

STATE OF MINNESOTA
IN COURT OF APPEALS

N.H.,

Respondent,

and

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

Plaintiff-Intervenor, Respondent,

vs.

Anoka-Hennepin School District No. 11,

Appellant.

***AMICUS CURIAE BRIEF OF COMMISSIONER
OF THE MINNESOTA DEPARTMENT OF EDUCATION***

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AMICUS STATEMENT

The Commissioner of the Minnesota Department of Education (“MDE”) is charged with adopting goals for and exercising general supervision over public schools and public educational agencies in the State of Minnesota. Minn. Stat. § 127A.05, subd. 3 (2019). The Commissioner of Education (“Commissioner”)¹ was appointed by the Governor based on her knowledge and experience strengthening children and families. *See* Minn. Stat. § 119A.03. The Commissioner and MDE have extensive knowledge of and experience with Minnesota’s primary and secondary education system, and are charged to develop and maintain state model policies for local schools or districts on safe and supportive schools. Minn. Stat. § 121A.031, subd. 6. MDE administers the *Minnesota Student Survey* (“MSS”), which assesses school climate and student emotional wellbeing, every three years since 1989. The 2019 MSS included questions for 9th and 11th grade students about sexual orientation and gender identity. Thus, the Commissioner has broad knowledge of the policy implications of reducing protections for transgender and other gender-nonconforming² students

Ensuring that Minnesota’s schools are safe, welcoming places for all students is of paramount importance to the Commissioner. By creating safe, welcoming school

¹ Pursuant to Minn. R. Civ. App. P. 129.03, the Commissioner certifies that no counsel for any party in this action authored this brief, in whole or in part, and that no entity other than MDE made any monetary contribution to the preparation or submission of this brief.

² For purposes of this brief, in the interest of brevity, the Commissioner uses the term “gender-nonconforming” to describe individuals who are transgender, are gender-nonbinary, or have any other gender identity besides cisgender male or female.

environments, the Commissioner believes that schools can facilitate the most effective possible education and preparation for adulthood.

On December 19, 2019, the Commissioner petitioned this Court for leave to file an *amicus curiae* brief in this matter. That petition was granted on January 2, 2020.

INTRODUCTION

Studies show that gender-nonconforming students are a vulnerable population that suffers serious harm when subjected to discrimination, particularly in school settings. Research further demonstrates that the harm these students suffer continues into adulthood. This is the exact type of population that the Minnesota Human Rights Act (“MHRA”) was enacted to protect. MDE has provided guidance for districts on how to support gender-nonconforming students and avoid these harms. Nevertheless, Appellant Anoka-Hennepin School District chose to force Respondent N.H. to use a segregated locker facility due to his transgender status, undermining his gender identity and causing him harm. For the sake of Minnesota’s thousands of transgender, gender-nonconforming, and gender questioning students, the MHRA³ cannot be interpreted to ratify Appellant’s forced segregation of N.H. The Commissioner submits this brief in support of N.H.’s MHRA claim and asks the Court to afford N.H., and all gender-nonconforming students, the full protection of the MHRA by allowing N.H.’s claim to proceed.

³ N.H. also claims that Appellant violated the Equal Protection Clause of the Minnesota Constitution. The Commissioner takes no position as to the standard of review that should apply to that claim in this brief.

ARGUMENT

I. GENDER-NONCONFORMING STUDENTS ARE THE TYPE OF VULNERABLE POPULATION THE MHRA WAS ENACTED TO PROTECT.

Gender-nonconforming students are subjected to bullying and harassment at higher rates than their cisgender peers and are especially likely to suffer from a host of serious problems as a result. The MHRA was enacted specifically to protect such vulnerable populations and support their acceptance by society, and it should be interpreted to robustly protect gender-nonconforming individuals.

A. The MHRA Was Enacted To Protect Vulnerable Populations In Educational Settings.

The MHRA declares a public policy against discrimination in education, among other settings, based on a variety of characteristics including sexual orientation and declares existence of a civil right to “full and equal utilization of . . . educational institutions without such discrimination.” Minn. Stat. § 363A.02, subs. 1, 2 (2019). From the time it extended the MHRA to schools in 1967, the Legislature recognized that discrimination in educational settings, like discrimination in employment, housing, public accommodations, and public services, “menaces the institutions and foundations of democracy.”⁴ Laws of Minn. 1967, ch. 897, § 26.

⁴ The Legislature’s focus on “foundations of democracy” suggests that schools are an especially important area in which to prevent discrimination. Providing the opportunity for *all* Minnesotans to participate fully in our democracy is one of the primary reasons for our public school system. See Minn. Const. art. XIII, § 1 (establishing public schools because “[t]he stability of a republican form of government depend[s] mainly upon the intelligence of the people”); *Bd. of Educ. of Town of Sauk Centre v. Moore*, 17 Minn. 412, 416 (1871) (holding the object of public schools is to enable all Minnesotans to (Footnote Continued on Next Page.)

This policy declaration did not occur in a vacuum. The enactment of the education provisions of the MHRA occurred at a time when legislatures across the country, including the U.S. Congress, were recognizing discrimination against racial minorities and fashioning legislative solutions. In doing so, Congress’s purpose was to address the stigma and harm to personal dignity that discrimination causes. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250, 85 S. Ct. 348, 354 (1964) (stating the purpose of Title II of the Civil Rights Act of 1964).

The Minnesota Legislature was no different when it enacted the MHRA. The Legislature, in enacting the MHRA, specifically intended to protect vulnerable groups’ civil rights by preventing harm to “dignity and self-respect” and promoting change in the way society interacts with these vulnerable groups. *Daniel v. City of Minneapolis*, 923 N.W.2d 637, 648–49 (Minn. 2019) (noting the MHRA’s status as a civil rights statute and emphasizing injury to a plaintiff’s “dignity and self-respect”); *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 378 (Minn. 1990) (“[T]he essence of the MHRA is societal change.”); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 626, 104 S. Ct. 3244, 3254 (1984) (explaining that the MHRA’s broad scope, “reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups”).

(Footnote Continued From Previous Page.)

“acquire an education which will fit them to discharge intelligently their duties as citizens of the republic”). Thus, discrimination in schools strikes directly at a principal foundation of democracy and must be diligently prevented.

Gender-nonconforming individuals fall squarely within the protections the MHRA affords individuals in an educational setting. The Legislature expressly provided protection based on “sexual orientation” to individuals “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness,” which is a clear description on gender-nonconforming individuals. Minn. Stat. § 363A.03, subd. 44. Thus, when the Legislature prohibited discrimination in the “full utilization of or benefit from any educational institution” and exclusion or other discrimination against a person enrolled as a student on the basis of sexual orientation, it granted that protection to gender-nonconforming students. *See* Minn. Stat. § 363A.13, subds. 1, 2.

B. The MSS Shows Gender-Nonconforming Individuals Are Vulnerable During Their School-Age Years.

Gender-nonconforming students in Minnesota’s schools are a vulnerable population that suffers real dignitary, emotional, and physical harm. The harsh reality for thousands of students in Minnesota is as follows: If you are a gender-nonconforming student in Minnesota schools, you are highly likely to experience harassment or bullying at school, even more likely to suffer from mental health issues, and unlikely to feel that you have a support network at your school for addressing these problems. Surveys and studies show that gender-nonconforming students face hostile environments at school on the basis of gender identity, experience greater distress than cisgender peers who face similar levels of hostility on other bases, and suffer in adulthood as a result.

The MSS is administered by MDE to determine the activities, opinions, behaviors, and experiences of students in order for MDE to learn about students' health and well-being. *Minnesota Student Survey*, MDE, <https://education.mn.gov/MDE/dse/health/mss/>.⁵

On the 2019 MSS, 9th and 11th grade students were asked questions about their sexual orientations and gender identities. MDE, *2019 Minnesota Student Survey Statewide Tables 3*, tbl. 2 (Oct. 2019), retrieved from <https://public.education.mn.gov/MDEAnalytics/DataTopic.jsp?TOPICID=11>. Of the 80,149 students in 9th and 11th grades responding to the MSS, 1,141 identified as transgender, genderqueer, or genderfluid,⁶ while another 1,179 indicated that they were questioning their gender identities.⁷ Minnesota Student Survey Interagency Team, *Minnesota Student Survey 2019* ("MSS 2019"), [Level: State; Year: 2019; Category: Demographics; Report: ALL;

⁵ MDE administers the MSS to 5th, 8th, 9th, and 11th grade students every three years in school districts that opt to participate. *Id.* About 81% of school districts in Minnesota participated in 2019. *Id.* For students in participating districts, the MSS is voluntary and responses are anonymous. *Id.*

⁶ In this brief, these students are referred to as gender-nonconforming.

⁷ These numbers do not reflect the actual number of Minnesota students who are gender nonconforming or questioning their gender because it does not account for 10th grade, 12th grade, or pre-high school students. Moreover, only 60% of 9th and 11th grade students took the 2019 MSS. Although the MSS is not designed to be a representative sample of Minnesota's student population and thus does not support extrapolation by percentage, it is safe to say that the way Minnesota law applies to gender-nonconforming students at school affects thousands of Minnesota's children.

Grade: 9 & 11; Demographics: Gender Minority], retrieved from <https://public.education.mn.gov/MDEAnalytics/DataTopic.jsp?TOPICID=242>.⁸

According to the 2019 MSS, gender-nonconforming students were more than twice as likely as their peers to report being bullied at least once per week. *Id.*, [Category: School; Demographics: Gender Minority & Cisgender].⁹ Among gender-nonconforming 9th and 11th grade students taking the MSS, 23% reported experiencing at least four Adverse Childhood Experiences (“ACEs”),¹⁰ and 80% reported experiencing at least one ACE.¹¹ *MSS 2019*, [Level: State; Year: 2019; Category: Risk Factors; Report: Adverse Childhood Experiences; Grade: 9 & 11; Demographics: Gender

⁸ The bracketed material in citations to the MSS refers to the selections in the dropdown menus on the cited MDE webpage. An ampersand is used to indicate that two selections on the same dropdown menu were used to retrieve the indicated data. In short-form citations, any changes to the dropdown menu selections from the previous citation to the MSS will be noted in brackets.

⁹ Gender-nonconforming students are also more than three times as likely to feel unsafe at school. *Id.*, [Report: Perceptions of Safety].

¹⁰ According to the CDC, ACEs are “potentially traumatic events that occur in childhood (0–17 years),” including violence, abuse, and witnessing violence at home, as well as “aspects of the child’s environment that can undermine their sense of safety, stability, and bonding,” including substance abuse in the home and imprisonment of a household member. *Preventing Adverse Childhood Experiences*, Ctrs. for Disease Control and Prevention (“CDC”), <https://www.cdc.gov/violenceprevention/childabuseandneglect/aces/fastfact.html>. ACEs can cause a host of problems in children’s health, including disrupting brain development, limiting social development, compromising immune system functioning, and causing children to turn to unhealthy coping behaviors, such as substance abuse. CDC, *Preventing Adverse Childhood Experiences (ACEs): Leveraging the Best Available Evidence* 7–8 (2019).

¹¹ Transgender and gender-nonconforming students experienced ACEs at a much higher rate than the average student. Among all respondents, only 8% of 9th grade students and 7% of 11th grade students reported four or more ACEs, and 49% of 9th grade students and 50% of 11th grade students reported one or more ACEs. *MSS 2019*, [Level: State; Year: 2019; Category: Risk Factors; Report: Adverse Childhood Experiences; Grade: 9 & 11; Demographics: ALL].

Minority]. In light of the distress that the thousands of gender nonconforming students in Minnesota face, it is not surprising that 72% of gender-nonconforming students who took the MSS reported suffering from long-term mental health issues. *Id.*, [Category: Mental Health; Report: ALL].¹²

Studies also demonstrate that the harmful discrimination gender-nonconforming students suffer in school translates to physical harm, diminished academic achievement, and problems in adulthood. Research indicates that victimization based on LGBTQ status leads directly to psychosocial adjustment problems in young adults, that transgender students have higher levels of victimization in school than other LGBTQ students, and that poverty, unemployment, and suicide rates are much higher among transgender individuals than cisgender individuals.¹³

¹² Despite all the need Minnesota's gender-nonconforming students have for support, many have no adult support structure at school. On the MSS, 42% of these students said the adults at their schools care about them only a little or not at all, and 23% of these students reported they have no adult to whom they can talk about problems they experience. *Id.*, [Category: Family and Relationships].

¹³ See Russell B. Toomey et al., *Gender-Nonconforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, 46 *Dev'l Psychol.* 1580, 1585 (2010) (finding a direct link between LGBT-based victimization in school and psychosocial adjustment problems such as depression, suicidality, and lack of life satisfaction, in young adulthood); Emily A. Greytak et al., *Gay, Lesbian and Straight Educ. Network, Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools* 44 (2009) (transgender students experience higher levels of victimization and lower levels of school engagement than other LGBTQ students); Sandy E. James et al., *Nat'l Center for Transgender Equal., The Report of the 2015 U.S. Transgender Survey* 5 (2016) (reporting that 29% of transgender respondents were living in poverty, 15% were unemployed, and 40% had attempted suicide, compared to 14% (poverty), 5% (unemployed), and 4.6% (attempted suicide), respectively, of the general U.S. population).

C. MDE’s Toolkit for Safe and Supportive Schools for Transgender and Gender Nonconforming Students Was Created To Help Schools Protect Vulnerable Gender-Nonconforming Students in Educational Settings.

MDE had these students’ vulnerability in mind when promulgating guidance for schools. Promoting safe and welcoming schools is one of the Commissioner’s major priorities. For gender nonconforming students, a safe and welcoming school is one where their identities are affirmed and the teachers, administrators, staff, and fellow students create a supportive environment. MDE released a toolkit in 2017 that provides guidance for schools and districts on creating safe and welcoming environments for gender non-conforming students. MDE, *A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students (“Toolkit”)* 1 (2017) (MDHR Add. 26). The *Toolkit* emphasizes the important opportunities extracurricular activities present to gender-nonconforming students, recommends schools facilitate participation, and cautions schools of the stigmatizing effect of forcing gender-nonconforming students to use restrooms or locker rooms against their wishes. *Id.* at 35.¹⁴ Although the *Toolkit* is not binding on schools or districts, following its recommendations will lead to inclusive environments, and it is intended in part as a guide for compliance with relevant laws, including the MHRA.

¹⁴ The *Toolkit* also encourages working collaboratively with gender-nonconforming students and their families to accommodate the unique needs of each student as they transition or navigate school while out to their peers. MDHR Add. 29–31.

II. APPELLANT’S TREATMENT OF N.H. ILLUSTRATES WHY THE MHRA’S PROTECTIONS ARE SO IMPORTANT FOR GENDER-NONCONFORMING YOUTH.

In its plain text, the MHRA protects students from any form of discrimination on the basis of transgender or other gender-nonconforming status in school settings. Minn. Stat. §§ 363A.03, subd. 44; 363A.13; *see also* Section I.A, *supra*, (analyzing the text and purpose of the MHRA). When Appellant forced N.H. to use a segregated locker facility against his will, it did so expressly because of his transgender status. Appellant’s board justified its actions by arguing its decision was intended to protect the privacy concerns of other male students when changing in locker rooms.¹⁵ Compl. ¶ 83; App.’s Br. 35–36. The MHRA section governing educational settings, Minn. Stat. § 363A.13, provides no exception, however, that allows discrimination on the basis of protected characteristics in the interest of privacy.¹⁶ Appellant violated the MHRA’s plain meaning when it forced N.H. to use a segregated locker facility due to his transgender status.

Appellant’s refusal to allow N.H. to use the locker room that fits his gender identity illustrates why gender-nonconforming students need the protection of the MHRA when they are at school. The staff at CRHS initially respected N.H.’s preferences, affirmed his gender identity, and avoided discriminating against him.¹⁷ At that time,

¹⁵ As noted in *Vernonia School District 47J v. Acton*, cited by Appellant, locker rooms are places almost entirely devoid of privacy, where students’ privacy interests are nearly non-existent. 515 U.S. 646, 657, 115 S. Ct. 2386, 2392–93 (1995).

¹⁶ Appellant’s board also stated that the law was insufficiently clear to determine whether N.H. should be segregated. Compl. ¶ 97. In light of the clarity of sections 363A.03, subdivision 44, and 363A.13, this contention is misplaced.

¹⁷ This was in line with Appellant’s mission statement, which includes “[p]roviding a safe and respectful learning environment,” meeting students’ individual needs, and promoting (Footnote Continued on Next Page.)

Appellant, through the CRHS staff, was complying with the MHRA by providing N.H. with the benefits enjoyed by all of its other male students. N.H. was thriving in the environment the CRHS staff created. Compl. ¶ 76.

When the school board intervened, and Appellant segregated N.H. from the other boys due to his transgender status, the effects were nearly instantaneous. N.H.'s mental health rapidly deteriorated. He had to be hospitalized three times. Compl. ¶¶ 80, 85, 105. When Appellant continued to bar N.H. from using the locker room that aligned with his gender identity and to threaten discipline if he did so, N.H. was forced to transfer to a school in another district. Compl. ¶¶ 99, 102, 106, 107.

N.H.'s experience is, unfortunately, in line with those of many gender-nonconforming students. Many of those students go to school in environments that fail to affirm their gender identities. As a result, the vast majority of transgender and gender-nonconforming students in Minnesota, including N.H., suffer from long-term mental health problems. *MSS 2019*, [Level: State; Year: 2019; Category: Mental Health; Grade: 9 & 11; Demographics: Gender Minority]. These mental health problems too often lead to tragic results. Compared to national averages, transgender individuals are more than eight times as likely to have attempted suicide. *See* n.13, *supra*. As N.H.'s case demonstrates, policy decisions can have significant, direct, and immediate implications

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achievement for *all* students. *About us, Anoka-Hennepin Schools*, <https://www.ahschools.us/domain/74>.

for gender-nonconforming students' mental health status. Accordingly, it is imperative that gender-nonconforming students receive the full protection of the MHRA.

CONCLUSION

The MHRA prohibits discrimination in schools on the basis of sexual orientation. Under the statute's plain text, this includes forcing a student to use a segregated locker room because of his transgender status. For the sake of Minnesota's thousands of transgender, gender nonconforming, and gender questioning students, the MHRA cannot be interpreted to ratify Appellant's actions in this case. Accordingly, the Commissioner of Education asks the Court to hold that the MHRA means what it says and that N.H.'s education discrimination claim can proceed.

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