

No. A19-1944

State of Minnesota
In Court of Appeals

N.H.,

Respondent,

and

Rebecca Lucero, Commissioner of the
Minnesota Department of Human Rights,
Plaintiff-Intervenor,

Respondent,

v.

Anoka-Hennepin School District No. 11,

Appellant.

**BRIEF OF *AMICUS CURIAE* OUTFRONT MINNESOTA, INC. AND
TRANSFORMING FAMILIES MINNESOTA, INC.**

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Minn. Stat. § 363A.13, subd. 1	6, 28
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Amanda Montañez, <i>Beyond XX and XY: The Extraordinary Complexity of Sex Determination</i> , 317 <i>Sci. Am.</i> 50, 51 (2017).....	3, 4
Emily A. Greytak et al., <i>GLSEN, Harsh Realities: The Experiences of Transgender Youth in Our Nation’s Schools</i> 30–32 (2009)	17

Esther L. Meerwijk & Jae M. Sevelius, <i>Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples</i>	7
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Sandy E. James et al., National Center for Transgender Equality, <i>The Report of the 2015 U.S. Transgender Survey</i> (2016).	10, 13, 16

Minn. Sen., Hearing on S.F. 444 before the Sen. Judiciary Comm., 78th Minn. Leg., Reg. Sess. (Feb. 22, 1993)..... 25

Stephen T. Russel & Jessica N. Fish, *Mental Health in Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth*, 12 Ann. Rev. Clinical Psychol. 465 (2016) 18–19

Terryann C. Clark et al., *The Health and Well-Being of Transgender High School Students: Results from the New Zealand Adolescent Health Survey (Youth’ 12)*, 55 J. Adolescent Health 93 (2014) 9

IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

OutFront Minnesota was founded in 1987 to fight for LGBTQ justice and equity. OutFront's mission is to advocate for full equality of lesbian, gay, bisexual, transgender, and queer people where they are free to be who they are, love who they love, and live without fear of violence. Over the past 32 years, OutFront has worked to ensure that the values of liberation and intersectional justice guide its work until full equality under the law and full equity in practice is realized.

OutFront played a key role in amending the Minnesota Human Rights Act to include sexual orientation *and* gender identity as protected statuses in 1993. OutFront also worked to defeat an anti-marriage amendment at the ballot box and to pass marriage equality through the legislature in 2013. And OutFront helped to pass the Safe and Supportive Schools Act in 2014 and the Trans Toolkit in 2017, which ensure that transgender students in Minnesota have safer and more supportive environments in which to learn.

Transforming Families MN is a community-based organization that brings together transgender, gender nonconforming, and questioning youth and their families to support each other in a safe, welcoming space. Transforming Families holds monthly

¹ In accordance with Minn. R. Civ. App. P. 129.03, OutFront Minnesota, Inc. and Transforming Families Minnesota, Inc. state that no counsel for any party has authored any part of this brief, and that no person other than OutFront Minnesota, Inc. and Transforming Families Minnesota, Inc., their members, and their counsel have made any monetary contribution to the preparation or submission of this brief.

gatherings that feature separate breakout groups for parents, kids, siblings, and teens. These gatherings provide families and youth the opportunity to meet and learn from other people traveling the same path.

INTRODUCTION AND BACKGROUND

N.H. is a transgender teenage boy who transitioned socially prior to high school. (RA001, Compl. ¶ 1)

Although implicating larger constitutional and statutory questions, this case is really about N.H., who he is, and what challenges he and other transgender children face. As such, one cannot properly understand the legal issues presented in this case without understanding the stakes for transgender children like N.H. And one cannot understand what it means to be “transgender” without first understanding what “gender” and “sex” mean.

A. Key concepts and terminology.

Sex: The term “sex” has traditionally been used to refer to a person’s biological status, often conceived of in terms of a male/female dichotomy. But sex is as much of a social concept as it is biological, and consists of a person’s “assigned sex, legal sex, sex identity, and attributed sex.”² And contrary to popular conceptions, “biological sex” is not a binary proposition at all. Instead, it is best thought of as a spectrum consisting of many independent, physical components. For example, in addition to variations in

² Aaron Devor & Ardel Haefele-Thomas, *Transgender: A Reference Handbook* 5 (2019).

chromosomes—including XX, XXY, XYY, and XY—there are variations in gene expressions, hormones, internal and external sex organs, and secondary-sex characteristics that do not always perfectly align along the traditionally conceived-of male/female spectrum.³ As such, babies are not “born” with a given sex so much as they are “assigned” one at birth, usually based on “visual inspection of [their] genitals.”⁴ Importantly, a person’s assigned sex may not always correspond to their legally designated sex, to their own sexual identities, or to the sex that people attribute to them.⁵

Gender: Broadly speaking, gender is a set of social expectations—expectations that vary across different cultures and throughout time—about the behaviors and characteristics people are “supposed” to possess based on whether they are male or female. Gender is typically assumed to follow from sex, such that girls or women are thought to be females and feminine, and boys or men are thought to be males and masculine.⁶ Like sex, gender can have many components, including one’s “assigned gender, legal gender, gender identity, gender expression, and gender attributions.”⁷ Like sex, those components do not always line up with each other, in that a person’s assigned

³ See, e.g., Amanda Montañez, *Beyond XX and XY: The Extraordinary Complexity of Sex Determination*, 317 *Sci. Am.* 50, 51 (2017).

⁴ Devor & Haefele-Thomas, *supra* note 2, at 5.

⁵ *Id.* at 6.

⁶ *Id.* at 6–7.

⁷ *Id.*

or legal gender may differ from their gender identity or their expressed gender.⁸ And just like sex, gender is not binary, i.e. male/female, but is better thought of as existing along a multi-dimensional spectrum in which people may identify as male, female, genderqueer, gender fluid, non-binary, agender, or many other identities.⁹

Transgender: “Transgender or trans are both umbrella terms used to describe a range of people who share the feature of not feeling that their sex and gender assignments made for them at birth were correct.”¹⁰ (This brief uses the term “cisgender” to refer to people whose gender identities match their assigned sex at birth.) Some trans people may identify with a different binary sex and gender than they were assigned. For example, an individual assigned with the sex and gender of male/boy may identify instead as a female/girl.¹¹ A person may identify as a different sex and gender from the one they were assigned at birth with or without undergoing gender-affirming medical procedures.¹² Others may reject the binary gender distinction altogether and identify as “non-binary.”¹³ Importantly, the sense that one’s sexual and gender identities differ from the identities assigned to them at birth is often felt to be an inherent characteristic. One does not choose to be trans. Rather a person considers “that they

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 8.

¹¹ *Id.*

¹² *Id.* at 48–49.

¹³ *Id.* at 8.

have always been the sex and gender with which they identify,” not the sex and gender they were assigned.¹⁴

B. N.H. and the Anoka-Hennepin School District policy.

This case is about a transgender student, N.H., whose assigned sex was female at birth but who, from a very young age, realized he was a boy. By high school, N.H. had socially transitioned and “present[ed] himself to the world as a boy.” (RA013-14, Compl. ¶ 66) He joined the high school swim team and, “[j]ust like all the other students on the boys’ swim team, N.H. used the boys’ locker room.” (RA014, Compl. ¶ 73) N.H. was welcomed and supported by the team and used the boys’ locker room without incident. (RA014-15, Compl. ¶¶ 74–76)

Then, the Appellant Anoka Hennepin School District No. 11 and the School Board (collectively, the “District”) intervened. The District built a new “‘enhanced privacy’ restroom and changing facility” in the boys’ locker room, (RA017, Compl. ¶ 88) and instructed N.H. that he was to use the separate changing facility—not the main boys’ locker room. (RA018-19, Compl. ¶¶ 97, 99, 102) N.H. understandably felt individually targeted and stigmatized by the District’s actions and struggled to cope. (RA015-16, 018-20, Compl. ¶¶ 80, 85–86, 96, 105–08) He was intermittently hospitalized due to mental-health concerns and eventually transferred out of the school district so as to avoid being the target of the District’s discriminatory conduct. (*Id.*)

¹⁴ *Id.* at 49.

There are thousands of transgender children just like N.H. in Minnesota. Many of them struggle to gain acceptance and support from their families, friends, and communities. Many are bullied, harassed, and even assaulted. And many suffer from severe emotional- and physical-health risks. Schools, in particular, can be a focal point for the pressures that transgender children face, and thus schools have an important role to play in adopting and implementing policies that support transgender students and make them feel included, welcome, and safe in their identities. Unfortunately, policies like the one implemented by the District do the opposite: They set transgender students apart, stigmatize them, and put their emotion and physical safety at risk.

Deciding to forcibly segregate students like N.H. is not just a bad policy, it is an illegal one—Minnesota law does not permit the District to segregate N.H. and other transgender students. The Minnesota Human Rights Act (“MHRA”) is designed to ensure all people, regardless of their “race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability,” have equal access to “the full utilization of or benefit from any educational institution.” Minn. Stat. § 363A.13, subd. 1. The law prohibits practices like those employed by the District not just because they literally segregate students like N.H. based on their gender identity, *see id.* § 363A.03, subd. 13 (defining discrimination), but because they stigmatize and harm them in the process. The drafters of the 1993 amendment who added “sexual orientation” to the list of protected traits in the MHRA

explicitly set out to protect students just like N.H. from being subjected to harmful policies just like the one at issue here.

ARGUMENT

I. THERE IS A CURRENT AND PRESSING NEED TO PROTECT TRANSGENDER AND GENDER-NONCONFORMING STUDENTS

A. There are thousands of transgender and gender-nonconforming students like N.H. in Minnesota.

Nationwide, roughly 0.4% of people identify as transgender.¹⁵ In 2020, that translates to about 1.3 million people in the United States. The rate of people who self-identify as transgender, however, has slowly increased over time—likely because people feel more comfortable identifying themselves as transgender—making those estimates conservative.¹⁶ Further, studies of youths find slightly higher rates compared to adults, with survey respondents who identify as transgender or who were unsure about their gender identity ranging from 1.3% to 3.7%.¹⁷

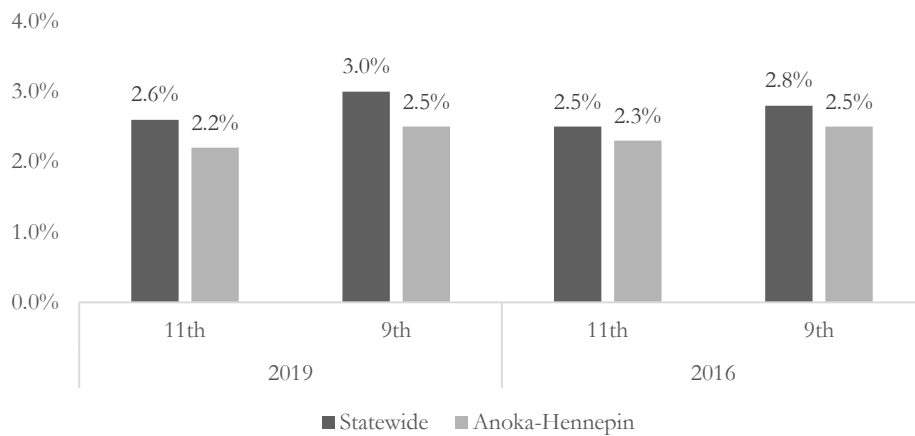
¹⁵ See generally Esther L. Meerwijk & Jae M. Sevelius, *Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples*, 107 *Am. J. Pub. Health* 1 (2017) (conducting a meta-analysis of studies); Lindsay Collin et al., *Prevalence of Transgender Depends on the “Case” Definition: A Systematic Review*, 13 *J. Sex Med.* 613 (2016) (same).

¹⁶ See Meerwijk & Sevelius, *supra* note 15, at 5.

¹⁷ See Marla E. Eisenberg et al., *Risk and Protective Factors in the Lives of Transgender/ Gender Nonconforming Adolescents*, 61 *J. Adolescent Health* 521, 522, 525 (2017) (describing studies).

Perhaps the best evidence of the portion of Minnesota students who identify as transgender or gender-nonconforming comes from the Minnesota Student Survey (“MSS”), conducted by the Minnesota Department of Education every three years.¹⁸ In 2016 and 2019, the MSS asked 11th and 9th graders whether they identified as transgender, genderqueer, or genderfluid, or were unsure about their gender identity.¹⁹ In 2019, roughly 2.6% of 11th graders and 3.0% of 9th graders statewide identified as transgender or were unsure about their gender identity. Those rates are a slight increase over 2016, when roughly 2.5% of 11th graders and 2.8% of 9th graders answered the same. Figure 1, below, shows statewide rates compared to rates among students in the Anoka-Hennepin school district.

Figure 1: Percent Identifying as Transgender or Unsure about Gender



¹⁸ See *id.* at 522 (describing the MSS).

¹⁹ All MSS data cited herein is available at <https://education.mn.gov/MDE/dse/health/mss/>, at “online interactive reports.”

B. Transgender and gender-nonconforming students are a targeted and vulnerable group.

N.H. came out as transgender to his family and close friends in the spring of 2015. Prior to that time, N.H. suffered significant internal turmoil. As young as age 7, N.H. prayed when he went to sleep at night that he would wake up as a boy. As he grew older, he more fully understood that he is transgender; however, he suppressed his true self out of fear that he would be rejected and ostracized by his family, peers and the broader community. (RA013, Compl. ¶ 65)

N.H.'s experiences of dealing with inner turmoil and fear of being “rejected and ostracized by his family, peers and the broader community” are common among transgender and gender-nonconforming youth. These students face a variety of unique emotional, developmental, and social pressures.

For example, many transgender and gender-nonconforming students are subjected to homophobic and gender-identity-based harassment. There is clear consensus in scholarly literature that LGBTQ students are more likely to be bullied and that bullying can cause severe emotional and psychological harm.²⁰ Transgender and gender-nonconforming children also frequently face familial tensions due to their gender identity. They are less likely to feel cared for and loved by their parents than their cisgender peers,²¹ and many transgender and gender-nonconforming people have

²⁰ See, e.g., Eisenberg et al., *supra* note 17, at 524; Terryann C. Clark et al., *The Health and Well-Being of Transgender High School Students: Results from the New Zealand Adolescent Health Survey (Youth' 12)*, 55 J. Adolescent Health 93, 95–97 (2014).

²¹ Terryann C. Clark et al., *supra* note 20, at 97.

had relationships with family members end, have experienced violence, or have been kicked out of their home because they came out to their family.²²

Schools often serve as an epicenter for the negative social and interpersonal pressures that transgender and gender-nonconforming youth face. Indeed, one national survey of transgender and gender-nonconforming people found that 77% of respondents were either verbally harassed, physically attacked, sexually assaulted, or experienced a similar negative experience while in school.²³ According to an analysis of the MSS, the experiences of transgender and gender-nonconforming students in Minnesota are, unfortunately, no different. Compared to their cisgender peers, transgender and gender-nonconforming students are twice as likely to experience:

- physical bullying (25.1% compared to 12.7%);
- relational bullying (52.2% compared to 32.0%); and
- cyber bullying (27.6% compared to 12.3%).²⁴

Not surprisingly, the MSS indicates that, in 2019, transgender and gender-nonconforming 11th graders were three times more likely to feel unsafe at school than their cisgender peers (28.6% compared to 8.8%).

²² See Sandy E. James et al., National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 70–76 (2016).

²³ *Id.* at 132.

²⁴ Eisenberg et al., *supra* note 17, at 524.

Heightened rates of bullying and victimization, along with other factors, result in higher rates of negative emotional and psychological health outcomes.²⁵ Compared to cisgender students, transgender and gender-nonconforming students in Minnesota are three times more likely to:

- suffer from depressive symptoms (57.9% compared to 21.3%);
- engage in suicide ideation (61.3% compared to 20.0%); and
- attempt suicide (31.0% compared to 7.1%).²⁶

Many of those risk behaviors and experiences are suffered more acutely by transgender and gender-nonconforming students who, like N.H., were assigned female at birth. For example, compared to transgender and gender-nonconforming students who were assigned male at birth, those who were assigned female at birth were more likely to:

- suffer from depressive symptoms (64.9% compared to 41.6%);
- engage in suicide ideation (69.9% compared to 40.9%); and
- attempt suicide (34.4% compared to 22.9%).²⁷

And, of course, disparities in emotional and physical health correlate with disparities in educational achievement, too.²⁸ Transgender and gender-nonconforming

²⁵ See Joseph G. Kosciw et al., GLSEN, *The 2017 National School Climate Survey* 50–51 (2018).

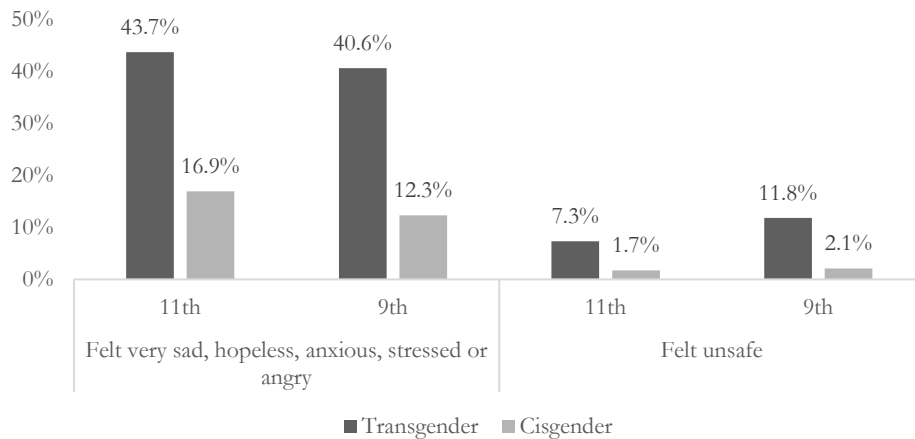
²⁶ Eisenberg et al., *supra* note 17, at 524.

²⁷ *Id.*

²⁸ See Kosciw et al., *supra* note 25, at 46–47.

students, and especially those who have been victimized at school, are more likely to receive poor grades and miss school, and are less likely to aspire to graduate high school or pursue post-secondary education.²⁹ Such disparities are readily evident in responses to the MSS. For example, as Figure 2 shows, transgender and gender-nonconforming students were more likely than their cisgender peers to miss school because they felt “very sad, hopeless, anxious, stressed or angry” and because they felt unsafe at school.

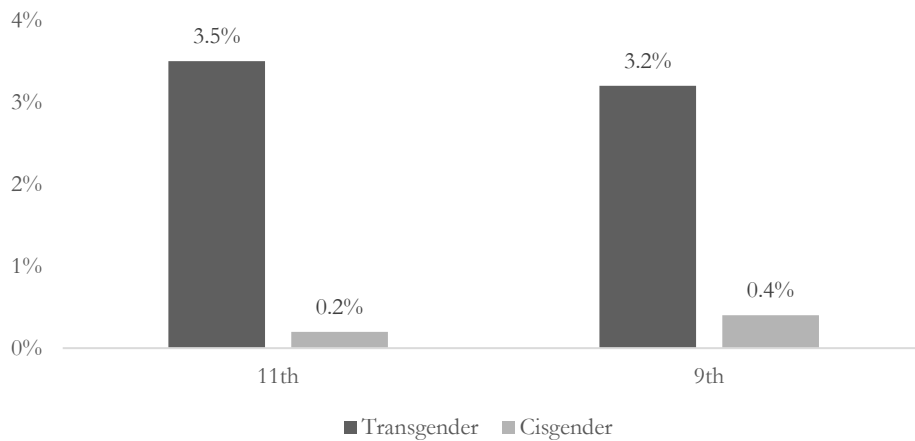
Figure 2: Reasons for Missing School
Statewide Responses, 2019



Further, the percentage of transgender and gender-nonconforming students who do not plan to complete their high-school education is higher than their cisgender peers by an order of magnitude.

²⁹ See *id.* at 43–49.

Figure 3: Do Not Plan on Graduating High School
Statewide Responses, 2019



In response to the mental health concerns that were aggravated by Defendant’s discriminatory conduct, J.H. transferred N.H. out of CRHS while he was still hospitalized. (RA019, Compl. ¶ 106)

It is not uncommon for transgender and gender-nonconforming students like N.H. to transfer or even drop out of school because of how the school’s climate and its policies impact their mental well-being. In fact, nationally, 17% of transgender and gender-nonconforming people report having left school because they were so severely mistreated there,³⁰ and 18% report having to change schools because they felt unsafe.³¹

II. SCHOOL POLICIES HAVE AN IMPORTANT IMPACT ON THE EDUCATIONAL AND HEALTH OUTCOMES OF TRANSGENDER AND GENDER-NONCONFORMING STUDENTS

Merely identifying as transgender or gender-nonconforming does not inevitably lead to negative health and educational outcomes. To the contrary, evidence shows that,

³⁰ See James, *supra* note 22, at 132.

³¹ See Kosciw et al., *supra* note 25, at 16.

when transgender and gender-nonconforming children are supported in their identities by their families, their friends, and their communities, they experience rates of depression and anxiety similar to their cisgender peers.³² Importantly, while supportive familial and inter-personal relationships are essential factors in healthy development for transgender and gender-nonconforming children, schools play an important role, too. The negative risk behaviors and outcomes discussed above, (*see supra* Section I) can be exacerbated or moderated by school policies, as the District knows.³³

³² See generally Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 *Pediatrics* 1 (2020).

³³ The District was the subject of a 2011 lawsuit in which students complained that its policy of requiring school employees to “remain neutral on matters regarding sexual orientation” contributed to a hostile and unsafe environment for LGBTQ students. See Compl. ¶ 8, *E.R. v. Anoka-Hennepin Sch. Dist. No. 11*, No. 11-cv-02282-JNE-JSM (D. Minn. Aug. 10, 2011) (*available at* https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/Anoka_complaint072111.pdf (hereinafter, “2011 Complaint”)); see generally Sabrina Rubin Ederly, *One Town's War on Gay Teens*, *Rolling Stone* (Feb. 2, 2012), <http://www.rollingstone.com/politics/news/one-towns-war-on-gay-teens-20120202>.

The students argued that the “gag policy” prevented teachers and staff from “address[ing] anti-gay hostility within the student body.” 2011 Compl., *supra*, ¶ 9. The Complaint documents the gender-identity-based bullying of LGBTQ students at school, including being called “fag” or “transvestite;” being “stab[bed] in the neck with a pencil;” or even being told to commit suicide. See Hannah Bolt, *The Anoka-Hennepin Lawsuit: How Anti-Gay Bullying Was Sex-Based and "Neutrality" Created A Hostile Environment*, 26 *Harv. Hum. Rts. J.* 265, 269–70 (2013) (quoting the students’ Complaint). But when LGBTQ students came to school staff for help, they were told to “lay low,” to “try to stay out of people’s way,” and to “hide [their] sexual orientation.” 2011 Compl., *supra*, ¶¶ 6, 33. The District eventually entered into a consent decree that required it to implement new policies to prevent bullying based on gender stereotypes or gender identity and expression.

A. Bathroom and locker-room policies that fail to support transgender and gender-nonconforming students risk harming students' health.

One of the chief ways a school can *exacerbate* negative health effects is by refusing to permit transgender and gender-nonconforming students to live out and express their gender identities.

[L]ess than three weeks after being released from his prior hospitalization, N.H. was again admitted to the hospital to address mental health concerns. In connection with N.H.'s hospitalizations, N.H.'s mother and N.H. began working with a Child Protection Worker. The Child Protection Worker noted that N.H.'s hospitalizations coincided with the [District's] discussions to exclude N.H. from sex-separated changing facilities. (RA016, Compl. ¶ 85–86)

N.H. is not alone. Other families in the district have faced similar health concerns from the District's policy:

I am very nervous as we head into middle school next year. [A]lthough there are transgender students there this year, the school chose to only modify one girls' locker room. And poorly, at that. They created a single private changing room, which naturally, every girl wants to use. This will not be helpful to my child next year. I am not sure how or when to begin these discussions. My child does not want to be a trailblazer. The stress and anxiety of all of this resulted in self-harming behavior and a 5-week stay in a mental hospital.³⁴

As N.H.'s and other students' experiences show, refusing to permit transgender and gender-nonconforming students to use restrooms or locker rooms that align with their gender identity can create anxiety and feelings of isolation. Transgender and gender-nonconforming youth have reported avoiding locker rooms altogether, skipping

³⁴ Narrative supplied to OutFront. Notes on file with counsel.

physical-education classes, and avoiding extracurricular activities because they feel unsafe or uncomfortable.³⁵ Many transgender and gender-nonconforming people report that they avoid food and drink out of anxiety of having to use public, gender-segregated restrooms, and 8% have reported developing urinary-tract infections as a result.³⁶

J.H. and N.H. expressed concerns over the enhanced-privacy locker room facilities, including that segregating N.H. from the other students singled him out and could be unsafe for him. (RA018, Compl. ¶ 96.)

N.H.’s hesitance at using a segregated, “enhanced privacy” locker room is shared by other transgender and gender-nonconforming students and families in the Anoka-Hennepin district:

Our child will be attending [an Anoka-Hennepin] High School where physical education is a requirement. We were told at a meeting just last week that there would be a separate area for our daughter to change during gym. Our stance as a family is that separate is not equal.³⁷

Single-user bathrooms or “enhanced privacy” locker rooms can be a helpful option for transgender students, but they also represent “a double-edged sword;

³⁵ See Kosciw et al., *supra* note 25, at 15–16.

³⁶ James, *supra* note 22, at 228–29.

³⁷ Narrative supplied to OutFront. Notes on file with counsel.

offering privacy on the one hand, but singling them out on the other.”³⁸ Students may want to avoid the “unwanted attention” of using a separate facility.³⁹ Consequently, many transgender and gender-nonconforming students may wish to avoid single-user bathrooms and locker rooms altogether for fear that they could be “outed” as transgender.⁴⁰

Defendant Board and CRHS . . . continued to threaten N.H. with disciplinary action if he used a changing room facility other than the segregated one. (RA019, Compl. ¶ 103)

Of course, having an *option* to use a single-use bathroom or “enhanced privacy” locker room is much different than being *forced* to use one, as was the case with N.H. Requiring transgender and gender-nonconforming students to use a particular bathroom and locker-room imposes a direct burden on transgender and gender-nonconforming students and may indirectly impact the students’ relationships and sense of belonging to their schools. Transgender and gender-nonconforming students are aware of, and internalize, their schools’ “bathroom and locker room use polic[ies].”⁴¹

³⁸ Lance S. Weinhardt et al., *Transgender and Gender Nonconforming Youths’ Public Facilities Use and Psychological Well-Being: A Mixed-Method Study*, 2.1 *Transgender Health* 140, 147 (2017).

³⁹ *See id.*

⁴⁰ *Cf.* Emily A. Greytak et al., GLSEN, *Harsh Realities: The Experiences of Transgender Youth in Our Nation’s Schools* 30–32 (2009) (noting that the fear of being “outed” can be so severe that it prevents students from going to school staff for support or assistance, or even to report incidents of harassment or assault).

⁴¹ Weinhardt et al., *supra* note 38, at 146–48.

Policies that *force* transgender and gender-nonconforming students to use a particular facility, even a single-use bathroom or “enhanced privacy” locker room, take agency away from such students. By not fully supporting students, such policies can engender feelings of distrust and alienation.⁴² And of course, threatening to *discipline* transgender students for their refusal to use specific facilities, as happened in N.H.’s case, only magnifies those feelings of distrust and alienation.

B. Bathroom and locker-room policies that support transgender and gender-nonconforming students improve health and educational outcomes.

In contrast, inclusive school policies can *mitigate* negative health and educational outcomes. School policies that support the identities of transgender and gender-nonconforming students can help engender feelings of connectedness, safety, and belonging. Studies have found that schools with anti-bullying policies that include provisions about gender- and sexuality-based bullying and schools that have LGBTQ-inclusive curriculum and LGBTQ-specific training for teachers have improved rates of students’ sense of safety, connectedness, and feelings of acceptance.⁴³ Such policies can

⁴² *Cf. id.* at 146–49.

⁴³ See Stephen T. Russel & Jessica N. Fish, *Mental Health in Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth*, 12 *Ann. Rev. Clinical Psychol.* 465, 473–74 (2016).

reduce rates of bullying and harassment,⁴⁴ and consequently improve educational outcomes for transgender and gender-nonconforming students.⁴⁵

School policies that make LGBTQ students feel more connected to their school (as measured, for example, by reports that they feel safe at their school or feel like they are a part of their school), not only improve educational outcomes but they also improve mental- and physical-health outcomes.⁴⁶ One study found that LGBTQ students have lower rates of suicidal ideation if they attended schools with LGBTQ-inclusive policies like having Gay-Straight Alliance clubs or having safe spaces for LGBTQ students.⁴⁷

Specific to this case, multiple direct and indirect benefits arise from permitting transgender and gender-nonconforming students to *choose* which restrooms and changing facilities to use—whether it be a single-use bathroom, an “enhanced privacy” locker room, or the gender-segregated facilities that match their gender identities. “[N]avigating bathrooms and changing rooms at school, particularly when policies are

⁴⁴ *See id.*

⁴⁵ *Cf.* Kosciw et al., *supra* note 25, at 46–47.

⁴⁶ *See* Kelly Whitaker et al., *School-Based Protective Factors Related to Suicide for Lesbian, Gay, and Bisexual Adolescents*, 58 *J. of Adolescent Health* 63, 66 (2016).

⁴⁷ *See generally* Mark L. Hatzenbuehler et al., *Protective School Climates and Reduced Risk for Suicide Ideation in Sexual Minority Youths*, 104 *Am. J. Pub. Health* 279 (2014); *see also* Whitaker, *supra* note 46, at 66 (finding that feeling “connected” to one’s school decreases the likelihood of LGBTQ students engaging in suicidal ideation).

not supportive or limit choice, are daily stressors for [transgender] youth.”⁴⁸ But giving students “agency in their choices” means they can select a bathroom or locker room that “feels safe and appropriate on any given day in a particular social context,” helping to reduce or eliminate those “daily stressors.”⁴⁹ In addition to that direct benefit, supportive school policies that empower transgender students to make their own choices can increase “feelings of comfort, belonging, and safety in school.”⁵⁰

C. The Minnesota Department of Education and Minnesota schools have crafted bathroom and locker-room policies that support transgender and gender-nonconforming students.

Scholarly findings on how to improve educational and health outcomes for transgender and gender-nonconforming students can be and have been translated into concrete policy guidelines that Minnesota schools have successfully implemented. For example, the Minnesota Department of Education, in collaboration with OutFront and other organizations, drafted “A Toolkit for Ensuring Safe and Supportive Schools for Transgender and Gender Nonconforming Students” (“Trans Toolkit”), which outlines policies and approaches that schools can take to create more inclusive and supportive environments for transgender and gender-nonconforming students.⁵¹ In addition to

⁴⁸ Weinhardt et al., *supra* note 38, at 149.

⁴⁹ *Id.*

⁵⁰ *Id.* at 148.

⁵¹ The Trans Toolkit is available at the Minnesota Department of Education’s website. *See* Minn. Dep’t of Educ., Ensuring Safe and Supportive School, <https://education.mn.gov/MDE/dse/safe/>; then follow “Toolkit for Ensuring Safe

recommending that schools work closely with families to ensure they are “address[ing] the individualized needs of transgender and gender-nonconforming students,”⁵² the Trans Toolkit recommends specific policies that can help create more supporting, inclusive learning environments. Those include:

- Ensuring the school and teachers use the students’ preferred names and pronouns;⁵³
- Permitting students to engage in athletic teams or school activities that are “consistent with their gender identity” or “expression;”⁵⁴ and
- Creating inclusive dress codes, where relevant, so that students can wear attire that aligns with their gender identity.⁵⁵

Specific to this case, the Trans Toolkit specifies that:

Schools should work with transgender and gender nonconforming students to ensure that they are able to access needed facilities in a manner that is safe, consistent with their gender identity and does not stigmatize them. Privacy objections raised by a student in interacting with a transgender or gender nonconforming student may be addressed by segregating the student raising the objection provided that the action of the school officials does not result in stigmatizing the transgender and gender nonconforming student.⁵⁶

and Supportive Schools for Transgender and Gender Nonconforming Students”
hyperlink (last visited Mar. 9, 2020).

⁵² *Id.* at 5.

⁵³ *Id.* at 7.

⁵⁴ *Id.* at 8.

⁵⁵ *Id.* at 9.

⁵⁶ *Id.* at 10.

Importantly, the Trans Toolkit speaks in terms of “access” and what a student might “prefer” or “wish” to do, consistent with the idea that policies should be flexible and should respect transgender and gender-nonconforming students’ agency.

Consistent with those directives, the Minnesota State High School League adopted a rule that “allows participation for all students regardless of their gender identity or expression in an environment free from discrimination with an equal opportunity for participation in athletics and fine arts.”⁵⁷ And school districts like St. Paul have adopted gender-inclusion policies that stipulate that all students should have the “opportunity to participate in co-curricular and extracurricular activities in a manner consistent with their gender identities, including but not limited to intramural and interscholastic athletics” and that all students should have “access to facilities that best align with students’ gender identity.”⁵⁸

III. THE MINNESOTA HUMAN RIGHTS ACT PROHIBITS THE ANOKA-HENNEPIN SCHOOL DISTRICT’S CONDUCT

The text of the MHRA could not be more clear: Minnesota schools cannot discriminate against transgender students. Schools cannot “segregate or separate,” based on a student’s “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” Minn. Stat.

⁵⁷ Minn. State High Sch. League, MSHSL Fair Hearing Procedure, <https://legacy.mshsl.org/mshsl/TransgenderEligibilityAppealProcedures.pdf> (last visited Mar. 9, 2020).

⁵⁸ See Saint Paul Public Schools, Gender Inclusion Policy, <https://www.spps.org/domain/1254> (last visited Mar. 9, 2020).

§ 363A.03, subds. 13, 44. Any fair reading of the statute must conclude that forcing a student to use a separate, “enhanced-privacy locker room” because of their gender identity is prohibited by the Act.

The existence of language protecting transgender and gender-nonconforming students is intentional and it is important. The drafters of the 1993 amendment that added “sexual orientation” as a protected status under the MHRA did so to protect students exactly like N.H. from discriminatory conduct exactly like the conduct at issue here. Whether one considers the text or the purpose behind the text, the outcome is clear: The District’s actions violated the MHRA.

A. Minnesota amended the MHRA to ban discrimination based on “sexual orientation” in order to protect students like N.H.

Even if the textual prohibition against the District’s conduct was ambiguous—and it is not—the contemporaneous legislative history of the MHRA, the circumstances under which the MHRA was enacted, and the wrongs the MHRA sought to remedy, support an interpretation that the MHRA expands protection to transgender individuals from the sort of policies at issue here. *See* Minn. Stat. § 645.16; *Hersh Props., LLC v. McDonald’s Corp.*, 588 N.W.2d 728, 736 (Minn. 1999) (“If a statute is ambiguous, . . . [t]he legislature’s intent may be ascertained by considering” the indicia of legislative intent behind it); *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 210 (Minn. 2001) (“[I]f a statute is ambiguous, we may ascertain the legislature’s intent by considering a number of matters, including the legislative history, the necessity for the law, and the

consequences of various interpretations.”). When ascertaining the legislature’s intent behind a statute, Minnesota courts can consider principles of statutory construction, including the “mischief to be remedied,” “the object to be obtained,” “the consequences of a particular interpretation,” and the “contemporaneous legislative history.” Minn. Stat. § 645.16.

The Minnesota legislature added “sexual orientation” as a protected class under the MHRA to protect Minnesotans from discrimination based on possessing “a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” *See* Act of April 1, 1993, ch. 22, 1993 Minn. Laws 121, 122 (adding prohibition against sexual-orientation discrimination); Minn. Stat. § 363A.03, subd. 44 (defining “sexual orientation” under the MHRA). The chief goal of this amendment was to protect members of the LGBTQ community against invidious stereotypes leveled against them because their sexuality or identity does not conform to society’s dominant or traditional expectations. These protections were intended to cover transgender individuals just as much as lesbian, bisexual, and gay persons.

By including as a main feature of “sexual orientation” a person’s “self-image or identity not traditionally associated with one’s biological maleness or femaleness,” the 1993 amendment goes beyond protecting discrimination based on emotional or sexual preference to protect discrimination based on gender and gender identity. Indeed, the hearings and testimony related to this amendment show that the legislature intended to provide civil rights protection to *all* members of the LGBTQ community, including

transgender Minnesotans. *See Handle With Care, Inc. v. Dep't of Human Servs.*, 406 N.W.2d 518, 522 (Minn. 1987) (noting that statements made “by the sponsor of a bill or an amendment on the purpose or effect of the legislation are generally entitled to some weight.”). According to Senator Allan Spear—one of the bill’s main sponsors—the 1993 amendment sought to provide civil rights protections to members of the LGBTQ community that have faced “historical patterns of discrimination,” including transgender children.⁵⁹ Representative Karen Clark—the main sponsor in the House of Representatives—described the definition of “sexual orientation” as “a broad category,” designed to be all-inclusive.⁶⁰ During the first senate floor hearing, Senator Spear noted that the definition of sexual orientation was modeled after existing civil rights ordinances in Minneapolis⁶¹ and St. Paul, which banned discrimination based “on having or projecting a self-image not associated with one’s biological maleness or one’s

⁵⁹ Minn. Sen., Hearing on S.F. 444 before the Sen. Judiciary Comm., 78th Minn. Leg., Reg. Sess. (Feb. 22, 1993), *available at* <https://www.leg.state.mn.us/lrl/media/index?body=senate&sess=78&comm=1329-0&d1=&d2=&y=&video=n&audio=y> (audio media) (initial comments by Sen. Allan Spear).

⁶⁰ Minn. H. Floor Debate, 78th Minn. Leg., Reg. Session (Mar. 18, 1993), *available at* <https://www.leg.state.mn.us/lrl/media/index?body=house&sess=78&comm=7135-0&d1=&d2=&y=&video=n&audio=y> (audio recording) (initial comments by Rep. Karen Clark).

⁶¹ Notably, the Minneapolis ordinance is widely recognized as being one of the first civil rights laws to protect transgender persons. *See, e.g.*, Minneapolis, LGBTQ History in Minneapolis, <https://www.minneapolis.org/meetings-events/minneapolis-lgbtq-community/lgbtq-history-in-minneapolis/> (last visited March 9, 2020).

biological femaleness.”⁶² Similarly, Commissioner of the Minnesota Department of Human Rights David Beaulieu testified that the bill’s purpose was to protect members of the LGBTQ community from discrimination because of their “perceived sexual or affectional orientation.”⁶³

This inclusionary language was born out of efforts from a broad coalition of stakeholders, including the Governor’s Task Force on Lesbian and Gay Minnesotans (“Task Force”) and It’s Time Minnesota—a campaign by OutFront (formerly the Gay and Lesbian Community Action Council) and the Minnesota Alliance for Progressive Action, which mobilized unprecedented numbers of LGBTQ and allied constituencies throughout the state to support the amendment. First commissioned by Governor Rudy Perpich in March 1990,⁶⁴ the Task Force conducted hearings and gathered information about violence and discrimination against Minnesota’s LGBTQ community, and recognized transgender persons as part of that community who faced

⁶² Minn. Sen. Floor Debate, 78th Minn. Leg., Reg. Session (Mar. 18, 1993), *available at* <https://www.leg.state.mn.us/lrl/media/index?body=senate&sess=78&comm=7135-0&d1=&d2=&y=&video=n&audio=y> (audio media) (comments from Senator Allan Spear); *see also id.* (stating that the amendment “[was] about protecting what one happens to be. Not what one happens to do.”).

⁶³ Minn. H. Hearing, Hearing on H.F. 585 before the H. Judicial Comm., 78th Minn. Leg., Reg. Session (Mar. 5, 1993), *available at* <https://www.leg.state.mn.us/lrl/media/index?body=house&sess=78&comm=1329-0&d1=&d2=&y=&video=n&audio=y> (audio media) (testimony by Commissioner David Beaulieu).

⁶⁴ Governor Arne Carlson continued the work of the Task Force until its report was completed on March 22, 1991.

historical patterns of discrimination deserving protection.⁶⁵ And It's Time Minnesota's instrumental grass-roots campaign included more than 60 supporting groups across the LGBTQ community and across the LGBTQ spectrum.

Any interpretation of the MHRA that exempts the District's conduct here would conflict with this legislative intent and would severely undermine the purpose of the 1993 amendment to the MHRA. The object to be obtained informs legislative intent, Minn. Stat. § 645.16(4), and the drafters of the 1993 amendment wanted to ensure that every LGBTQ person could live proudly and would not be ashamed of who they are. A policy that segregates and separates transgender and gender-nonconforming students is based upon nothing more than disagreement with a person's expression of their sexuality or gender because that expression is "not traditionally associated with one's biological maleness or femaleness." Accordingly, the legislative intent of the MHRA, the circumstances under which the MHRA was enacted, and the wrongs the MHRA sought to remedy, are all aimed at protecting transgender students like N.H. from this kind of discrimination. The Court should carry out the legislature's intent to prevent both the day-to-day harm that transgender and gender-nonconforming children endure because of the perpetuation of institutional discrimination and the stigma of being singled out for differential treatment based on their gender identity.

⁶⁵ Report of the Governor's Task Force on Lesbian and Gay Minnesotans, Report, 3, 30, 35, available at <https://www.leg.state.mn.us/docs/pre2003/other/910436.pdf>.

B. The Anoka-Hennepin Policy harms students like N.H. and is not permitted under the MHRA.

The District’s policy poses a risk to transgender and gender-nonconforming students and runs afoul of the clear text of and purpose behind the MHRA. The District’s action defines and targets N.H. because his “self-image or identity [is] not” consistent with his “biological maleness or femaleness.” Minn. Stat. § 363A.03, subd. 44. The effect of the District’s action is to set N.H. and transgender and gender-nonconforming students apart—to isolate and stigmatize them in a way that harms not only their educational achievement but their mental and physical health as well.

The record demonstrates that N.H., unlike any cisgender student, was *required* to use a “separate enhanced-privacy boys’ locker room.” (Appellant’s Br. 12–13) Put another way, the District forced N.H. to use a “segregate[ed] or separate” locker room “because of [his] . . . status with regard to” his “having a self-image or identity not traditionally associated with [his] biological maleness or femaleness.” Minn. Stat. § 363A.03, subds. 13, 44; *id.* § 363A.13, subd. 1. That is a textbook example of prohibited discrimination under the MHRA, and is the exact kind of discrimination the drafters of the 1993 amendment sought to prevent.

Further, the District’s action substantially deviates from empirically tested best practices in supporting transgender and gender-nonconforming students. On a very basic level, any policy that forces transgender and gender-nonconforming students to use separate, “enhanced privacy” locker rooms prevents students from living their

gender identity. (*See supra* Section II) A student who identifies as a boy should be able to use the boys' locker room; forcing him to use the girls' locker room *or* an “enhanced privacy” locker room denies recognition of his gender identity. (*Id.*) Forcing transgender or gender-nonconforming students to use a separate, “enhanced privacy” locker room also risks “outing” students who are otherwise fully living their gender identity by revealing to other students for the first time that a peer is transgender or gender-nonconforming.

In addition to those direct effects on transgender and gender-nonconforming students, the District's policy denies transgender and gender-nonconforming students the agency they need to navigate difficult, daily decisions. (*See id.*) Transgender and gender-nonconforming students need freedom and flexibility to make choices on a day-to-day basis to pursue situations in which they feel the most comfortable and safe. (*See id.*) The District's policy takes that freedom away. Moreover, because the policy applies *only* to transgender and gender-nonconforming students, it likely engenders stigma and humiliation. (*Id.*) The District's policy thus contributes to an atmosphere of distrust between students and the school administration and exacerbates the sort of hostile environment that puts transgender and gender-nonconforming students' health and safety at risk. (*See supra* Sections I & II)

CONCLUSION

The District's policy sets N.H. apart from his peers. It alienates him and other transgender and gender-nonconforming students. It fosters an atmosphere of hostility.

And it risks contributing to negative educational, mental, and health outcomes. In short, it is the *exact* sort of policy, and the *exact* sort of harms, the MHRA amendment is intended to prevent.

Date: March 9, 2020

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Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, for a brief produced with a proportional font. The length of this brief is 6,566 words. This brief was prepared using Microsoft Word 2016 software.

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