

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF ANOKA

TENTH JUDICIAL DISTRICT

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N.H.,

Plaintiff,

and

Rebecca Lucero, Commissioner of  
the Minnesota Department of Human Rights,

Plaintiff-Intervenor,

vs.

Anoka-Hennepin School District  
No. 11,

Defendant.

**ORDER DENYING  
DEFENDANT'S MOTION TO  
DISMISS AND GRANTING THE  
MOTION TO INTERVENE**

Court File No.: 02-CV-19-922  
Case Type: Discrimination

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The above-captioned matter came on before the Honorable Jenny Walker Jasper, Anoka County District Court, on May 24, 2019, on the Defendant's Rule 12 Motion to Dismiss and the Minnesota Department of Human Rights' Motion to Intervene. Plaintiff was represented by Timothy Griffin and Andrew Davis. Defendant was represented by Jeanette Bazis and John Baker. The Minnesota Department of Human Rights was represented by Rachel Bell-Munger, Assistant Minnesota Attorney General.

The case was originally filed by N.H.'s mother on his behalf and included the Anoka-Hennepin School Board as a Defendant. On May 28, 2019, an Order was entered granting Plaintiff J.H.'s unopposed motion to substitute N.H. as Plaintiff. On May 29, 2019, a stipulated order was filed dismissing N.H.'s claims against the Anoka-Hennepin School Board without prejudice.

Now, therefore, this Court hereby issues the following:

## ORDER

1. Defendant's Rule 12 motion to dismiss N.H's claims for violation of the Minnesota Human Rights Act and violation of his constitutional rights to equal protection and due process are **DENIED**.
2. Rebecca Lucero's, Commissioner of the Minnesota Department of Human Rights, motion to intervene is **GRANTED**. The Commissioner shall serve and file the Complaint in Intervention in accordance with the Minnesota Rules of Civil Procedure.
3. Court Administration shall change the caption of the case to, "N.H., Plaintiff, and Rebecca Lucero, Commissioner of the Minnesota Department of Human Rights, Plaintiff-Intervenor, vs. Anoka-Hennepin School District No. 11."
4. The May 31, 2019 Order Staying Discovery is **VACATED**.
5. The parties shall submit a revised stipulated scheduling order within 45 days of entry of this order. The parties shall obtain a trial date from Marianne Setala, Anoka County Court's Assignment Manager, at 763-760-6582

By the Court:

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Jenny Walker Jasper  
Judge of District Court

## MEMORANDUM

### I. Facts

#### a. Plaintiff's Complaint

N.H. is biologically female and was designated a female at birth based on anatomy. A person's gender identity does not always conform to their anatomy. A person's gender identity is based on their innate sense and personal understanding of their own gender. The term "cisgender," refers to individuals whose gender identify conforms to their biological gender.

Transgender individuals have a gender identify that is different than their biological gender. It is estimated that 0.6 percent of adults in the United States are transgender. This means approximately 1.4 million adults in the United States, and approximately 24,250 adults in Minnesota, identify as transgender.

Transgender individuals frequently suffer from gender dysphoria; a recognized medical condition that causes transgender people to experience persistent and clinically significant distress due to the difference between their gender identity and the sex assigned to them at birth. Gender dysphoria is a medical condition recognized by the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders. Gender dysphoria can cause serious medical problems such as clinically significant psychological distress, dysfunction, depression and self-harm. It is widely accepted in the medical community that the treatment for gender dysphoria is for transgender people to socially transition and live their lives in a way that is consistent with the gender identity.

Gender identity, whether a person is transgender or cisgender, can develop early in childhood. N.H. is transgender and has been diagnosed with gender dysphoria. N.H.

suffered from internal turmoil as a child as a result of gender dysphoria. When he went to sleep at night he prayed that he would wake up as a boy. N.H. told his family he was transgender in early 2015. N.H. began counseling and treatment for gender dysphoria. N.H. began to socially transition while he was in therapy, which included using masculine pronouns; selecting a name that aligned with his male gender identity; and styling his hair and dressing in a way society traditionally associates with boys.

Thirty-six percent of transgender students reported being bullied, and more than half of transgender children had attempted suicide within the previous two years according to a survey conducted by the Minnesota Department of Education in 2016. Transgender teens have high rates of mental health issues including depression, anxiety and self-harm. These mental health issues are often attributed to the discrimination, stigma and social rejection experienced by transgender youth.

Major medical and mental health organizations; including the American Medical Association, the American Academy of Pediatrics, the American Psychiatric Association, and American Psychological Association, have found that excluding transgender students from sex-separated bathrooms and changing rooms that are consistent with their gender identity harms their health and may cause acute psychological damage. The segregation of transgender youth from these facilities increases their risk of depression, anxiety, and feelings of isolation associated with gender dysphoria. Research has found that transgender youth are at high risk of suicidal ideation and actions. Research also suggests that the risk of suicidal ideation and action is reversed if transgender youth are allowed to socially transition and live their lives in a manner that is consistent with their gender identity. Research also suggests that transgender youth who socially transition before

puberty have virtually the same levels of depression and only slightly higher rates of anxiety than other children their age.

Transgender individuals often avoid using sex-separated bathrooms and changing facilities because it is stigmatizing or difficult to access. Transgender youth report that forcing them to use enhanced-privacy facilities against their wishes is problematic; traumatizing and negatively impacting their education and social experiences. The National Association of School Psychologists; the National Association of Secondary School Principals, the National Association of Elementary School Principals and the American School Counselor Association have called on schools to allow transgender students to use sex-separated bathrooms and changing facilities consistent with their gender identity. According to the American Academy of Pediatrics there is no evidence that allowing transgender students to use facilities consistent with their gender identity causes any harm to physical or mental health of cisgender students.

The Minnesota Department of Education established the School Safety Technical Assistance Council (hereinafter “Safe School Council”). In 2017, the Safe School Council published *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students*. The publication states, “(t)ransgender ... students should be afforded the opportunity to use the restroom of their choice,” and “(c)oaches should consider how they can utilize privacy curtains, restrooms and separate changing schedules to provide privacy for all students.”

N.H. resided within Anoka-Hennepin District 11, and within the boundaries for attendance at Coon Rapids High School (hereinafter “CRHS”), in 2015. The Anoka-Hennepin School Board (hereinafter “School Board”) is the governing body for public

schools located in Anoka-Hennepin District 11. The School Board establishes policies for public schools within the district. The District's General Counsel and its Title IX/Equity Coordinator, Dr. Cherry, authored a Memorandum dated March 22, 2016 titled, "School Planning Guide for Working with Transgender and Gender Non-conforming Students." The memorandum states schools in the district, "have a growing number of students who identify as transgender or gender non-conforming," and that "(m)any questions have arisen regarding how best to support our transgender students with respect to the use of names or pronouns, rest room/locker rooms, and record keeping." The memorandum states that the use of restrooms and locker rooms by transgender students will be determined on a case-by-case basis." The memorandum allows the Anoka-Hennepin School Board to determine which restroom and locker rooms each transgender student will be allowed to use.

N.H. enrolled as a freshman at CRHS for the 2015/2016 school year. A CRHS counselor arranged for N.H.'s chosen name to be included in the school's online system for students' names and notified teachers of N.H.'s preferred name and pronouns. N.H. joined the boys' high school swim team. N.H. used the boys' locker room for nearly the entire swim season. During the period of time N.H. was allowed to use the boys' locker room with other teammates he felt well-liked by staff, coaches and students.

On February 1, 2016, CRHS staff notified N.H.'s mother that the School Board ordered N.H. to stop using the boys' locker room. A few hours thereafter, N.H.'s mother was notified that the School Board reversed its decision. On February 5, 2016, N.H. was admitted to the hospital due to mental health concerns. N.H. was hospitalized for

approximately two weeks. N.H. alleges the School Board's action singled him out and caused him to experience emotional distress.

The School Board's Chair sent N.H.'s mother an email on February 22, 2016, which stated N.H.'s access to restrooms and locker rooms needed to be balanced against the privacy rights and needs of other students. The School Board's Chair indicated that there should be separate changing facilities for transgender students. Subsequently, N.H.'s mother was notified that a meeting would be held at CRHS on March 3, 2016, to discuss N.H.'s use of the locker room. On March 2, 2016, N.H. was admitted to the hospital due to mental health concerns.

N.H. began working with a social worker. The social worker noted that N.H.'s hospitalization coincided with the School Board's decision to exclude N.H. from the CRHS locker room. The social worker recommended that N.H. request that his participation on the swim team count as a required physical education credit. This would allow N.H. to fulfill the required physical education credit and allow him to avoid further discussion on which locker room he would be required to use.

During the summer of 2016, CRHS remodeled the boys' locker room. The remodel included the addition of an enhanced-privacy bathroom and changing area. The enhanced-privacy area is separate from the boys' locker room and has a separate entrance.

N.H. decided to take the required physical education class during the third trimester of the 2016-2017 school year. N.H. determined, despite the recommendations of the social worker, that he wanted to fulfill the physical education requirement like other students. N.H. and his mother approached CRHS staff before the third trimester started

due to concerns that the School Board would interfere with N.H.'s ability to use the boys' locker room. The last contact N.H. and his mother had regarding his use of locker room facilities occurred during the spring of the 2015-2016 school year. N.H.'s mother contacted Dr. Cherry, Anoka-Hennepin's Title IX/Equity Coordinator, who indicated N.H. should use the enhanced-privacy locker room.

On February 27, 2017, the School Board held a closed meeting to discuss N.H.'s use of the boys' locker room at CRHS. The School Board ordered N.H. to use the enhanced-privacy locker room. The Chair of the School Board wrote to N.H.'s mother and stated, "(u)ntil specific clarification is received under state or federal law, the use of restrooms and locker rooms will be determined on a case-by-case basis," and that, "the district has recommended (N.H.) use the boy's locker room with enhanced privacy."

On March 20, 2017, N.H. used the main boys' locker room with his friends. N.H.'s preference was to use the locker room all the boys used; not the enhanced-privacy locker room. N.H.'s mother was contacted by a CRHS staff person who told her N.H. would be disciplined if he continued to use the main boys' locker room. N.H.'s mother requested that CRHS provide, in writing, the School Board's decision that N.H. was required to use the enhanced-privacy locker room and the consequences if N.H. violated the School Board's decision. Neither CRHS, nor the School Board, responded to this request.

N.H. was removed from class by Dr. Cherry on March 21, 2017, to discuss N.H.'s use of the main boys' locker room in violation of the decision made by the School Board. After this incident, N.H.'s mother sent another request for that the School Board to place its decision that N.H. was required to use the enhanced-privacy locker room and the



consequence of violating this decision, in writing. For the second time, CRHS and the School Board ignored the request and did not provide the requested information in writing. N.H. used the enhanced-privacy locker room as he was instructed to do so that he could take the gym class required by the school district in order to graduate. On April 10, 2017, N.H. was hospitalized for the third time after his use of the boys' locker room became an issue due to mental health concerns. N.H. decided to transfer out of the Anoka-Hennepin school district while he was in the hospital.

N.H. sued Anoka-Hennepin School District 11 (hereinafter "Defendant"). N.H.'s Complaint includes the following causes of action:

Count I: Violation of Minnesota Human Rights Act. Minn. Stat. § 363A.01;

Count II: Violation of N.H.'s right to equal protection and due process under the Minnesota Constitution; Article 1, §§ 2 and 7.

**b. Proposed Intervenor's Complaint in Intervention**

The Proposed Intervenor is Rebecca Lucero, the Commissioner of the Minnesota Department of Human Rights (hereinafter "MDHR"). The Commissioner has authority to administer and enforce the Minnesota Human Rights Act (hereinafter "MHRA"). The MDHR Proposed Complaint in Intervention includes substantially the same factual allegations raised in N.H.'s Complaint. The MDHR also alleged additional facts as outlined below.

Defendant is a public school district in Minnesota. Its duty and functions include furnishing school facilities to every child of school age in any part of the school district. The School District is legally responsible for operation of schools in its district. The School Board is vested with the care, management, and control of public schools within

its boundaries. The School Board manages schools within the district and adopts rules for the organization, government, and instruction of schools in the district. The school board is vested with the authority to govern, manage, and control the school district, carry out the district's duties and responsibilities and to conduct district business. The school board employs a superintendent who serves as a nonvoting member of the School Board.

In approximately January of 2016, the School Board Chair and/or members of the School Board, asked the School District's Superintendent if a student was changing in a locker room inconsistent with the sex assigned to the student at birth. The School Board expected the Superintendent to be notified if a student used a locker room for a gender other than the one assigned to the student at birth. Day-to-day locker room use at individual school facilities is not ordinarily overseen by the Superintendent or the School Board. Rather, it is the responsibility of each individual school's administrators.

The Title IX/Equity Coordinator initially assured the Superintendent that no student was using a locker room for a sex other than the one assigned to the student at birth. The Superintendent provided this information to the School Board. Subsequently, the Superintendent learned N.H. was using the boys' locker room. The Superintendent and/or district staff told CRHS administrators N.H.'s use of the boys' locker room was not approved by the School Board.

On February 17, 2016, N.H.'s mother filed a complaint with the District School Board regarding how the district was handling N.H.'s locker room use and urged the District to adopt a gender inclusive policy that was similar to the policy adopted by other Minnesota school districts. After N.H. was told he could not use the boys' locker room

for gym class his mother notified CRHS staff that singling out N.H. because he was transgender was discriminatory.

On March 22, 2016, the District's general counsel and Title IX/Equity Coordinator issued a memorandum titled "School Planning and Guidance for Working with Transgender and Gender Non-Conforming Students." The memorandum indicated that due to the, "uncertainty" in state and federal law, "the use of restrooms and locker rooms shall be determined on a case-by-case basis." With respect to locker rooms, the memorandum stated,

"Any student who has a need or desire for increased privacy, regardless of the underlying reason, should be provided with a reasonable alternative changing area such as the use of a private area (e.g. a nearby rest room stall with a door, an area separated by a curtain, a PE instructor's office in the locker room or a nearby health office rest room) or with a separate changing schedule. Any alternative arrangements should be provided in a way that protects a student's ability to keep his or her transgender status confidential."

In the summer of 2016, an "enhanced privacy" boys' locker room was built at CRHS. The enhanced privacy locker room and the main boys' locker room had separate entrances. The District did not build an enhanced privacy locker room for girls at CRHS. No other enhanced privacy locker room was built at any school in the District.

In the winter of 2017, N.H.'s mother contacted CRHS staff and District staff to inquire whether N.H. would be allowed to use the boys' locker room in the spring of 2017 for his gym class. N.H.'s mother did not receive a response to her inquiries. In late January of 2017, N.H.'s mother sent a letter to the School Board indicating that they had not made any decision regarding whether gender non-conforming students could use the locker room of the gender to which the student identifies.

A School Board meeting was held on February 27, 2017. Before the meeting N.H.'s mother asked if the School Board would be voting on locker room use by transgender students. The Title IX/Equity Coordinator said that no such vote would occur at the meeting but that the School Board would be discussing N.H.'s request to use the boys' locker room for physical education during a closed session. The closed session was not on the published School Board's agenda for February 27, 2017.

On March 1, 2107, N.H.'s mother asked the Title IX/Equity Coordinator if a decision had been made regarding N.H.'s request to use the boys' locker room. The Title IX/Equity Coordinator responded stating the District, "continued to receive and consider input on this topic," and requesting that N.H. meet with her; the Superintendent and the CRHS principal regarding N.H.'s request to use the boys' locker room. Use of the enhanced privacy locker room generally requires an application and approval.

N.H. and his mother met with the Title IX/Equity Coordinator; the Superintendent and the CRHS principal on March 8, 2017, at which time N.H. was given a tour of the enhanced privacy boys' locker room. N.H. again stated he wanted to use the general boys' locker room and indicated he had not requested use of the enhanced privacy boys' locker room. On March 9, 2017, the Title IX/Equity Coordinator sent an email to A.H; that was copied to the CRHS principal; the Superintendent, and School Board Chair, stating, "(a)fter consideration of your input and the school board guidance, the district is assigning (N.H.) to use the boy's locker room with enhanced privacy." The MDHR alleges this decision is contrary to the anti-discrimination provisions of the MHRA.

The School Board Chair sent a letter to N.H.'s mother stating,

"Until specific clarification is received under state or federal case law, the use of restrooms and locker rooms will be determined on a case-by-case basis. The goal

is to ensure that all students feel safe and comfortable. Plans for accommodation for restroom and locker room use are made in consultation with school building administrators, the Title IX Coordinator, and Superintendent.”

The School Board Chair concluded in his letter that, “the district has recommended (A.H.) use the boy’s locker room with enhanced privacy.”

District staff indicated that the decision that N.H. use the boys’ locker room with enhanced privacy was based on providing privacy to all students. A district staff person also stated that the School Board’s expectation was that the district make a decision that honored the privacy concerns of all students in “intimate settings” where students change clothes. A school district official stated that the district did not consider bullying, fighting, or assault in making the decision that A.H. used the boys’ locker room with enhanced privacy and that the district did not have any concerns about bullying or harassment. One district official indicated that the School Board made it clear that no student should undress in the same locker room as students who were assigned a different sex at birth.

A School Board meeting was held on March 20, 2017. The School Board has a policy encouraging public discussion on subjects related to the management of the school district. Individuals who want to speak fill out a card before the meeting identifying the speaker and the topic to be addressed. A large number of people appeared at the meeting who spoke about their opposition to gender inclusive locker rooms.

On August 9, 2017, A.H.’s mother filed a charge of discrimination with the MDHR alleging that the School District discriminated against N.H. in the area of education and on the basis of gender identity. The MDHR began an investigation into the charge of discrimination that included interviewing district officials. On February 25,

2019, MDHR was notified that N.H.'s mother was withdrawing her charge because a lawsuit was being filed in district court.

The MDHR requests permission to intervene in this matter. The proposed Complaint in Intervention contains the following counts:

Count I: Discrimination in Educational Institution, disparate treatment, in violation of Minn. Stat. § 363A.13

Count II: Discrimination in Educational Institution, hostile environment in violation of Minn. Stat. § 363A.13

Count III: Reprisal in violation of Minn. Stat. § 363A.15

**c. Motions before the Court**

Defendant seeks dismissal of all Plaintiff's claims pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted. In the alternative, Defendant requests that the Court strike Plaintiff's request for punitive damages arguing that the request is barred by Minn. Stat. § 549.191. The MDRH requests that the Court allow it to intervene as a matter of right pursuant to Minn. R. Civ. P. 24.01 or in the alternative, permissively pursuant to Minn. Stat. § 363A.33, Subd. 5, based upon its certification that the case is of general public importance and pursuant to Minn. R. Civ. P. 24.02.

**II. Defendant's Motion to Dismiss**

**a. Legal Standard**

A Rule 12.02(e) motion raises the single question of whether the complaint states a claim upon which relief can be granted. *See* Minn. R. Civ. P. 12.02(e). It is immaterial whether or not the plaintiff can prove the facts alleged. *Royal Realty Co. v. Levin*, 244 Minn. 288, 290, 69 N.W.2d 667, 670 (1955). The Court must only consider the facts

alleged in the complaint, which are accepted as true, and must construe all reasonable inferences in favor of the non-moving party. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003).

**b. A.H.’s Complaint states a claim on which relief can be granted under the MHRA.**

A.H. claims that the School Board’s decision that he was required to use an enhanced privacy boys’ locker room violates the MHRA. Defendant argues that the Minnesota Supreme Court’s decision in *Goins v. West Group* is controlling and that the District exercised its discretion when it assigned N.H. to a privacy enhanced boys’ locker room. Defendant submits that this Court is bound by the decision in *Goins*, wherein the Minnesota Supreme Court held that “an employer’s designation of employee restroom use based on biological gender is not sexual orientation discrimination in violation of the MHRA.” *Goins v. West Group*, 635 N.W.2d 717, 720 (Minn. 2001).

This Court does not find *Goins* dispositive. The Minnesota Supreme Court’s ruling that an employer does not violate provisions of the MHRA that apply to employers and employees by requiring a transgender employee to use a restroom based on biological gender does not set precedent in a case involving a school district that has legal obligations set forth in a different provision of the MHRA. A.H.’s claim that his rights under the MHRA is based on Minn. Stat. § 363A.13, Subd. 1. This provision is distinct from the statute under which the Plaintiff in *Goins* sued his employer.

A.H. has stated a claim on which relief can be granted under Minn. Stat. § 363A.13, Subd. 1, which states,

“It is an unfair discriminatory practice to discriminate *in any manner in the full utilization of or benefit* from any educational institution, *or the services rendered* thereby to any person because of . . . , sexual orientation, . . . .”

The definition of “discriminate” under the MHRA, “includes segregate or separate. . .” Minn. Stat. § 363A.03, Subd. 13. The definition of “sexual orientation,” includes, “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” Minn. Stat. § 363A.13, Subd. 44. Based on the plain language of Minn. Stat. § 363A.13, Subd. 1, it is an unfair discriminatory practice for a school to discriminate against a transgender student in any manner that prevents the transgender student from utilizing the full benefits offered, or services provided, by the School District. A.H. has pled sufficient facts to assert a claim that Defendant’s actions violated Minn. Stat. 363A.13, Subd. 1.

- c. A.H. has a cause of action, based on the facts alleged in his Complaint, for the violation of his Constitutional Right to equal protection and due process.**

N.H. alleges that his constitutional rights to equal protection and due process under the Minnesota Constitution were violated when the School District required him to use the enhanced privacy boys’ locker room. The School District argues that this claim should be dismissed for failure to state a claim on which relief can be granted because: 1) there is no private cause of action for violation of equal protection or due process under the Minnesota Constitution; 2) if there was a private cause of action for violation of the state constitution there is no remedy; and 3) N.H. lacks standing to seek injunctive relief because he is no longer a student in the district.

- 1. A private cause of action exists for violation of a rights conferred on by the Minnesota Constitution.**

The School Board argues that while the state constitution may confers rights on individuals that there is no mechanism available to an individual whose rights have been



violated. As the Minnesota Supreme Court pointed out in *Cruz-Guzman v. State*, “(d)eciding that appellants’ claims are not justiciable would effectively hold that the judiciary cannot rule on the Legislature’s noncompliance with a constitutional mandate . . . . Such a result is incompatible with the principle that where there is a right there is a remedy.” *Cruz-Guzman v. State*, 916 N.W.2d 1, 9 (Minn. 2018)(citing *State v. Lindquist*, 869 N.W.2d 863, 873 (Minn. 2015)(The right to a remedy for wrongs is a fundamental concept of our legal system and a right guaranteed by our state constitution). The School Board would have the Court find that N.H.’s rights to equal protection and due process, conferred on him by our state constitution, cannot be legally protected through judicial action if those rights are violated. This argument is contrary to logic and case law.

**2. Injunctive and declaratory relief are available as remedies for the violation of a right conferred on an individual by the Minnesota Constitution.**

Minnesota allows an individual or organization to sue a governmental entity for violation of a right guaranteed under the Minnesota Constitution. The question is not whether a remedy exists for a violation of the constitution but rather what the remedy is for such violation. The School Board correctly notes that monetary damages are not available to a Plaintiff seeking to enforce his or her constitutional rights. See *Brooks v. Roy*, 881 F. Supp.2d 1034 (D. Minn. 2012)(there is no private cause of action *for damages* under the Minnesota Constitution unless the Minnesota Supreme Court has recognized the cause of action)(emphasis added). However, citizens whose constitutional rights are infringed upon they may seek injunctive and/or declaratory relief to cease the unconstitutional infringement of their rights. See *Edina Lutheran Church v. State*, 745 N.W.2d 194 Minn. Ct. App. 2008)(Respondent granted permanent injunction against the

State of Minnesota barring enforcement of statute against church that unconstitutionally violated churches' religious practices).

**3. N.H's claims that his constitution rights were violated by the School Board are not moot.**

Defendant submits that N.H. no longer has standing to sue Defendant for violation of his constitutional rights because he is no longer a student at CRHS, or anywhere else within the Defendant school district. As a result, Defendant argues N.H.'s requests for declaratory and injunctive relief are moot.

Generally, a court only has jurisdiction to issue a declaratory judgment if there is a justiciable controversy. *Minnesota Ass'n of Public Schools v. Hanson*, 287 Minn. 415, 419-20, 178 N.W.2d 846, 850 (1970). A controversy is justiciable when it involves definite and concrete assertions of right. *Id.* at 420, 178 N.W.2d at 850. Mootness can be described as the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness). *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

However, the Court is mindful that the mootness doctrine should not be applied strictly in every case. The Minnesota Supreme Court held that mootness is, "a flexible discretionary doctrine, not a mechanical rule that is invoked automatically." *State v. Rud*, 359 N.W.2d 573, 576 (Minn. 1984). Generally, a case should be dismissed as moot if effectual relief cannot be granted. *In re Schmidt*, 443 N.W.2d 29, 32 (Minn. 1980). This Court should not deem this matter moot, and should retain jurisdiction, if the case is "functionally justiciable" and is an important public issue "of statewide significance that should be decided immediately." *State v. Brooks*, 604 N.W.2d 345, 347-48 (Minn. 2000).

“A case is functionally justiciable if the record contains the raw material (including effective presentation of both sides of the issue raised) traditionally associated with effective judicial [decision making].” *Rud*, 359 N.W.2d at 576. This exception to the mootness doctrine is to be narrowly applied by courts. *Dean v. City of Winona*, 868 N.W.2d 1, 7 (Minn. 2015).

In *Dean*, the Supreme Court noted that this exception to the mootness doctrine was applied in a criminal matter to address the issue of whether a criminal defendant has the right to call child witnesses and victims to testify at a contested omnibus hearing. *Id.* Despite the fact that the criminal charges were dismissed against the defendant, and the case was technically moot, the Minnesota Supreme Court proceeded to hear the appeal because, “a failure to decide [the issue when presented] could have a continuing adverse impact in other criminal trials.” *Id.*

In *In re the Guardianship of Tschumy*, the Minnesota Supreme Court addressed whether a court-appointed guardian could consent to remove a ward from life support despite the fact that the case was technically moot because the ward in that case had been removed from life support by court order. In determining that the matter was not moot, the Court reasoned that more than 12,000 Minnesotans were wards under State supervision and a decision was needed to “clarify for the guardians and their wards the scope of the guardians’ authority to make one of life’s most fundamental decisions. *In re the Guardianship of Tschumy*, 853 N.W.2d 728, 741 (Minn. 2014)(plurality opinion).

In *Mertins v. Commissioner of Natural Resources*, appellant challenged the prehearing revocation of his commercial fishing license. While the matter was pending, appellant was criminally convicted of an offense that prevented him from obtaining a

commercial fishing license for five years, making his claim technically moot. The Court of Appeals concluded the issue raised by appellant was justiciable and had statewide significance. The court noted in reaching this decision that the prehearing revocation applies “to all Minnesota fish and game licenses. Neither the state nor (appellant) provides an estimation of the number of commercial fish and game licenses that may be subject to prehearing seizure under the provision. *Mertins v. Commissioner of Natural Resources*, 755 N.W.2d 329, 335 (Minn. Ct. App. 2008).

First, N.H.’s claims that his constitutional rights were violated by Defendant when it forced him to use a boys’ locker room with enhanced privacy is functionally justiciable. The record contains the raw material necessary to adjudicate the claim. The Complaint sets forth with great specificity the acts by Defendant which N.H. claims violated his constitutional rights. Additionally, the facts surrounding N.H.’s claims have been investigated by the MDHR. Plaintiff and Defendant are represented by eminently qualified and competent counsel; this Court has no doubt that there will be effective presentation of both sides of the issues raised, which will allow a judicial determination to be made.

Second, there can be no doubt that this case raises an important public issue of statewide significance that should be decided immediately. Anyone who has read the newspaper; watched the news or used social media within the last five years cannot dispute the fact that the use of bathrooms and changing facilities by transgender individuals has been hotly debated and is an important policy decision for businesses and government. Any argument that this issue is not of public important is disingenuous and

can only be made if one completely ignores current events and, like the proverbial ostrich, has its head buried in the sand.

Defendant is the largest school district in the State of Minnesota. Its policies affect a large number of students within the State of Minnesota. Additionally, a decision on the issues presented in this case will affect all students within the State of Minnesota and, more importantly, give guidance to all school districts. Studies indicate that there are 24,000 adults in the state who are transgender, which translates to .6% of the state's population. Neither party indicated the number of students who identify as transgender, which may reflect a lack of study in this area. However, it is reasonable to assume, based on the adult population, that at least .6% of the student population identifies as transgender. Additionally, it is fair to say that this issue does not only impact transgender students. The issue impacts every student and family in Minnesota. The impact is most closely felt by transgender students, their families, and friends. However, resolution also impacts every student who attends school in Minnesota. All Minnesotans have a legitimate interest in having the issues raised in this lawsuit resolved.

This Court is also convinced that the issues in N.H.'s lawsuit raise an important public issue of statewide significance that should be decided immediately based on two important facts set forth in N.H.'s Complaint.

First, The Minnesota Department of Education's Safe School Council issued a publication that states, "(t)ransgender ... students should be afforded the opportunity to use the restroom of their choice," and "(c)oaches should consider how they can utilize privacy curtains, restrooms and separate changing schedules to provide privacy for all students." This recommendation is in direct conflict with how Defendant has determined

transgender use of changing facilities should be handled. The Court is not suggesting that Defendant is required to follow recommendations made in a publication issued by the Department of Education. However, the fact that the Safe School Council published guidelines on transgender youth's use of changing facilities suggests that this is an important issue that effects the health and well-being of transgender youth.

Second, based on Defendant's policies and its board members communication with N.H., and his mother, Defendant recognizes: 1) it has a growing number of transgender students in its district; 2) and is unsure of its legal obligations to transgender students with respect to use of restrooms and locker rooms as demonstrated by its inability to adopt a policy to address this issue. A memorandum drafted by Defendant's legal counsel and its Title IX/Equity coordinator states district schools, "have a growing number of students who identify as transgender or gender non-conforming," and that "(m)any questions have arisen regarding how best to support our transgender students with respect to the use of names or pronouns, rest room/locker rooms, and record keeping." The schools solution to this important question was that it would have no policy but instead make a determination on a case-by-case basis. A legal resolution to this issue will eliminate the need for the School District's arbitrary "case-by-case" decision making. Additionally, the Chair of the School Board wrote to N.H.'s mother indicating, "(u)ntil specific clarification is received under state or federal law, the use of restrooms and locker rooms will be determined on a case-by-case basis..." Apparently the Chair of Defendant's School Board recognized that use of locker rooms by transgender youth is an important public issue of statewide significance that must be decided immediately based

on his assertion that clarification was needed under state and federal law in order for the School District to establish a policy.

**4. N.H.’s Complaint states a claim for violation of his constitutional right to equal protection and due process under the Minnesota Constitution.**

Defendant argues that the Complaint fails to state a cognizable claim under the equal protection and due process components of the Minnesota Constitution.

**1. Equal Protection**

Article I, § 2 of the Minnesota Constitution states,

“(n)o member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.” Although the phrase “equal protection” is not used, the Minnesota Supreme Court has recognized the Minnesota Constitution “embodies principles of equal protection synonymous to the equal protection clause of the Fourteenth Amendment to the United States Constitution.” *In re Guardianship of Durand*, 859 N.W.2d 780, 784 (Minn. 2015)(citation omitted). Article I, § 2 of our state constitution has been construed to provide greater protection than equal protection rights granted under the United States Constitution. *Greene v. Comm’r of Minn. Dep’t of Human Services*, 755 N.W.2d 713, 725 (Minn. 2008).

In an equal protection challenge that involves a suspect class or a fundamental right, courts apply a strict scrutiny analysis. *Id.* Intermediate scrutiny is applied to gender-based classifications. *Id.* (citation omitted). In all other cases, courts use the rational basis test to analyze the claim. *Id.* (citation omitted).

Minnesota has long recognized that transgender individuals face significant issues. See *Doe v. State Dept. of Public Welfare*, 257 N.W.2d 816, 817 (Minn. 1977)(“(a)lthough for most members of society sex and gender are synonymous, it is possible for each to develop independently,” and in such “cases when sex and gender do not develop independently, the end product is often a transsexual person plagued by the serious problem of ‘gender role disorientation, a painful cross-gender identity.” *Id.* at 819. The Minnesota legislature subsequently amended the MHRA to ban discrimination based on sexual orientation in educational settings. Minn. Stat. § 363A.03, Subd. 13. The definition of “sexual orientation,” includes, “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” Minn. Stat. § 363A.13, Subd. 44. The Minnesota Supreme Court held that a statute targets a suspect class when it works to the disadvantage of a social group with identifiable characteristics that has either been subject to a history of purposeful, unequal treatment or is politically powerless. *Skeen v. State*, 505 N.W.2d 299, 314 (Minn. 1993)(citation omitted).

There can be no argument that as a group, and individually, transgender individuals experience discrimination, persecution and are stigmatized. Transgender individuals frequently suffer from gender dysphoria, which can cause serious medical problems such as clinically significant psychological distress, dysfunction, depression and self-harm. Thirty-six percent of transgender students reported being bullied, and more than half of transgender children had attempted suicide within the previous two years, according to a survey conducted by the Minnesota Department of Education in 2016. Transgender teens have high rates of mental health issues including depression,



anxiety and self-harm. These mental health issues are often attributed to the discrimination, stigma and social rejection experienced by transgender youth. Based on this, Minnesota case law and the MHRA, transgender individuals are a suspect class. As such, N.H.'s claim that his right to equal protection was violated is reviewed utilizing strict scrutiny. *Greene*, 755 N.W.2d at 725.

Strict scrutiny is the most exacting standard of equal protection review. *In re the Custody of J.J.S.*, 707 N.W.2d 706 (Minn. Ct. App. 2006). Under this standard, court's will uphold a classification only if it is "narrowly tailored and reasonably necessary to further a compelling governmental interest." *Greene*, 755 N.W.2d at 725. Applying strict scrutiny to review Defendant's decision to require a transgender student to use an enhanced privacy locker room, which he did not wish to use and which was segregated from the main boys' locker room, N.H. has stated a claim for violation of his right to equal protection. At this stage in the proceeding, before discovery is completed and Defendant has filed an answer, Defendant cannot demonstrate that the actions it took in relation to N.H.'s use of the boys' locker room were narrowly tailored and reasonably necessary to further a compelling government interest.

## **2. Due Process**

N.H. has also stated a claim on which relief can be granted based on his claim that Defendant violated his right to substantive and procedural due process. Substantive due process protects a fundamental right against, "arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *State v. Hill*, 871 N.W.2d 900, 905-06 (Minn. 2015). Under the Minnesota Constitution, the right to an education is a fundamental right. *Kahn v. Griffin*, 701 N.W.2d 815, 830 (Minn. 2005).

N.H.'s Complaint alleges that he was segregated from other students in an educational setting based on his membership in a protected class. N.H.'s complaint alleges substantial facts to support the claim that he was segregated, and treated differently, from other students based solely on the fact that he is transgender. N.H. alleges that: 1) he initially used the boys' locker room without any trouble and with the support of fellow students and staff at CRHS; 2) that the School Board contacted the District's Superintendent and asked if a transgender student was using the boys' locker room at CRHS; 3) that the School Board held a closed session at which they addressed N.H.'s use of the boys' locker room at CRHS; 4) that the School District built an enhanced privacy boys' locker room at CRHS; 5) that enhanced privacy locker rooms were not added to the girls' locker room at CRHS or any other school in the district; 6) that N.H. was the only student required to use the enhanced privacy boys' locker room; and 7) that the School Board instructed CRHS staff to require N.H. to use the enhanced privacy boys' locker room. N.H. alleges that the action taken by Defendant negatively impacted his education by removing him from class to enforce a policy decision that only affected N.H.; caused or contributed to his mental health problems; and created an environment at CRHS that made N.H. feel isolated and unsafe. Based on the foregoing, N.H. has alleged sufficient facts in his complaint to state a claim that his substantive due process rights were violated by Defendant.

Procedural due process constrains state action that deprives individuals of "liberty" or "property" interests within the meaning of the Due Process Clauses of the Fifth and Fourteenth Amendments. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976). The Minnesota Constitution has a parallel due process

clause. Minn. Const. art I, § 7. Due-process protections granted under the United States and Minnesota Constitutions are identical. *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn.1988); *Fosselman v. Comm'r of Human Servs.*, 612 N.W.2d 456, 461 (Minn.App.2000). First, A.H. must allege that he has been deprived of protected life, liberty or property interest. *Mertins*, 755 N.W.2d at 336. Property interests are not created by the constitution, “they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Id.* (citation omitted). In determining the constitutional adequacy of specific procedures, the Court must consider: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used and probable value, if any, of additional or substitute procedural safeguards; and 3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

As addressed above, N.H. has a fundamental right to an education. Additionally, under the MHRA, educational institutions may not discriminate against N.H. based on his sexual orientation, which includes N.H.’s transgender status. N.H.’s Complaint alleges facts that challenge the adequacy of procedures used by Defendant to make the decision that N.H. be required to use a boys’ locker room with enhanced privacy. N.H. has alleged sufficient facts to state a claim for denial of his right to procedural due process. N.H. was using the boys’ locker room with approval of CRHS administrators until Defendant’s School Board took the unusual step of intervening in the individual school’s determination regarding locker room use. Defendant’s School Board created a policy

and/or is following a memorandum created by district staff that use of locker rooms by transgender students be decided on a “case-by-case” basis. Defendant’s School Board decided in this case that N.H. could not use the general boys’ locker room in a closed door meeting. Based on the foregoing, N.H. has stated a claim that his due process rights were violated.

**5. A.H. is permitted to request punitive damages in his Complaint under the MHRA without obtaining leave of the Court to demand such relief.**

Defendant requests that A.H.’s claim for punitive damages be stricken pursuant to Minn. Stat. § 549.191, which generally does not allow a claim for punitive damages to be made at the commencement of civil suits. Rather, in most civil suits, the Court must give leave to a party to file an Amended Complaint to make a claim for punitive damages. *Id.* Defendant asserts that the language of the MHRA does not provide an exception to the statutory requirement that party may not make a claim for punitive damages at the commencement of the lawsuit.

Defendant’s argument ignores the language of the MHRA and case law. Pursuant to Minn. Stat. § 363A.29, Subd. 4, punitive damages may be awarded to an aggrieved party pursuant to Minn. Stat. § 549.20. This provision does not require a party filing a Complaint under the MDHA to meet the requirements of Minn. Stat. § 549.19.

Additionally, it has been recognized in case law that the requirements of Minnesota statute requiring leave of court to plead punitive damages does not apply to a claim for punitive damages asserted under Minnesota Human Rights Act. A plaintiff does not forfeit a punitive damages award under the MHRA by failing to meet the motion requirements of section 549.191. *Bougie v. Sibley Manor, Inc.*, 504 N.W.2d 499, 496

(Minn.App.1993) (refusing to vacate punitive damages award despite lack of compliance with section 549.191); *see also Daines v. City of Mankato*, 754 F.Supp. 681, 704 (D.Minn .1990) (holding that the Minnesota legislature did not implicitly include the motion requirements of section 549.191 when it expressly incorporated the punitive damages standards of section 549.20).

Defendant's position that punitive damages cannot be pled in a Complaint alleging a violation of the MHRA is without merit.

**III. The Commissioner of the Minnesota Human Rights Department is allowed to intervene as a matter of right pursuant to Minn. R. Civ. P. 24.01 and permissively under the MHRA.**

N.H., through his mother, initially filed a charge of discrimination with the MDHR. The MDHR began investigating N.H.'s claims against Defendant. As a part of its investigation, the MDRH obtained information regarding Defendant's decision to restrict N.H. to the enhanced privacy boys' locker room. In gathering information related to N.H.'s claim, the MDHR interviewed School District staff. Based on its investigation, the MHRD believes that Defendant violated provisions of the MHRA by requiring N.H. to use a privacy enhanced boys' locker room. As such, the MDHR has requested intervention as a matter of right, or alternatively, permissive intervention.

Minn. Stat. § 363A.33 allows a court to permit the MDHR to intervene in an action under the act on timely application and certification that the case is one of general public importance. Minn. Stat. § 363A.33, Subd. 5. Proposed Intervenor's motion to intervene was timely. Additionally, in paragraph 12 of the proposed Complaint in Intervention, the Commissioner has certified that N.H.'s civil action is of general public importance. The MDHR seeks intervention to obtain relief to ensure that Defendant

ceases discriminatory practices affecting students in the district and operate the schools in the district in compliance with the MHRA. Intervention is appropriate under the MHRA.

Pursuant to Minn. R. Civ. P. 24.01, an applicant may request intervention as a matter of right if they show: 1) a timely application; 2) an interest in the subject matter of the action; 3) an inability to protect that interest unless the applicant is a party to the action; and 4) the applicant's interest is not adequately represented by the existing parties. *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 641 (Minn. 2012). As addressed above, the motion to intervene is timely.

**a.) The MDHR has an interest in the subject of the action.**

N.H. sued Defendant for violation of the MHRA. A charge of discrimination was originally filed with the MDHR, which began an investigation into the matter. After the investigation had commenced, but before any decision was made regarding the charge, N.H. decided to pursue his claim in district court. Based on the investigation that was conducted, the MDHR believes that Defendant violated the MHRA in requiring N.H. to use the enhanced privacy boys' locker room. The MDHR has an interest in representing all Minnesotan's civil right to education and the utilization of, and benefits offered, by educational institutions. The interest in the subject matter is demonstrated by the fact that the MDHR has certified N.H.'s case as one of general public importance. As a result MDHR has an interest in the subject matter.

**b) The MDHR will not be able to protect their interest in the subject of the action unless it is a party.**

The MDHR argues,

“(a)s a practical matter, MDHR’s ability to protect its interests may be impaired or impeded if MDHR does not intervene. A decision in this matter, reached

without input from MDHR, could impair or impede MDHR's ability to bring cases alleging discrimination based on gender identity, or in the area of education, and could affect how MDHR investigates and resolves such claims."

The MDHR also argues that its ability to pursue claims or relief may be impaired or impeded if the motion to intervene is not granted. MDHR's argument that its interest in this action cannot be protected unless it is a party is compelling. Absent intervention, the MDHR will not be able to protect its interest in the subject of the action and its outcome.

**c. N.H. cannot adequately represent the interests of MDHR.**

MDHR has investigated N.H.'s complaint against Defendant and substantiated the claims based on the allegations contained in the Complaint in Intervention. Based on MDHR's investigation; their Complaint alleges separate and distinct causes of action than N.H.'s Complaint. More importantly, MDHR is requesting different relief under the MHRA than N.H.; including that the Court order Defendant to submit revised policies, procedures and guidelines related to transgender locker room use to the MDHR; order Defendant to report to the MDHR on Defendant's compliance; order Defendant's employees undergo training approved by the MDHR; and order Defendant's to pay a civil penalty to the State. This relief is different than the type of relief that can be sought by a private party suing for violation of the MHRA. Based on the foregoing, MDHR interests cannot be adequately represented by N.H.

Defendant proffered multiple arguments in opposition to intervention. None of these arguments were persuasive. Based on the authority to allow the MDHR to intervene permissively under the MHRA and as a matter of right under Minn. R. Civ. P. 24.01, MDHR's motion to intervene is granted.

**JWJ**