seaholm High School, Birmingham Public School District, Birmingham, Michigan

Cyndy Taymore, Retired Superintendent, Melrose Public Schools, Melrose, Massachusetts

David Vannasdall, Ed.D., Superintendent, Arcadia Unified School District, Arcadia, California

Washington Central Unified Union School District, Montpelier, Vermont

STATEMENT OF ISSUES

Whether this Court should affirm the opinion of the district court, which held:

1. The policy of the Defendant-Appellant school board, which would prohibit transgender students such as Plaintiff-Appellee Andrew Adams² from accessing the school restroom that corresponds to their identity, violates the equal protection guarantees of the Fourteenth Amendment to the United States Constitution.

2. The policy of the Defendant-Appellant school board, which would prohibit transgender students such as Plaintiff-Appellee Andrew Adams from accessing the school restroom that corresponds to their identity, violates Title IX of the Education Amendments of 1972.

SUMMARY OF THE ARGUMENT

School districts across the country have grappled with issues regarding the treatment of transgender students—whether those students will be viewed in accord with their identity or whether the students will be characterized by their birth or so-called “biological” sex; whether transgender students will be treated with equal dignity and respect as their peers or whether they will be singled out for

² Plaintiff has legally changed his name to Andrew Adams. This change is not yet reflected in the case name.

disparate treatment; and whether transgender students will be afforded the same access to school facilities and programs as other students of their sex or whether they will be barred from access, which stigmatizes and demoralizes them.

The Defendant-Appellant here has defended its years-long denial of equal treatment to Plaintiff-Appellee Andrew Adams (“Andrew”) on the basis of unfounded fears—fear that accommodating a transgender student would create division within the school and community; fear that permitting Andrew to use the boys’ restroom in accordance with his identity will impact the privacy of others; and fear that policies inclusive of transgender students will harm others.

The experiences and reflections of *Amici Curiae* School Administrators illustrate that those fears are not reality, and that district after district has seen improvement in the educational experience of all students after implementation of inclusive policies toward transgender students. *Amici* are school districts as well as former and current school board members, superintendents, principals, and other officials and educators from schools and school districts across the country that have adopted inclusive policies and practices for their transgender students. Together, *amici* represent a broad cross-section of schools and districts from around the country and are responsible for educating hundreds of thousands of students annually. Their experience shows that inclusive policies facilitate the protection of privacy and safety for all students; that when school districts act in

the best interest of transgender students, other students feel secure that they too would be protected when necessary; and that students themselves generally lead the way toward equality and mutual respect.

ARGUMENT

I. Policies Respectful Toward Every Student’s Identity Help Create A Safe, Inclusive, And Productive Learning Environment That Benefits All Students

Educators, school administrators, and school districts throughout the country have developed and implemented inclusive, student-focused policies regarding the treatment of transgender students. These policies are based on the recognition that transgender students—like all students—are deserving of equal respect and equal treatment in their educational experiences. Pursuant to these policies, transgender students across the country are afforded equal access to all school facilities and programs provided to other students of their gender—including the right to utilize bathrooms that correspond to their identities.

Amici’s schools and districts allow transgender students to use the same facilities and opportunities as other students of the same gender. *Amici’s* collective experience is that inclusive policies, first and foremost, fulfill the “solemn obligation” of school districts “to guard the well-being of the children in their charge.” Findings of Fact and Conclusions of Law, *Adams v. School Board of St. Johns County, Florida*, Case No. 3:17-cv-739-J-32JBT (July 2, 2018), Doc. 192 at

1 (“Doc. 192”). By safeguarding the rights of transgender students and treating these students with the same degree of respect as provided to other students, school districts demonstrate to all students that they are welcome and will be protected.

In contrast, Defendant-Appellant’s policy toward public school bathroom access barred Andrew from using the boys’ restrooms at his high school, Allen D. Nease High School, and limited him instead to the gender-neutral restrooms on campus. Doc. 192 at 25. Despite the fact that “[t]here were no reported instances of privacy breaches during the time [Andrew] used the boys’ restroom at Nease” (Doc. 192 at 27), Defendant-Appellant presented its restrictive policy before the court below as “involv[ing] concerns for privacy and safety.” *Id.* at 20; *see also* En Banc Br. of Appellant The School Board of St. Johns County, Florida at 15 (“Defendant-Appellant En Banc Br.”). Defendant’s witnesses testified that the restrictive policy respected the privacy of “the other” students, and curbed “opportunities for students ‘with untoward intentions to do things they ought not to do.’” Doc. 192 at 20. The Defendant’s witnesses expressed concerns about the possibility that “a student—a football player for example—could pose as being gender-fluid for the purpose of gaining access to the girls’ restroom,” even though the school board “task force’s research did not reveal any actual situations where a problem like that occurred.” *Id.* at 20-21.

However, while many of the *amici* also initially had concerns over the imagined consequences of fully integrating transgender students into the school community, *amici*'s experiences over time revealed that these speculative fears are unfounded. *Amici*'s experiences with the inclusive, respectful policies and practices in place in their schools—some for more than a decade—show that such policies can have a strong positive effect on the broader student population.³ Far from being invasive or potentially unsafe, inclusive policies have *minimized* such concerns. Diana Bruce, former Director of Health and Wellness at the District of Columbia Public Schools said, “A policy that requires equal treatment is not difficult to implement. Beyond sorting it out at the beginning, it’s not an ongoing, lingering issue[.]” Diana Bruce Interview (Oct. 5, 2015) (“Bruce Interview”). As educators, “[o]ur goal is to make sure that every young person is as present and as able to engage in academic work as possible. Promoting a safe and welcoming environment is a way to promote education.” *Id.*

If they’re worrying about the restroom, they’re not fully there to learn, but instead just trying to navigate their day. Give students the opportunity to

³ More broadly, research comparing localities with and without gender identity inclusive public accommodation nondiscrimination ordinances has found that the passage of such laws does not lead to an increase in criminal incidents. Amira Hasenbush, et al., *Gender Identity Nondiscrimination Laws in Public Accommodations: A Review of Evidence Regarding Safety and Privacy in Public Restrooms, Locker Rooms, and Changing Rooms*, 16 *Sexuality Rsch. & Soc. Pol’y*, 70-83 (2019).

just be a kid, to use the bathroom, and know that it's not a disruption, it just makes sense.

Dr. David Vannasdall Interview (Sept. 23, 2015) (“Dr. Vannasdall Interview I”).

At first, we had our concerns—would letting students participate in activities and facilities that were consistent with their gender identity create problems? What would happen?

Ultimately, we decided that we as the adults needed to manage our fears and give students the respect and dignity that they deserved. And I'm pleased to say that none of our fears have materialized.

Dr. Judy Chiasson⁴ Testimony to the California Senate Education Committee on A.B. 1266 (June 12, 2013) (“Dr. Chiasson Testimony”).⁵

A. Students' Experiences In Schools With Inclusive Policies Have Been Positive

Although the Defendant-Appellant has portrayed its restrictive policies as aimed at protecting students, *amici*'s years of professional experience show that educational policies—particularly those that bear on the fair and equitable treatment of vulnerable students—should be driven by fact and evidence, not fear.

Dr. Chiasson, with more than a decade of experience working with the inclusive policies of the Los Angeles Unified School District (“LAUSD”), the second-largest

⁴ Dr. Chiasson is the Program Coordinator for the Office of Human Relations, Diversity and Equity, Los Angeles Unified School District.

⁵ Available at <https://www.youtube.com/watch?v=PlIG0qCYRfl> (last visited Nov. 11, 2021).

school district in the country, stressed that fears and concerns about inclusive policies were unfounded:

Our experience has been that the fears of the adults rarely play out. The students are very affirming and respectful of their classmates. Most of the reaction that I've ever encountered has been in response to people's fears, not the students' experiences. The students' experiences have been overwhelmingly positive. I have yet to be called into a situation to respond to an actual incident; I've only had to respond to fears, and the fears are unfounded.

Dr. Judy Chiasson Interview (Sept. 23, 2015) ("Dr. Chiasson Interview").

As *amici* relate, in many instances opposition to inclusive policies seems to spring from adults and their personal beliefs or fears of the unknown, rather than the students. In their day to day experience, *amici* have found that often students are quicker to understand that their transgender peers deserve equal respect and treatment. "Most of the problem is with the adults; the students are pretty accepting of these issues." Roger Bourgeois Interview (Oct. 8, 2015) ("Bourgeois Interview"). *See also* Dr. Rachel Santa Interview (May 27, 2016) ("Dr. Santa Interview") ("Adults have more issues than the students do."); Dr. David Vannasdall Interview (Sept. 9, 2016) ("Dr. Vannasdall Interview II") (with students, "there hasn't been a problem at all."); Sherie Hohs Interview (Oct. 15, 2015) ("This isn't a kid issue. It's an adult issue."). In fact, students most frequently set a leading example recognizing transgender students' rightful place in

school facilities that match their identity. See Howard Colter Interview (June 6, 2016) (“As to the students, I am most impressed. They are very understanding and accepting of their classmates. It feels like the adult community is struggling with it more.”); Bruce Interview (“Young people are pretty savvy and comfortable, and can understand and empathize with someone who just wants to use the bathroom.”); Kathy Canavan, *Transgender bathrooms already happening in Delaware*, Del. Bus. Times, May 13, 2016 (“Meece Interview”) (quoting Gregory Meece) (“We had a few parents ask some questions, and we’ve had some express thoughts on it, but the students are 100% accepting.”).⁶

Several *amici* have themselves considered some of the concerns raised by the Defendant-Appellant here when deciding whether to adopt inclusive policies and practices in their schools. For example, Dr. Vannasdall, Superintendent of Arcadia Unified School District in California, dealt with a complaint and investigation by the U.S. Department of Justice and the U.S. Department of Education, Office for Civil Rights (“OCR”) based on the lack of an inclusive policy. Dr. Vannasdall said administrators and others within the school district were concerned that treating a transgender boy in the district like any other boy might be disruptive and burdensome. Dr. Vannasdall Interview I. However, once

⁶ Available at <https://delawarebusinesstimes.com/news/features/transgender-bathrooms-already-happening-delaware/> (last visited Nov. 20, 2021).

Dr. Vannasdall and other administrators had a simple, open conversation with the student and his family, it became “obvious that this student had no intentions of creating a disruption—he just wanted a home and a place to learn, and not worry about which restroom to use.” *Id.* Once the administrators understood that the student was simply asking to be treated like any other boy, their obligation as educators became clear: to help this student, and all of their students, “come to school ready to learn.” *Id.*

[Inclusive policies have] absolutely enhanced the experience for transgender students so they have the same experience as other students. When a student comes to school and has to put forth an enormous amount of energy to figure out which restroom to use, it detracts from their ability to learn.

Id. Dr. Vannasdall’s district reached a voluntary resolution agreement in 2013 with the DOJ and OCR. The resolution agreement permitted the transgender student at the school district access to all sex-specific facilities consistent with his gender identity. It also stated the school district would adopt a comprehensive policy respecting students’ gender identity that, among other things, recognized that gender-based discrimination includes discrimination based on a student’s

gender identity.⁷ The outcome has been “very positive for the school, the district, and the students.” *Id.*

Dr. Vannasdall now regularly consults with educators across the country, giving informal advice and guidance on inclusive policies for transgender students.

Id. He understands what it is like to grapple with concerns from parents and the community, but when those are the primary concern, “you have people making decisions from the basis of fear and extremes, and that’s never good for kids.”

Julie Bosman & Motoko Rich, *As Transgender Students Make Gains, Schools Hesitate Over Bathroom Policies*, N.Y. Times, Nov. 4, 2015, at A14 (quoting Dr. Vannasdall).⁸ The “game-changer” for Dr. Vannasdall’s district and for other districts with which he has consulted is when educators “remember what we are here to do,” *i.e.*, to help kids learn. Dr. Vannasdall Interview I. Dr. Vannasdall

⁷ See Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Office of Civil Rights, OCR Case No. 09-12-1020/DOJ Case No. 09-12-1020 (July 24, 2013), available at <https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf> (last visited Nov. 20, 2021). See also Letter from DOJ and OCR to Arcadia School District (July 24, 2013), available at <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf> (last visited Nov. 6, 2021).

⁸ A version of this article is available online at <https://www.nytimes.com/2015/11/04/us/as-transgender-students-make-gains-schools-hesitate-at-bathrooms.html> (last visited Nov. 6, 2021).

believes that generally school administrators new to dealing with transgender students are “overthinking this issue. This doesn’t need to be as tough as some people make it. It can be a good experience for that student and other students as well.” Vannasdall Interview II. As Mr. Vannasdall explained in an ABC 20/20 interview on April 21, 2017, transgender students are “managing themselves with our behind the scenes support, without impacting any students. It’s been very successful.”⁹

Similarly, Dr. Thomas Aberli, former principal of Atherton High School in Louisville, Kentucky, had concerns about possible disruptions or privacy issues when a transgender student in his district first raised the issue of adopting policies inclusive toward transgender students. But Dr. Aberli tried to understand the student’s request on both a personal level and in terms of the legal obligations of the schools. Dr. Thomas Aberli Interview (Oct. 7, 2015) (“Dr. Aberli Interview”). He then developed a policy through an extensive collaborative effort with a panel of school administrators, teachers, and parents, in which “[w]e considered the issue very carefully and thoughtfully, and posted all of the evidence we reviewed

⁹ *Parents, school administrators talk with Caitlyn Jenner about transgender issues: Part 3*, ABC News (Apr. 21, 2017), <https://abcnews.go.com/2020/video/parents-school-administrators-talk-caitlyn-jenner-transgender-issues-46948872> (last visited Nov. 22, 2021).

online.” Dr. Aberli Interview.¹⁰ Some in the community expressed the view that inclusive policies might be fine for schools in Los Angeles, but not in their own community in Kentucky. But as Dr. Aberli pointed out in his testimony to the Kentucky Senate Education Committee, however, empathy and equality are not limited by geography:

The value of human life is the same in Kentucky as it is anywhere else in this nation. And when we’re talking about an issue of civil rights, we’re talking about the value we put on human individuals.

Dr. Aberli Testimony.

Framing the purpose of the policy as a matter of protecting students’ basic civil rights helped further the discussion.

It helped people to understand that this wasn’t about providing a special accommodation or “special rights”—this is about eliminating discrimination. When you tell a person you will do something that makes them stand out from everyone else, *that’s* when you start discriminating against them.

¹⁰ The materials Dr. Aberli references as having been posted online are available at <https://schools.jefferson.kyschools.us/high/atherton/SBDM.html> (last visited Nov. 6, 2021). Dr. Aberli explained the school’s decision-making process further in his testimony before the Kentucky Senate Education Committee on Feb. 19, 2015. *See* Dr. Thomas Aberli Testimony before the Kentucky Senate Education Committee on S.B. 76 (Feb. 19, 2015) (“Dr. Aberli Testimony”), video excerpt available at <https://www.youtube.com/watch?v=QodplMWsEvQ> (last visited Nov. 6, 2021).

Dr. Aberli Interview. For the most part, adults and a handful of students who questioned the new policy were simply unfamiliar with these issues.

I respect that some people may disagree or even feel uncomfortable with the policy, because honestly, for many people—including myself until a few months ago—they simply weren’t knowledgeable, or it wasn’t a close enough personal issue in terms of interacting with openly LGBT people to have a comfort level. I acknowledge and respect that. But I am not going to use someone’s discomfort as a means for discriminating against a protected population.

Id.

Despite the initial opposition, in practice, Dr. Aberli “received zero complaints regarding a specific incident of concern for a violation of privacy. The concerns raised by individuals have all been philosophical.” *Id.* Atherton students interviewed for a PBS News Hour segment after the policy was enacted agreed that it had not caused any issues in practice.¹¹

It’s just going to the bathroom . . . It’s just simple. And when people make a big deal about it, it just kind of gets blown out of proportion.

¹¹ Atherton students participated in an interview for a PBS News Hour segment which related the story of how Atherton’s policy was developed and implemented after a student identified herself as transgender. *See As Transgender Teens Struggle, Here’s How One Kentucky School Leads the Way*, PBS News Hour (June 7, 2016), <https://www.pbs.org/newshour/show/as-transgender-teens-struggle-heres-how-one-kentucky-school-leads-the-way> (last visited Nov. 20, 2021) (“Atherton PBS News Hour Segment”).

Atherton PBS News Hour Segment.

[I] have been going to this school for two years, and it's just routine. Like, everyone gets to the restroom, everyone gets out. It's nothing, nothing. It's not a big deal.

Id. Indeed, in *amici*'s experience, "an affirming policy has a positive effect on other students as well. If everyone is taken care of, students see that and they value that." Denise Palazzo Interview (Oct. 3, 2015) ("Palazzo Interview").

"When kids see that you are respecting all students, then they know that they will be respected. We are showing them how to treat people respectfully and know they will be treated the same." Dr. Santa Interview. As Peyton Chapman, principal of Lincoln High School in Portland, Oregon said:

Students have high integrity radars—if some youth are made fun of, then they know it could happen to them. These fears keep all students in small boxes. They don't try things out, engage their creativity and figure out who they are and can be. If schools define "who" students need to be and how they should behave, then they are less free to explore themselves, cultures, and communities.

Peyton Chapman Interview (May 27, 2016). Respecting every student's identity, by contrast, fosters mutual respect and "creates open and innovative environments." *Id.*; *see also* Meece Interview ("I'm really proud of the students who see a student as a human being before they see gender or disability or race.").

B. In *Amici*'s Experience, The Feared Hypothetical Negative Consequences Of Inclusive Policies Have Not Materialized

Amici have experience with the fears and concerns commonly raised when schools consider implementing policies and practices inclusive toward transgender students, including the often discussed hypothetical of an individual abusing inclusive practices to gain access to facilities designed for use by the other gender for an improper purpose. Defendant-Appellant raised this very “safety” concern to the court below. Doc. 192 at 20-21. But research conducted by a task force within the school district did not reveal any actual instances of such concerns. *Id.* *Amici* similarly report that those feared consequences have not materialized in practice.

As Dr. Aberli of Kentucky described his district’s experience:

[There have been] multiple transgender individuals in our school, and restroom access has not been an issue. . . .

[T]here has not been any issue at all with respect to the implementation. It’s not a big deal when you look at it from a standpoint of, we’re dealing with real people, we’re dealing with children. Even at the high school level we’re dealing with people who have had a hard enough time as it is, and they’re just looking for reasonable support from the school in a very challenging social context, or during a very difficult process, as it is for many of them.

Dr. Aberli Interview; *see also Gender Inclusive Leadership in Action*, Video

Interview by Gender Spectrum with Dr. Pamela Retzlaff (Nov. 17, 2016)¹² (“Dr.

¹² The recording of this interview is available at <https://www.youtube.com/watch?v=XsflxtEjTJg> (Last visited November 22, 2021).

Retzlaff Gender Spectrum Interview”) (“He’s interested in using the toilet, that’s it. Not looking at anybody’s genitals. Not doing anything else in the bathroom. It’s just using the toilet.”).

1. Concerns About Disruptions In Gender-Segregated Spaces Have Not Materialized

“Questions about bathrooms come up in every staff training, and it’s an important thing that school staff want to understand. I think there’s an assumption that there will be disruption around restrooms.” Bruce Interview. But all schools routinely “deal[] with many more adolescent behavior issues than just who’s using the bathroom based on gender identity,” and schools can be prepared to address those issues. *Id.* As with any behavior issue, “oftentimes, disruption in our experience has been around inconsistency by staff—and that’s why clear guidance for schools is important . . . Our transgender students just want to use the restroom and be safe when they do it, and that’s all they’re trying to do.” *Id.*

Although this case focuses on restroom policies, *amici*’s experiences with inclusive locker room policies have also been positive. *Amici* related that their transgender students have only sought to use locker room facilities for their intended purpose and without incident. Diana Bruce explains that “our transgender students are not interested in walking around the locker rooms and checking out anatomy. They’re just trying to get through P.E. safely.” Bruce Interview.

Indeed, transgender students often have their own sense of modesty and privacy, particularly about differences in their bodies that do not match their identity. As Dr. Vannasdall explains, “Transgender [s]tudents dealing with this are very discreet. . . . The student’s goal is just not to stand out.” Vannasdall Interview I. Mary Doran of Minnesota concurs: “[W]hen the *coaches* tell me ‘this [transgender policy] isn’t an issue, isn’t a big deal,’ that really says something.” Mary Doran Interview (Oct. 16, 2015). In an interview with The Trans Advocate, Dr. Judy Chiasson similarly noted that:

[O]ur transgender children I find—are particularly discreet and modest about their bodies. The last thing, generally speaking, they want to do is have anybody see a part of them that they are just so—that they don’t want public. They don’t want to be known as “the transgender student.” They just want to be known as another boy or another girl. And, they’re not showing anything that will make them stand out and feel different.

Interview with LAUSD’s Judy Chiasson About AB1266 (Part 2), The Trans Advocate (Jan. 13, 2014).¹³

Defendant-Appellant clinically argues that a transgender boy may be “anatomically different from biological males,” Defendant-Appellant En Banc Br.

¹³ The transcript of this interview is available at https://www.transadvocate.com/interview-with-lausds-judy-chiasson-about-ab1266-part-2_n_11358.htm (last visited November 24, 2021).

at 11, and these “differences” implicate bathroom privacy, *id.* at 17. But *amici*’s experience shows that the privacy rights of transgender students and the student community are best served when transgender students are not “singled out” by requiring them to use a different restroom than they would normally use. Palazzo Interview; *see also* Doc. 192 at 2 (noting Plaintiff-Appellee Andrew “uses the mens’ bathroom wherever he goes, including in this federal courthouse during trial”); Dr. Vannasdall Interview I (“By the time we’re involved in this issue, the student and family has been dealing with this for a while and they are ready to manage this.”).

In the rare instances that *amici* have needed to address any privacy issues, it has been to ensure the safety of the transgender students themselves. According to the largest study of transgender discrimination done in the United States, 77% of transgender students report harassment by students, teachers, or staff. S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Nat’l Ctr. for Transgender Equal. (2016). “The sad truth is that our transgender children are significantly more likely to be the targets of student misconduct, rather than the perpetrators of it.” Dr. Chiasson Interview; *see also* Ken Kunin Interview (June 10, 2016) (“Kunin Interview”) (“The risk is to people who identify as transgender, or gay, or just ‘other.’”). Another study supports this conclusion, finding that transgender and non-binary “[y]outh whose restroom and locker room use was restricted [such

that they were prohibited from using facilities matching their gender identities] were more likely to experience sexual assault compared with those without restrictions.” Gabriel R. Murchison, *School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, 143 J. of Pediatrics 6 (2019).

2. Students Have Not “Posed” As Transgender To Gain Improper Access To Facilities

Amici have also addressed the concern that transgender students might change their minds often about their identity, or that non-transgender students might falsely claim to be transgender for improper purposes. These concerns have also not materialized. Moreover, *amici* have noted that policies permit schools to make reasonable assessments of individual requests for accommodation. As Dr. Chiasson explained in a letter to Dr. Aberli:

It is reasonable to expect that a student will exercise consistency with respect to their identity and access to facilities. Students cannot switch their identity arbitrarily or opportunistically. [. . .]

If the school strongly suspects that the request is not legitimate, they should provide accommodation for the student while continuing the conversation to better understand the student’s motivation for the request. Being transgender is a deeply rooted identity It is not subject to arbitrary whims.

Letter from Dr. Judy Chiasson to Dr. Thomas Aberli (May 29, 2014) (“Dr. Chiasson Letter”).¹⁴ Similarly, as Roger Bourgeois, former Superintendent-Director of the Greater Lowell Technical Regional School District in Massachusetts, explains:

A student can’t just show up and say, “I’m a male, but I want to start using the girls’ locker room today.” People worry some football player will show up and want to get into the girls’ locker room, but we would not allow that. There’s a process we go through to work with them and their families, and verify their identity.

Bourgeois Interview. All *amici*’s schools follow a similar practice, and as a general matter, genuine requests for accommodation from transgender students are easy to identify.

Some people fear someone will masquerade . . . as transgender to be predatory. . . . I’ve never had that happen, where someone has pretended to be transgender for nefarious reasons. It’s just plain silly to think that [a male student] is going to come to school for months on end, wear female attire, present as female to all of his friends and teachers, just so he can go into the female locker room.

Dr. Chiasson Interview; *see also* Dr. Santa Interview (“The hysteria is from misunderstanding. The concern is that the policy will allow a typical high school

¹⁴ A copy of Dr. Chiasson’s letter to Dr. Aberli is included among the materials posted by Atherton. *See supra* n.10.

boy to say he is transgender so he can go peek at girls in the bathroom. I haven't seen it."). Indeed, irrespective of policies regarding transgender students, schools are very adept at dealing with instances of misbehavior in restrooms and locker rooms precisely because it is not particularly difficult for a student to gain access to another gender's facilities.

Adolescents can be impulsive, and we have had boys and girls dart into the other bathroom. We find them and deal with them. They certainly don't need to masquerade as transgender to engage in that misconduct.

Dr. Chiasson Interview.

In other words, as educators with often decades of experience with teenagers, *amici* and schools generally are adept at disciplining students for infractions of school rules. Parents, teachers, and administrators alike are always advocating for the safety of *all* students. In that respect, a practice of respecting transgender students is likely to thwart misbehavior in these spaces, not cause it.

II. School Districts Can And Should Fully Respect The Identity And Privacy Concerns Of All Students

As is the case with Defendant-Appellant here, many of the concerns raised regarding inclusive policies for transgender students involve perceived threats to the "privacy" or "comfort" of other students. As educators, *amici* are respectful of the needs and concerns of all their students. But *amici* strongly disagree that a school should discriminate against transgender students in order to accommodate

complaints that *other* students are “uncomfortable” with sharing restroom or locker room facilities with a transgender person for no reason other than unfounded fears. That is simply not how educators deal with students’ discomfort with others or with themselves. To the extent that a student has concerns about sharing facilities with transgender students, schools must help the student deal with that discomfort in a way that does not impinge upon other students’ rights to equal treatment.

Particularly given what we understand about gender identity, and how core it is to the individual, it would be unconscionable to deny transgender students access to the restroom that matches their gender identity just based on the objections of others.

Palazzo Interview.

Most of *amici*’s schools offer a simple solution in such cases that still respects the privacy and identity of their students—private facilities that may be used by persons of either gender, in addition to gender-segregated facilities. This would apply as well in the event that a student did not want to share a space with a transgender student—he or she could avail themselves of alternate, gender-neutral facilities. Diana Bruce recounts that, in D.C. public schools,

[A]ccording to our policy guidance, if a student has a problem, we can make another bathroom available to that student. I haven’t heard from our schools, however, of students that have asked to use a different restroom in that circumstance. When I train our school staff, some want to ask

hypotheticals, but in our experience, this has not been an issue.

Bruce Interview. These facilities are available to all students, for any reason, without the need to provide an explanation.

[A]ny student who, for whatever reason, feels uncomfortable in a communal setting—whether because of weight, whether because of weight, personal comfort, body image, social anxiety, or other reasons—we will accommodate that without the need for explanation, and they can use a private setting such as a nurse’s room.

Dr. Chiasson Interview.

Likewise, Dr. Aberli’s school allows any student who wants to use a private restroom to do so.

What I have clearly communicated in public is that any student may use the front office restroom. We don’t ask why. There’s a thousand reasons that a student needs privacy, so it’s our responsibility to accommodate any student for any reason. It could be shyness, or trauma.

Dr. Aberli Interview.

When separate facilities are not available or practical to meet student requests for additional privacy, there are other means of providing extra privacy to students when needed, such as using a curtain to create a separate area, or allowing a student to use the locker room before or after other students. Matthew Haney Interview (June 6, 2016). Accommodating individual students’ needs is “something educators do every day,” and educators have proven themselves “very

flexible and adaptable in adopting new policies for their students” in order to meet their needs. Dr. Vannasdall Interview II. Providing transgender students what they need to thrive in school is no different. Lauren Slagter, *Schools Take Steps to Address Needs of LGBTQ Students*, MLive Michigan, Apr. 21, 2016 (quoting Craig McCalla) (“We make accommodations for all kids in all different ways. We always have, and there’s no reason not to for a specific group of people.”).¹⁵

Even where a student might express discomfort with sharing facilities with a transgender student, the solution is not to deny the transgender student access to those facilities. Any student expressing such discomfort should be offered alternative facilities or arrangements to address their concerns. As Roger Bourgeois explains:

[W]e’re not going to tell the transgender student they can’t go where they’re comfortable. I can still remember the remnants of white people being uncomfortable with black people being in same locker rooms and restrooms, so it’s not about whether everyone is “comfortable.” Just because some people were uncomfortable didn’t mean you treated people as second-class citizens.

Bourgeois Interview. Mr. Kunin of Maine agrees that “being uncomfortable doesn’t overrule someone’s rights,” but he also emphasizes that “there are also ways to

¹⁵ Available at https://www.mlive.com/news/ann-arbor/2016/04/schools_take_steps_to_address.html (last visited Nov. 20, 2021).

support the person who is uncomfortable—we would want that person to feel safe and participate, too.” Kunin Interview.

Especially within the educational context, policies like that of the Defendant-Appellant school board single out and create a serious dilemma for transgender students like Andrew, requiring him either to use a separate restroom (which no other student is required to use) simply because he is transgender, or to use facilities that are inconsistent with his gender. Having to navigate this problem daily seriously interferes with transgender students’ education, impairs their ability to learn and socialize, and can result in real physical and emotional harm. Diana Bruce explains that when transgender students “have reported worrying about whether they can use the restroom that matches their gender identity, they have said they just don’t go to the bathroom at school. That can’t possibly help them learn.” Bruce Interview.

We don’t want them preoccupied with trying not to use the bathroom when they’re supposed to pay attention to trigonometry We want them to know where they can use the restroom, so they can feel more like anyone else in their school and not like an outsider.

Id.

Although schools should accommodate requests for additional privacy for any student (including but certainly not limited to transgender students), no student should ever be *forced* to use a separate facility simply because they are

transgender. Dr. Aberli agrees that singling out and forcing transgender students to use separate facilities is no answer at all:

Tell me what we would say to that child—that there’s something so freakish about you, and so many people are uncomfortable with you, that you have to use a completely separate restroom than the one you feel like you should be using?

Dr. Aberli Interview. Instead, in *amici’s* experience, all students’ needs are best served when educators can treat all students equally.

III. Gender-Segregated Spaces And Activities Are Fully Consistent With School Policies Respecting Every Student’s Identity

Amici’s actual experiences run counter to Defendant-Appellant’s claim there is “no evidence” that a classification other than differences in the “biology and physiology of the sexes” could serve privacy interests, Defendant-Appellant En Banc Br. at 19, or that permitting individuals to use facilities consistent with their identity will lead to the abolition of gender-specific facilities, *see id.* at 21. In fact, respecting the identity of transgender students *reinforces* the concept of separate facilities for girls and boys. Conversely, requiring a girl who is transgender to use the boys’ restroom or a boy who is transgender to use the girls’ restroom *undermines* the notion of gender-specific spaces, and can often cause more discomfort for all students—not just the transgender students themselves.

Dr. Chiasson offers an example from her own district, in which a new male student who was transgender had been using the female facilities because he

incorrectly assumed that, because he was assigned a female sex at birth, he would be required to do use the girls' facilities.

It was equally uncomfortable for him to use the girls' facilities as it was for the girls themselves. When the administration learned of the situation, they told the young man that he could use the boys' facilities. Everyone was relieved.

Dr. Chiasson Letter; *see also* Dr. Retzlaff Gender Spectrum Interview (“[H]is classmates were also somewhat relieved because they knew, too, something’s not right [about a boy who is transgender being forced to use the girls’ restroom].”).

John O’Reilly, Principal of Arts & Letters 305 United, Brooklyn, New York, similarly commented that, until he considered the effect of forcing a transgender student to use a restroom inconsistent with their identity, he “hadn’t really understood the literal meaning of the word ‘misfit.’ When forced to use the restroom for the gender they do not associate with, a student literally becomes a *misfit*: someone being forced into a place they don’t belong.” John O’Reilly Interview (Sept. 20, 2015).

Transgender students like Andrew do not seek to eliminate gender-specific facilities—they merely want to use the facilities that correspond with their identity. “Far from being disruptive, our experience has been that those students just want to blend in.” Bourgeois Interview. “Transgender-affirming policies solve problems, not create them. Even if the law allowed it, forcing a transgender boy to use the

female facilities would be extremely uncomfortable for all parties involved.” Dr. Chiasson Interview.

CONCLUSION

Amici have experienced that showing respect for each student’s privacy and identity supports the dignity and worth of all students by affording them equal opportunities to participate and learn in school. Moreover, policies inclusive toward transgender students have not been disruptive and have not in reality created the problems hypothesized by their opponents—instead, such policies protect the safety and privacy of all students. *Amici Curiae* School Administrators respectfully request that this Court affirm the district court’s judgment.

Dated: November 26, 2021

Respectfully submitted,

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TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. Rule 32-4, this brief contains 5,829 words.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

Dated: November 26, 2021

/s/ Carmine D. Boccuzzi, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Carmine D. Boccuzzi, Jr.
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