GENDER JUSTICE

July 8, 2016

VIA HAND DELIVERY (HARD COPY AND ELECTRONIC)

Lao Sue Yang
Human Rights Specialist
City of Saint Paul
Dept. of Human Rights and
Equal Economic Opportunity
15 Kellogg Blvd West; 240 City Hall
Saint Paul, MN 55102

Readus Fletcher
Deputy Director
City of Saint Paul
Dept. of Human Rights and
Equal Economic Opportunity
15 Kellogg Blvd West; 240 City Hall
Saint Paul, MN 55102

Re: David and Hannah Edwards v. Nova Classical Academy - No. A-5376

Dear Mr. Yang and Mr. Fletcher:

Thank you for accepting this Rebuttal letter submitted on behalf of the Charging Parties in the above-captioned Charge, Hannah and David Edwards ("the Edwardses").

INTRODUCTION

We write to provide a corrective to the Response letter submitted by the Respondent, Nova Classical Academy ("Nova" or "the School"). While Nova's Response is detailed and lengthy, it misrepresents key facts and sidesteps any real response to the human rights issues brought forward by the Edwardses' Charge.

Most critically, the Response misrepresents the fact that forced the Edwardses to withdraw their 5-year-old child, "H.E.," from the school in February 2016.[1] Deciding to withdraw H.E. from her school in the middle of the school year was not easy; after all, the Edwardses had chosen the school with care and then spent more than 6 months and many hours attempting to work with school staff in hopes that H.E. could thrive there, regardless of her gender expression or gender identity. On February 29, 2016, however, the Edwardses were told that *Nova would not permit H.E. to transition at school.* Despite the Edwardses' pleas about the harm that would come to H.E. if she were

[1] As explained in the Charge, when the Edwardses' child began the year at Nova in August 2015, she presented as a "gender-nonconforming" or "gender-diverse" boy – that is, as a boy who preferred clothing and activities often associated with girls. (For reference, see Ex. B - the PowerPoint presentation that the Edwardses delivered to Nova staff in October 2015, in an effort to help them understand the need to protect their child from gender-based harassment.) Subsequently, in all areas of her life except at Nova, H.E. socially transitioned. Among other things, this meant that she began using a female name and "she/her" pronouns, everywhere but at Nova. (For further information regarding the gender identity of transgender children, see Ex. T (Olson Article – forthcoming); for information regarding the value of social transitioning, see Ex. S (Olson Article).) We will use the initials "H.E." here and will refer to H.E. consistently with "she/her" pronouns, regardless of the time frame referenced.

forced to wait any longer to simply be herself at school, *Nova refused to inform H.E.'s classmates and teachers of H.E.'s preferred name and pronouns*. Nova insisted instead on an additional multi-day delay, during which time the school would write Nova families *to invite them to "opt out" out of the bare information about H.E.'s name and pronouns.* (We place "opt out" in quotation marks because Nova's use of this term in this context is a misnomer. A student's name and pronouns – their essential identity – is not a portion of the curriculum and cannot be subject to anyone "opting out.")

This refusal to permit H.E. to be herself at school was itself a serious violation of the City of Saint Paul Legislative Code, Sec. 183.05, which bars discrimination on the basis of gender identity. And as described below, Nova's refusal to allow H.E. to transition was part of a larger pattern of violations which began long before February 29th and continues to this day, most particularly with Nova's newly written policy that (i) *bars transgender students from full facilities access*, (ii) *denies transgender students the right to be addressed by their appropriate pronouns*, and (iii) *invites gender-based rejection by fellow students.*

This pattern of violations might seem puzzling, in light of the apparent commitment of some key Nova staff – notably, the Executive Director and the Lower School Principal – to the principles underlying laws like Sec. 183.05, which bar gender discrimination in schools. But apparent commitment to principle is not enough; what counts is taking the correct action even in the face of opposition. The opposition at Nova was intense, and the leadership of the school – notably, the board chair – repeatedly capitulated to it. This was the Edwardses' experience, leading up to February 29th: Over and over, in consultation with the Edwardses and with outside experts, school staff would agree to certain actions as the right thing to do, consistent with the law and best practice. Then, over and over, the school leadership – concerned with placating conservative factions and maintaining a high enrollment – would override these decisions. The end result: the school repeatedly made the wrong choices when they really mattered.

To assist the Department's investigation of this pattern of violations, we review the key facts and present a legal analysis.

KEY FACTS

A. Three Corrections

We begin by correcting three of the factual statements presented in the Introduction of Nova's Response.

First: the scope of the Edwardses' allegations regarding failures to prevent and correct discrimination

Nova states, "Although the Charge states that Nova failed to protect this Student [H.E.] and '…other gender non-conforming or transgender students,' [in fact] the Charge being investigated refers only to [H.E.] and not to other students at the School." Response at 2, n.3. This is a false distinction. As explained further below, the law requires schools to both prevent and correct gender-based harassment.[2] These two requirements – prevention and correction – are intertwined: studies

[2] In this context, we use the term "gender-based bullying" and "gender-based harassment" interchangeably.

show that effective measures to correct harassment also serve as effective means of preventing future harassment, not only for the victims already involved but also for other potential victims. *See* Ex. N (Fitzgerald Expert Report) at 6-7, 31, 44 (explaining connection between prevention and correction, as components of "organizational climate"). Thus, an investigation by this Department into the effectiveness of measures taken to protect H.E. from gender-based harassment at Nova will necessarily have implications for the ongoing risk of harassment faced by other Nova students.

By the same token, the Department's assessment of the effectiveness of Nova's prevention and correction measures for H.E. should look, not only to concerns raised by H.E., but also those raised by other students. Several students have spoken out forcefully this year about the gender-based harassment they have faced at Nova. Ex. D at 17, 85. As one 10th grader said,

> [F]undamentally this is an issue of protecting all students from bullying. Protecting any student protects every student. Many people have asserted that virtue education is enough to prevent bullying, but no number of virtue assemblies can protect the actual number of students who have been victims of bullying. I have been bullied at Nova, and I don't want any other student to have to go through that.

Ex. D (Public Comments) at 85. A parent noted:

> I think it was very clear, both from what the parents of the kindergartner who is being bullied said and what the 12th grader who spoke said, that the people who say the status quo is fine are simply incorrect. There have been problems, which are visible to the people who are having the problems even if they are not visible to everyone at the school.

Ex. D at 17. Unfortunately, it appears there may be a history at Nova of failures to effectively prevent and correct a variety of forms of gender-based harassment, with repercussions that remain today. A parent noted this for the Board:

> Several years ago, one of our daughters disclosed that a teacher was having a sexual relationship with a student at Nova. That teacher is gone, and the student is gone but the legacy remains. The climate at Nova, at that time, was such that many students knew, some adults suspected, others may have known, and yet nothing was done about it for a full year. Checks and balances were not in place to ensure that students would not be in precarious positions with adult teachers. Rules were not established to create proper boundaries around communications between students and teachers or administrators. Language was not given to students prior to, nor following this lengthy period of sexual misconduct perpetrated by an employee of the Academy against a student. No curriculum was built to correct this wrong. No access to support was clearly laid out. No processes were established to ensure that our community could recover well. Nothing was done to acknowledge it, to learn from it, to heal from it, to help to ensure that it would never happen again. Those affected were asked to cope in silence. They were told to keep quiet. The wounds from that time are still not entirely healed.

Ex. D at 33. For all these reasons, the Charging Parties anticipate that the Department will ask more than simply, "What actions did Nova take with respect to specific incidents of harassment of H.E.?" To assess Nova's measures to prevent and correct gender-based harassment, the Department must

look at Nova's organizational climate, including any patterns of harassment and response (or lack thereof).

Second: when and how problems arose

Nova states that "the collaborative efforts between the parties became problematic when the School choose [on February 26, 2016] not to read a book entitled 'I am Jazz' to the Student's kindergarten classmates because it had not been vetted through the School's curriculum Policy." Response at 2 (footnote omitted). This statement is inaccurate, for several reasons.

For one, the timing is off. While the Edwardses attempted to collaborate with school staff and the school's attorney over many months, up to and including over the events that unfolded in February, problems were also apparent long before February 26th.

More importantly, the problems were never about whether the School would make use of any particular educational material, such as the children's books "My Princess Boy" or "I am Jazz." Rather, the problems related to the bigger question just outlined: what was the organizational climate at Nova? The Edwardses believed, correctly, that the climate depended in part on how clearly Nova stated its own policies. *See* Ex. N at 32 (noting importance of clear policy to organizational climate, which in turn affects the risk of harassment). It was vital for the School to state its gender-related policies clearly and publicly, so the School community could understand what those policies were.[3]

The Edwardses themselves had a number of concrete policy questions, which they began asking in the fall of 2015. For example: What rules applied to the School's dress code and uniforms? Could a child like H.E. wear the School's jumper? Likewise, would the School respect a child's preferred name and pronouns, whether that child was cisgender or transgender?[4] And did all children at Nova have full access to facilities like bathrooms and locker rooms? *See generally* Ex. C (Correspondence). The Edwardses were given answers to these questions, behind closed doors. They believed that the Nova's positions on these questions – as related to them, privately, by the Executive Director, the Lower School Principal, and the School's attorney – were correct. But they

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[3] It is also important to emphasize here – as the Edwardses did when attempting to work with the School –that they were not demanding that the School instantaneously create "capital P" policies – i.e., formal, written governing documents that could only be created after certain internal processes were followed. Rather, the Edwardses were simply requesting that Nova make its existing "small p" policies (or practices) clear – that is, that it make clear what the School actually was doing or planned to do, related to gender inclusion issues such as uniforms and pronouns. The law cannot require the former (instantaneous passage of "capital P" policy), but it can and does require the latter (clarity about "small p" policy or practice), where a refusal to do the latter creates a discriminatory environment.

[4] This vocabulary is widely accepted in the scientific and legal communities, but may still be unfamiliar to some. "Transgender" refers to those persons whose gender identity differs from the gender they were assigned at birth (usually, based on the appearance of genitals, though other biological sex correlates, such as chromosomes, may also play a role). "Cisgender" refers to those who are not transgender – that is, to those whose gender identity aligns with the gender they were assigned at birth. For further information regarding these and related terms, see Ex. Q (Maryland Report) at 6-7; Ex. R (HHS Report) at 14, 64; Ex. O (Olson Article) at 3. (As an aside: It is not currently a preferred usage to use the label "transgendered" as an adjective –e.g., "transgendered persons" – as Nova occasionally does; rather, the preferred usage is to refer to "transgender persons" and "cisgender persons.")

thought it was important for H.E. and for other gender non-conforming and trans students at Nova that the whole community hear these answers. And that was what the school refused to do, over months.

Behind closed doors, for example, the Edwardses were assured that Nova's uniform policy did not discriminate on the basis of gender, and that H.E. was permitted to wear the jumper, if that was consistent with her preferred gender expression. But the Edwardses noted that many of the School's written communications (e.g., on its website) contradicted this policy. They asked repeatedly that the School correct these written communications, bringing them into line with what the Edwardses were being told. The School did not take this simple step, and as a result H.E. continued to face negative, hurtful comments regarding her gender expression (such as the insistence by other students that "you can't wear the jumper").

The School could not have been under the misapprehension that its erroneous written communications were of no consequence – it had to know they mattered. In addition to the Edwardses' pleas, it heard from other families that recognized the need for clarity. One parent stated:

> [A] simple step that could be taken is to remove the gender headings in our uniform policy. Simply list the acceptable items of clothing and colors and leave the rest to the family. As an example, our daughter has been wearing the "boys" sweater for three years because she likes it more than the approved "girls" sweater. There are many small actions like this that could really show that all students are welcome.

Ex. D at 86. It also heard from parents opposed to a non-discriminatory uniform policy. Those parents insisted that "boys [must] wear a boy's uniform and girls [must] wear a girl's uniform" or risk being "teased for wearing the opposite sex uniform." Ex. D at 39. Those parents made clear that they believed the current Nova policy did, in fact, require that "boys wear a boy's uniform and girls wear a girl's uniform." *Id.* In the face of this obvious need for clarity, the leadership at Nova made the wrong choice. They said one thing behind closed doors but left a different impression by their public silence – and by doing so, contributed to the harm H.E. (and other students) suffered.

The Edwardses were not alone in pleading for clarity; other community members also pleaded with the School to clarify its policies. *See, e.g.*, Ex. D at 89 (parent requesting "immediate action"); *id.* at 90-91 (parent noting that "[t]he Board has the power to act on this quickly" and pleading "[p]lease, step up and do the right thing"); *id.* at 212 (parent noting "[i]t has…taken such a long time for the policy to come together," and meanwhile harm increased).

With great effort, the Edwardses and others who recognized the need for clarity were eventually able to compel the Board to make a (somewhat) clear statement in January 2016. *See* Ex. G (2016.1.25 Board Meeting Minutes) at 4-6; *cf.* Ex. D at 187-90 (expressing opposition to any such statement). But this statement was too little, too late, and (sadly) would ultimately prove to be inaccurate as well, since the Board eventually adopted formal written policies that violate Sec. 183.05 and other non-discrimination law.

Third: the importance of Nova's decisions regarding "opt outs"

Nova states in its Introduction, "The Edwards[es] also disagreed with Nova's decision to allow parents of other students to 'opt out' of the school's teaching students about transgenderism. This decision was made pursuant to the School's Curriculum Opt Out Policy. The School advised the Edwards[es] that it would provide the lesson to those parents who 'opted out' of the direct instruction." Response at 2 (footnotes omitted).

On this point, Nova was, and is, insistently obtuse. From the beginning of their discussions with Nova in the fall of 2015, the Edwardses repeatedly explained that they were *not* objecting to the mere possibility that some families would make use of the School's Curriculum Opt Out Policy, which tracks Minn. Stat. § 120B.20, the Minnesota statute permitting curriculum review and the opportunity "to make reasonable arrangements with school personnel for alternative instruction." Rather, the Edwardses made clear, they were concerned about three distinct points related to the School's use of its Opt Out Policy:

(i) Whether the school could possibly meet its obligation to prevent and correct gender-based harassment, if a very large portion of H.E.'s class or of the School elected to opt out of anti-bullying instruction;

(ii) Whether, by specifically inviting opt-outs only for this portion of the curriculum, the school was undercutting the message of its anti-harassment policy, and thereby making its policy ineffective; and

(iii) Whether it could ever be appropriate for the School to permit parents to opt their children out of bare information about H.E.'s name and pronouns.

Although the Edwardses believe point (i) needs to be addressed, at some point – because it raises an important question of the proper relationship between Minn. Stat. § 120B.20 and federal, state, and local anti-harassment law – it was not the crux of their concern about Nova's use of opt-outs.[5] Points (ii) and (iii) were. The Edwardses believed that the School's decision to invite opt-outs significantly undercut the effectiveness of their anti-harassment policy; it negatively impacted the School's organizational climate and raised the risk that H.E. would continue to be harassed. Point (iii) was the starkest. Regardless of whether an excessive number of opt-outs could clash with the School's obligation to prevent and correct bullying, and regardless of whether it was wrong for the School to only invite opt-outs for gender equality instruction and thereby signal a lack of commitment to the content of that instruction, it was clearly wrong for the School to invite parents to "opt out" of bare information about H.E.'s name and pronouns. As noted above, a student's

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[5] The concern was not entirely academic. One observer noted:

> If my calculations are correct (and I think if you do the math you will find this estimate somewhat conservative) over 1/4 of the lower school kids come from families whose parents have openly opposed this book and/or gender education of this type happening in the classroom.

Ex. D at 61.

name and pronouns – their essential identity – is not a portion of the curriculum and cannot ever be subject to anyone "opting out."

B. Additional Information

Aside from these three errors, the body of Nova's Statement of Facts appears to be correct. To supplement their own recitation of facts in the Charge, the Edwardses offer here some additional information regarding the following topics:

- where Nova went wrong between August 2015 and February 2016,
- where Nova has gone wrong since February 2016,
- the nature of the opposition at Nova,
- the stakes for Nova's gender non-conforming and transgender students,
- the impact on H.E. and her family,
- the impact on other students and the school as a whole, and
- possible witnesses whom the Department may wish to interview.

Overview: Where Nova went wrong between August 2015 and February 2016

The Edwardses allege that Nova violated Sec. 183.05 by failing to protect students from gender-based bullying and hostility and denying H.E.'s right to undergo a gender transition in a safe and timely way.

Nova's failure to protect students from gender-based bullying and hostility stemmed from a number of wrong decisions:

- The refusal to timely clarify the School's policies or practices related to harassment, uniforms, names and pronouns, and facilities access;
- A reliance instead on drawn-out public debate over gender equality rights that "outed" the Edwards family and their child and placed the burden on them to argue for their child's rights against a hostile opposition;[6]

[6] We note another aspect in which the Edwardses were wrongfully "outed," arguably in violation of federal and state education privacy protections like FERPA (Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g): The school regularly communicated facts specific to H.E. to the broader community, as part of its own participation in the public debate it had engendered. These instances are documented. *See, e.g.*, Ex. D at 193 (noting that opposition parents were "consistently…advised by the Executive Director…that there presently are no pending requests by any student or family for restroom or locker room usage as described in the proposed policy"). In context, this amounted to keeping opposition parents informed about the status of H.E.'s gender transition.

- The introduction of unnecessary and harmful delay in presentation of anti-bullying instruction to Nova students;

- The adoption of less effective instructional materials, in an admitted effort to placate opposition families;

- Insistence on issuing invitations to families to "opt out" of anti-bullying instruction, which intentionally sent a message of ambivalence regarding the School's anti-harassment policies; and

- A refusal to treat gender-based bullying as legally equivalent to other forms of unlawful identity-based bullying.

See generally Exs. C-J.

The last point bears emphasis, as it contributed to the Edwardses' conclusion in February 2016 that they could no longer safely keep H.E. enrolled at Nova. Nova's attorney stated in a meeting with the Edwardses on February 29th (and then confirmed in a follow-up letter – *see* Ex. C at 50) that Nova intends to continue hamstringing its staff in their ability to respond to incidents of gender-based harassment. Despite the Board resolution passed in December 2015 that seemed to empower staff to respond to harassment in a timely and effective way, *see* Ex. E (a resolution passed at the Edwardses' request), Nova's attorney stated on February 29th that staff could not choose to quickly deploy pertinent instructional materials on gender, as they feel necessary.

Instead, where gender-based harassment is the problem, Nova staff will be limited to speaking privately to the individual student committing harassing acts, without any use of instructional materials. No gender equality instruction is permitted without express, prior Board approval, regardless of the degree to which the interposed delay reduces the effectiveness of the instruction. This is in contrast to other forms of identity-based bullying, such as bullying related to race or disability. There, the staff is permitted by the Board to quickly deploy pertinent instructional materials, as the staff sees fit. The Nova attorney stated in her follow up letter, "You noted that if a black girl was being called 'n[****]r' the administration would not have to run it by the Board before…teaching students about race. That is true…." Ex. C at 50. As to why the School was treating the two forms of discrimination differently, the attorney stated, "The difference is the social construct of race has 200 years of legal history and as many years of the community learning what race is and what the community expectations of behavior are." *Id.* By contrast: "[T]his [gender identity and expression] is a newer topic for many people. Unlike race or disability, there is not a 200 or 20 year history of education and law and Nova believes it is critical to the success of its antidiscrimination and inclusion work to bring its community along. (There is a good deal of literature on gender and race and the problems that arise when the two are analogized[.])" *Id.*

We responded to Nova on the same date, affirming our awareness of the complexities of any analogies related to different forms of discrimination, race and gender among them. *See id.* at 49 (agreeing that such analogies must be made with great caution and with the awareness, too, that

discrimination is often intersectional). Nonetheless, we explained, we believed that Nova's refusal to treat gender-based bullying as legally equivalent to other forms of unlawful identity-based bullying was unlawful:

> [We] stand by the argument that anti-discrimination law requires schools to empower their staff to take timely and effective actions to ensure equality, *across all the protected identities*.
>
> With regard to *any form of harassment or hostile environment*, anti-discrimination law recognizes the close relationship between prevention and correction, and mandates that staff be empowered to take timely action to do either.

Ex. C at 49 (emphasis added). As far as we are aware, this illegal aspect of Nova's policy continues today.

The second overarching violation – Nova's outright denial of H.E.'s right to undergo a gender transition – stemmed from wrong decisions reached by Nova's Board Chair over the course of February 25th through February 29th. *See* Ex. C at 21-50. The timeline of events is laid out in the Charge:

From the beginning of their discussions with Nova, the Edwardses had asked the School to be ready to support H.E. through a gender transition, should it become apparent that transition was necessary for her wellbeing. After H.E. expressed a consistent, persistent, and insistent desire to socially transition from male to female, the Edwardses themselves supported her social transition, at least as to all settings other than at Nova. In doing so, they followed expert advice. *See* Ex. S. But they did not insist that H.E. be able to simultaneously transition at Nova (as would have been ideal), because they anticipated that the School would require time to prepare and they were willing and able to be flexible, up to a point.

They notified the School in early February 2016 that the time had come and agreed to meet with the Lower School Principal, the Executive Director, and the School's attorney several weeks later, on February 25th, 2016, to finalize all materials and information that would be presented to H.E.'s classmates to ensure that the transition went smoothly, with minimal risk of harassing reactions. At that February 25th meeting, everyone present came to a consensus on the most pedagogically-effective means of supporting H.E's transition. Key components included a letter to be sent home to kindergarten families notifying them of the transition; use of the book "I Am Jazz" in each kindergarten classroom; and communications for any families who asked about opting out of the classroom education, to direct them to equivalent content and to outline behavior expectations.

Late the next day, Friday, February 26th, the Edwardses were abruptly informed that these agreed-upon plans had been canceled. When asked for an explanation, the Board Chair emailed David Edwards to say that all of the decisions were made by him alone. The Edwardses attempted to be cooperative and conciliatory over the weekend, to no avail. The School would not put together an alternative plan and would not commit to any particular time frame for doing so. Under the circumstances, the Edwardses had to keep H.E. out of school on Monday, February 29th.

In a meeting that Monday evening, which Nova agreed to only grudgingly, the Edwardses were told that the School was not willing to use effective materials like "I Am Jazz" to ensure a safe transition for H.E.; would not ever conduct gender education, whether preventative or corrective,

without first introducing delay, by requiring prior Board approval; would not ever conduct gender education, whether preventative or corrective, without inviting families to opt out; and would not even – as a bare minimum – simply *inform* H.E.'s classmates of her preferred name and pronouns, without first delaying for days and inviting families to "opt out" of this bare information regarding her identity.

As noted above, this sequence of events was itself a clear violation of Sec. 183.05. It was also the last blow for the Edwardses – they concluded that H.E. could not be safe as herself at Nova, and they were forced to withdraw her from the School. *See* Ex. C at 21-50.

Update: Where Nova has gone wrong since February 2016

Unfortunately – but perhaps not surprisingly – things have not improved since February. *See generally* Exs. H-L (recent Board documents). In late May 2016, the Board did adopt, with great fanfare, a Gender Inclusion Policy that seems on its face to be consistent with the School's legal obligations under gender discrimination law like Sec. 183.05. *See* Exs. I-K (tracking adoption of Policy). But at the same time, the Board also adopted an official written Implementation Policy that violates the law. *See* Ex. L.[7] It does so in three ways.

First, the Implementation Policy bars transgender students from full facilities access, by denying transgender students access to the locker room that is consistent with their gender identity. This is de jure discrimination. *See id.* at 2 (stating that Nova will "keep[] the current system of locker rooms as separated by biological sex").

Second, the Implementation Policy denies transgender students the right to be addressed by their appropriate pronouns:

> The pronouns "they/them/their" can also be used in place of he/she. …We chose to allow the plural they/them/their to address the concerns of those who may be uncomfortable, for whatever reason, with using to a pronoun different than the biological sex pronoun. Using the plural pronoun gives a gender neutral option for addressing classmates.

Id. at 2-3. This pronoun policy is cloaked in gentle-sounding language, but it does violence to the rights of transgender students. Transgender students, just like cisgender students, have a right to be addressed by male or female pronouns, as is consistent with their gender identity. There is no competing right for those who are "uncomfortable" with trans people to refer to a trans person in the third person, against the trans person's stated preference. *Cf.* Ex. D 204 (making unpersuasive 1st

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[7] Given the direct relevance to their Charge, the Charging Parties appreciate the Department's willingness to accept this rebuttal letter after the Board's decisions at the May Board meeting and after the relevant documents were made publically available. *See* Ex. M (noting that Board documents were, for a time, unavailable). To date, it does not appear that Minutes of the May 2016 meeting have been made public. *See* https://v3.boardbook.org/Public/PublicHome.aspx?ak=1001571 (listing Board documents only through the May 23 meeting date). However, it is the Charging Parties' understanding that the Gender Inclusion Policy and the Implementation Policy were both formally approved by the Board at the May Board meeting. *See* http://thinkprogress.org/lgbt/2016/06/03/3784295/nova-classical-transgender-policy/ (reporting on outcome of the meeting).

Amendment argument for the right to misgender fellow students at school). This too is de jure discrimination.

> And third, the Implementation Policy invites gender-based rejection by fellow students:
>
> Prior to an overnight field trip, during the planning stages, students will indicate on a form those students they would prefer to room with and students they would prefer not to room with (current practice is just to list who students prefer to room with only.) Given the two lists, we are assuming that specifically indicating to the staff overseeing the trip who each student is and is not comfortable with rooming with would help guide the comfort and safety of all students. These preferences will be used when making room assignments. Asking for other specific information would violate the privacy provisions being provided to our gender non-conforming students. We felt that allowing students and families to identify who students are and aren't comfortable rooming with would provide still a means to ensure the safety, comfort and privacy of every students. Sample forms are being researched and will be brought to the group as possible options for forms to complete prior to the trip to indicate preferences. The hope is that the transgender student and family will work closely with the school to determine the best way to be supportive and grant privacy to all parties.

Id. at 3. Once again, this policy is cloaked in gentle-sounding language, around preferences, comfort, support, and privacy. But in end effect, it simply invites Nova students to reject other students based on their gender identity, using officially-provided school forms. Like the locker room policy and the pronoun policy, it signals second-class citizenship for trans students at Nova – with predictable negative effects on the School's organizational climate.

The nature of the opposition at Nova

The opposition at Nova was often couched in superficially content-neutral, procedure-focused terms. *See, e.g.,* Ex. D at 3 (raising procedural arguments), 71 (asking "Who discussed this? Who approved this?"), 187-80 (arguing that all decisions regarding instructional materials should have gone through the lengthy process imposed by the School's Climate Committee).

But evidence suggested that this procedural framing was thin cover for a power struggle over substantive decisions. *See, e.g.,* Ex. C at 2-4 (evidencing efforts by the Climate Committee, led by Chair-Elect [redacted] to intentionally delay any discussion of possible gender education materials). A comparison to other, less loaded issues made the true substantive nature of the opposition clear:

> [F]rom what [redacted] says, it's entirely routine to read a book to help educate kids and manage interpersonal drama. If a child with a visible physical disability had enrolled in Nova's kindergarten, and had run into problems, and his parents had come to the school and said, "we'd like you to read 'Some Kids Have Wheelchairs' to help the other kids in the lower school understand that teasing him isn't okay," – I don't think it would have even occurred to Nova to send advance notification to parents that they were going to read this book, and if it had, you would not have been flooded with calls from people who wanted to fret about a slippery slope, or dilution of the curriculum, or who wanted to insist (repeatedly) that since the Americans with Disabilities Act does not explicitly require Nova to read books about disabilities than there is no reason to do it.

Ex. D at 17; *see also* Ex. C at 49-50 (Nova's admission that only gender-related instructional materials need to be "run by the Board"; race- or disability-related materials would not be saddled with any procedural hurdles).

On other occasions, the opposition to gender inclusion at Nova was couched in technical "Classical Education" terminology. For example:

> [Nova should maintain] a pedagogy which focuses on teaching children how to think, not what to think[.] ([T]his requires particular care in the Grammar Stage as children are still developing and are so black and white in their thinking. I am deeply concerned about how this non-gender conforming label will impact not only this one child, but the other children as well in this early development stage. If this issue is to be addressed, it should be no sooner than the School of Logic, or even better, the School of Rhetoric, when students would be much more capable of nuanced thinking and vigorous discourse)."

Ex. D at 29. Translated into everyday language, this passage conveyed the writer's opposition to Nova taking any measures to address gender-based bullying prior to 9th grade – in other words, any measures that could help protect H.E. for another 9 years.[8]

Much of the time, however, the opposition was not couched in either superficially content-neutral, procedure-focused terms or technical "Classical Education" terminology; rather, the opposition to gender inclusion at Nova resembled an "angry mob." Ex. D at 72.

A thread running through the opposition, whatever its superficial form, was a connection to certain religious tenets. Nova itself, while necessarily secular as a public school, does not shy away from the religious roots of the "Classical Education" movement. On its website it "recommend[s] that everyone read [the] Dorothy Sayer's essay…which inspired the modern interest in Classical Education." *See* Ex. A (Nova Website – Basis of Curriculum). Clicking through the provided link to the Sayer essay, one can read these thoughts:

> I shall add [theology] to the curriculum, because theology is the mistress-science without which the whole educational structure will necessarily lack its final synthesis. Those who disagree about this will remain content to leave their pupil's education still full of loose ends. This will matter rather less than it might, since by the time that the tools of learning have been forged the student will be able to tackle theology for himself, and will probably insist upon doing so and making sense of it. Still, it is as well to have this matter also handy and ready for the reason to work upon. At the grammatical age [grades K-5], therefore, we should become acquainted with the story of God and Man in outline –i.e., the Old and New

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[8] A number of opponents similarly expressed opposition to anti-bullying education in terms of timing. They argued that any such education should not occur before (at minimum) 5th grade, based on their false conflation of education about gender identity and/or expression (e.g., boys' right to wear pink shoes without being harassed) with education about sexuality. According to these opponents, reading "My Princess Boy" would "expose[] our young students to a complicated topic in a way that challenge[s] deeply held convictions about…sexuality"; likewise, such education was said to "compromis[e] the innocence and vulnerability of hundreds of young children." Ex. D at 69, 70; *see also* Ex. D at 3, 23-24, 25. For an accurate description of the difference between gender identity and/or expression and sexual orientation, see Ex. R at 64.

> Testaments presented as parts of a single narrative of Creation, Rebellion, and Redemption- and also with the Creed, the Lord's Prayer, and the Ten Commandments. At this early stage, it does not matter nearly so much that these things should be fully understood as that they should be known and remembered.

Id.

As a further source of information on Classical Education, the website recommends "Designing Your Own Classical Curriculum" by Laura Berquist. *Id.* The subtitle of this work is "A Guide to Catholic Home Education," and Nova notes that it is a "more religious and intellectually rigorous exploration of the classical model." *Id.*

Given these roots of Nova's signature approach to pedagogy, it is not surprising that much of the opposition to gender inclusion at Nova was couched in (conservative) religious language.[9] Opposition factions brought forward arguments from the Minnesota Family Council (http://www.mfc.org/issues/gender-sexuality), the Alliance Defending Freedom (http://www.adflegal.org/issues), and the Liberty Counsel (http://www.lc.org/). *See* Ex. D at 65, 83, 154-69, 170-74, 182. As the Minnesota Family Council explained,

> "God created mankind in His own image…male and female He created them." (Genesis 1:27) We believe that the Bible speaks clearly to God's design for those made in His own image, men and women.
>
> He created two distinct genders, each to be complementary to the other, and each to play a distinct role in His creation (Genesis 1:26-30, 2:7-24). He designed the relationship between one man and one woman to be unique among all others as the proper place for romantic, sexual love and for creating new life.
>
> We believe that attempts to alter or live contrarily to one's God-given gender are distortions both of God's design for humankind and of practical reality—and evidence our brokenness as human beings. We support efforts to strengthen and honor God's unique design for men and women, and oppose efforts that encourage and celebrate the lie that gender can (and should) be changed like an outfit without consequence.

http://www.mfc.org/issues/gender-sexuality. Opposition families echoed these arguments in public debate at Nova, *see, e.g.* Ex. D at 32, 36, 77, 78, and invited the Minnesota Family Council to hold an event in the Nova gymnasium on January 12, 2016, *see id.* at 83; *see also* http://thinkprogress.org/lgbt/2016/04/22/3771366/dave-hannah-edwards-transgender-kindergartner/.

The stakes for gender non-conforming and transgender students

For gender non-conforming and transgender students, the stakes of Nova's dispute over harassment and gender inclusion are high. This is a population at significant risk. Studies show that 42 percent of gender non-conforming youth report being called names frequently or often and 40 percent report being excluded by peers frequently or often. More than half of gender

[9] There are, of course, also religious arguments that can be made in favor of gender inclusion policies. But these did not play a large role in the public debate at Nova. *See generally* Ex. D.

nonconforming youth report never participating in activities like sports out of fear of discrimination. As many as 80 percent of transgender students report feeling unsafe at school because of who they are. Ex. Q at 5. Compared with non-transgender youth, transgender youth have an elevated probability of being diagnosed with depression (50.6 percent vs. 20.6 percent); suffering from anxiety (26.7 percent vs. 10 percent); [and] attempting suicide (17.2 percent vs. 6.1 percent). *Id.* at 6; *see also* Ex. R at 18.

A 2011 study found that respondents who expressed either transgender identity or gender nonconformity while in grades K-12 reported very high rates of harassment (81 percent), physical assault (38 percent) and sexual violence (16 percent). More than 40 percent reported that they had attempted suicide at some point in their life. Harassment was so severe that it led 6 percent to leave a school in K-12 settings. Students who experience high levels of victimization based on gender expression are twice as likely to report that they do not plan to go to college and are more likely than other students to end up in the juvenile justice system. Ex. Q at 6; *see also* Ex. R at 18, 22-23.

These serious harms do not arise as a function of these students' gender identity or expression; rather, they "stem from the stresses of prejudice, discrimination, rejection, harassment, and violence." Ex. R at 20. Harms can be significantly reduced if the students' families can be supportive, including supporting a gender transition where appropriate. *See* Ex. S. A 2015 study found very positive outcomes: "Socially transitioned transgender children who are supported in their gender identity have developmentally normative levels of depression and only minimal elevations in anxiety, suggesting that psychopathology is not inevitable within this group." *Id.* at 1. "These findings suggest that familial support in general, or specifically via the decision to allow their children to socially transition, may be associated with better mental health outcomes among transgender children. In particular, allowing children to present in everyday life as their gender identity rather than their natal sex is associated with developmentally normative levels of depression and anxiety." *Id.* at 5.

Likewise, studies have found that a supportive school environment significantly reduces or eliminates the otherwise alarming risks facing gender non-conforming and transgender students. *See* Ex. P; Ex. R at 20, 22-23.

The impact on H.E. and her family

Consistent with these broad patterns, the stakes for H.E. and her family at Nova were high. Had H.E. encountered a supportive environment, she had every chance of thriving, both personally and academically. But she did not; she instead encountered persistent gender-based harassment – harassment that not only upset her but also prevented her from being able to take part in the school's breakfast program and after-school program. *See* Ex. C at 7. Then, in February, H.E. was blocked from simply being herself (using her own name and pronouns) at school. Had H.E. remained at Nova, she would have faced significant risks to her wellbeing. The Edwardses could only hope to avert long-term, serious harms through the drastic step of removing H.E. from the school in the middle of year.[10]

[10] As matters devolved at Nova, the Edwardses attempted to avoid involving any media, in the belief that media attention might only make matters in the community more contentious and painful. However, they were contacted by the Pioneer Press after a member of the opposition called reporters there regarding the Minnesota Family Council event to be held on Nova grounds. Once the press had already become

The impact on other students and on the school as a whole

As noted above, it is a false distinction to say "the Charge being investigated refers only to [H.E.] and not to other students at the School." H.E. was not the only gender non-conforming or transgender student at Nova, and she was not the only student suffering gender-based harassment. Given the intrinsic links between prevention and correction, the School's failure to protect H.E. harmed other students as well. Conversely, had Nova put effective anti-harassment measures in place, it could have not only reduced levels of harassment, it could also have improved academic, behavioral, and attendance outcomes. *See* Ex. P (Freeman Article); *see also* Ex. O (Sugai Article).

The School's illegal, de jure policies will also harm other Nova students, going forward. They will suffer if they, like H.E., are not permitted to transition; they will suffer if they are barred from locker room access, intentionally misgendered with "they/them" pronouns, and selected for rejection by their peers on official school forms.

The School's choices are all the more unfortunate, given the easy access it had to model policies which have been vetted by school districts across the country. *See, e.g.,* Ex. Q (Maryland Report); Ex. V (Washington State Model Policy) at 28-31; http://tiny.cc/spps-gender (Saint Paul Public Schools Gender Inclusion Policy); *see also* Ex. Q at 19-21 (providing links to other model policies). Despite the uproar and "angry mobs" at Nova, it was not actually the locus of radical demands for gender equality; rather, Nova was simply being asked to go where many other schools – guided by law and best practices – have already gone. None of these schools have experienced the parade of horrors feared by the opposition at Nova. *See* Ex. U (MediaMatters Report) (reporting on its investigation into 17 school districts with model policies: "Years after implementing [these] antidiscrimination policies, none of the schools have experienced any problems."

A final aspect of harm to the Nova community bears mentioning: the specter of retaliation by the school leadership against the school staff who at least initially supported positive steps toward gender equality. A retaliation claim – based, say, on threats of termination coming from the Board, motivated by a felt need to placate opposition and maintain enrollment numbers – would not lie with the Edwardses themselves; it would lie with the staff on the receiving end of the threats. But the specter of retaliation still harmed the Edwardses and other Nova community members, to the extent it undercut the organizational climate at Nova and contributed to the wrongful choices made by school staff.

Evidence of a retaliatory atmosphere can be found in the public comments submitted to Nova. *See, e.g.,* Ex. D at 23 (letter in support of the Executive Director); 36 (threats to leave Nova if "the new [executive] director and principals who have been hired are bringing with them a non-classical approach to education"); 67 (commenting that "many are leaving because this situation has been handled so poorly by certain individuals – many of whom are also quite new to Nova, very much like the family that is tearing us apart. The wrong people are leaving."); 111-12 (commenting: "Our school-age children have been going to Nova so far. Please hire staff that will protect their

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involved, the Edwardses did consent to speak to them. For representative articles, see http://thinkprogress.org/lgbt/2016/04/22/3771366/dave-hannah-edwards-transgender-kindergartner/ and http://thinkprogress.org/lgbt/2016/06/03/3784295/nova-classical-transgender-policy/. These articles also serve to document the impact of the Nova dispute on H.E. and the Edwards family.

rights and allow them to return to feeling safe and comfortable at school. Please suggest that staff who have voiced their personal opinions in public or spoken publicly against parent involvement in curriculum, which has caused division and mistrust in our school community[,] consider employment elsewhere.") According to one observer:

> I have attended meetings and heard threats [by opposition families] of suing, leaving the school, direct attacks on school personnel, fear mongering and the vicious spreading of lies. Virtually every meeting entails raised and harsh voices and judgmental name calling…. I have heard and read that the teachers should not be allowed a voice in this process; I do know that some teachers have been harassed for daring to express an opinion that is counter to that particular view. I know that the administration is dealing with daily harassment and nastiness from parents and others. It is heartbreaking to see how they are currently being treated and the intimidation towards them and administration that is being brought to bear… Bullying, fear and intimidation are being modeled. Sadly, at this point this behavior demonstrates exactly why we need this curriculum… Ultimately, it's not about this one child or this one family. I want to be clear; I admire these parents, the administration and teachers for taking a stand in the face of this intimidation and harassment… However, even if the intimidation and threats work and this family or the administration leave[s] NOVA, this movement to make NOVA safe will continue. It must. Because, as long as we exclude any child [from] protection and safety then how can we possibly say any child at NOVA is safe[?]

Ex. D at 78-79.[11]

Suggested witnesses

To confirm these facts and fill in additional factual details, the Charging Parties recommend that the Department consider interviewing the following individuals:

- David and Hannah Edwards;
- Nova's Board Chair for 2015-2016;
- Nova's Chair-Elect for 2015 (since resigned);
- Nova's Executive Director for 2015-2016;
- Nova's Lower School Principal for 2015-2016;
- Supportive parents, including, for example, those who submitted public commentary- *see* Ex. D;

[11] Technical note: the public comment contained in Exhibit D was pulled directly from the Board packets available on the Nova website. Nova staff were apparently instructed to redact certain content before posting comments. For reasons unknown, these redactions do not persist when redacted text is cut and pasted, e.g., into this document. We do not attempt to "re-redact" the affected passages, but rather quote passages in full, as they were originally submitted to the Board.

- Involved students, including those who submitted public commentary – *see* Ex. D – or who spoke at Board meetings regarding their experiences with gender-based bullying; and

- Opposition parents, including, for example, [redacted] and/or other signatories to the online anti-gender-inclusion petition – *see* Ex. D at 93-153.

LEGAL ANALYSIS

A. Local, State, and Federal Law All Bar Discrimination on the Basis of Gender Expression and Gender Identity

Three separate bodies of law – the City of Saint Paul Legislative Code, the Minnesota Human Rights Act, and Title IX – bar schools in Saint Paul from discriminating on the basis of gender expression or gender identity.

City of Saint Paul Legislative Code

City of Saint Paul Legislative Code Sec. 183.05 (Prohibited Acts in Education) makes it unlawful "[t]o discriminate in any manner with respect to access to, use of or benefit from any institution of education or services and facilities rendered in connection therewith." The term "discriminate" is defined in Sec. 183.02:

> Discriminate or discrimination includes all unequal treatment of any person by reason of race, creed, religion, color, sex, sexual or affectional orientation, national origin, ancestry, familial status, age, disability, marital status or status with regard to public assistance. For purposes of discrimination based on sex, it includes sexual harassment.

Sec. 183.02, sub. 9. The Code further defines "discrimination by reason of sex":

> Sex includes but is not limited to gender identity, pregnancy, childbirth, disabilities related to pregnancy or childbirth, and sexual harassment.
>
> Gender identity means a person's actual or perceived self-image or identity as expressed through dress, appearance, behavior, speech or similar characteristics, whether or not traditionally associated with the person's physical anatomy, chromosomal sex, or sex at birth.

Sec. 183.02, sub. 28, sub. 32. Although the Code does not state that "sex includes gender expression," the Code's definition of "gender identity" essentially subsumes what might otherwise be defined separately as "gender expression." *Cf.* Ex. Q at 6-7 (providing separate definitions).

In light of this series of definitions, City of Saint Paul Legislative Code Sec. 183.05 clearly bars schools from discriminating against students based on their gender expression ("through dress, appearance, behavior, speech or similar characteristics") or their gender identity (that is, their "perceived self-image or identity" as male or female).

Minnesota Human Rights Act

The Minnesota Human Rights Act ("MHRA") also uses express language to bar discrimination on the basis of gender identity. Section 363A.13, regarding educational institutions, makes it unlawful

> 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 race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability, or to fail to ensure physical and program access for disabled persons.

MHRA, § 363A.13, sub. 1. The MHRA further defines "sexual orientation" as follows:

> "Sexual orientation" means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.

MHRA, § 363A.103, sub. 44. This provision – which proudly dates from 1993 – is not entirely congruent with current usage, since it seems to subsume gender identity ("having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness") under the definition of sexual orientation, when in fact these are now understood to be independent. *See* Ex. R at 64 (defining terms separately); *see also Rumble v. Fairview Health Servs.*, 2015 U.S. Dist. LEXIS 31591, *5 (D. Minn. Mar. 16, 2015) (explaining the difference in usage). But regardless of this (now) awkward phrasing, it is clear that the MHRA expressly encompasses gender identity.

Unlike Sec. 183.05, the MHRA does not have any language expressly referencing gender expression as a protected characteristic. However, case law makes clear that discrimination because of gender expression is protected under the MHRA as a type of discrimination on the basis of sex. *See Hunter v. UPS*, 697 F.3d 697, 702 (8th Cir. Minn. 2012) (noting that interpretation of the MHRA tracks federal law, including decisions such as *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which barred discrimination on the basis of gender stereotyping and gender expression as forms of sex discrimination).

Thus, like Sec. 183.05, the MHRA clearly bars schools from discriminating against students based on their gender expression or their gender identity.

Title IX

Title VII provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 USCS § 1681(a).

The statute does not expressly refer to either gender identity or gender expression. However, Title IX's reference to "discrimination on the basis of sex" has been interpreted to encompass both discrimination on the basis of gender expression and discrimination on the basis of gender identity. *See* Office for Civil Rights ("OCR"), U.S. Dep't of Education, "Dear Colleague" Letter (May 13, 2016), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf; *G.G. v. Gloucester Cnty. Sch. Bd.*, 2016 U.S. App. LEXIS 7026 (4th Cir. Apr. 19, 2016). As OCR explained in 2014: "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity, and OCR accepts such complaints for investigation." OCR, U.S. Dep't of Education, "Dear Colleague" Letter at 12 (Apr. 29, 2014),
available at http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

B. Nova Did Not Meet Its Legal Obligation to Take Reasonable Steps to Prevent and Correct Gender-Based Harassment

Courts were initially slow to recognize harassment or hostile environments as a source of discrimination. But 30 years after the Supreme Court found sexual harassment claims actionable under Title VII in *Meritor v. Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the connection is now clear: where the law bars discrimination on a protected ground such as sex, institutions are obligated to take reasonable steps to prevent harassment based on that ground.

Applying that principle here: City of Saint Paul Legislative Code Sec. 183.05 bars discrimination on the basis of gender identity or expression. To comply with that law, Nova is obligated to to take reasonable steps to prevent harassment based on gender identity or gender expression.

The key question, then, is "What are reasonable steps?"

Title IX, as currently interpreted by the courts, sets what may be a relatively low bar: institutions can only deemed unreasonable if they had actual notice of harassment or a hostile environment and then act with "deliberate indifference." *Davis v. Monroe County. Bd. of Educ.*, 526 U.S. 629, 652 (1999).

The exact height of this bar is still being sorted out by courts. While "[t]here is a danger that courts will apply the deliberate indifference test so strictly as to exclude from liability all but those most egregious cases where schools take no action whatsoever….courts have not limited Title IX damages liability to only those cases involving a complete failure to respond to known sexual harassment. In a number of recent decisions, courts have upheld Title IX claims where schools have taken some remedial steps in response to sexual harassment by students, but the action was clearly inadequate and ineffective." Deborah L. Brake, *School Liability for Peer Sexual Harassment After* Davis*: Shifting from Intent to Causation in Discrimination Law*, 12 Hastings Women's L.J. 5, 27-28 (2001).

It is not necessary to determine the exact height of the Title IX bar here, however, since there is no obligation for state and local laws like the MHRA and Sec. 183.05 to adopt the federal "deliberate indifference" standard for harassment in education. *See* Fatima Goss Graves, *Restoring Effective Protections for Students against Sexual Harassment in Schools: Moving Beyond the* Gebser *and* Davis

Standards, Issue Brief (2008), available at http://www.nwlc.org/sites/default/files/pdfs/ACS-Article-Moving-Beyond-Gebser-and-Davis-Final.pdf (explaining that the Supreme Court only felt bound to set a low bar for Title IX damage claims because Title IX, unlike state and local laws, is a "spending statute" with an implied right of action).

State and local laws can instead apply the standard familiar from the employment setting, which holds institutions responsible under a "knew or should have known" standard, if they fail to take reasonable care to prevent and correct any harassing behavior. *See id.* at 25; *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) (setting "prevent and correct" standard); *see also Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1086, 1095 (D. Minn. 2000) (preserving the question of which standard to apply under the MHRA but finding in any event that inconsistent and ineffective disciplinary measures could establish deliberate indifference).

It makes sense on principle to apply the same "prevent and correct" standard to both education and employment settings. Children are, if anything, more vulnerable to harassment, and schools are at least as capable as employers of controlling their institutional climate. *See* Brake, *supra*, at 25-26; Graves, *supra*, at 14 (arguing for this standard for state and local laws because "schools, particularly at the K-12 level, have broad duties to their students and substantial control over student conduct").

This standard does not require school districts to "purge its schools" of harassment, since no school can prevent all instances of peer harassment. Graves, *supra,* at 13 (quoting *L.W. v. Toms River Regional School Board of Education*, 915 A.2d 535, 550 (N.J. 2007)). But schools must "implement effective preventive and remedial measures to curb severe or pervasive discriminatory mistreatment." *Id.* (citing *Toms River* at 550). This standard strikes the right balance, providing necessary incentives for school districts to address harassment, including a broader hostile environment, and take preventative measures to protect students from invidious discrimination in schools.

Applying that standard here, the Department should find that Nova failed to meet its obligation to take reasonable steps to prevent and correct gender-based harassment. As described above, Nova

- Knew that gender-based harassment was a problem but refused to respond in a timely way, instead introducing unnecessary delays to appease those who were opposed to effective preventative measures;
- Permitted H.E. and her family to be exposed publically and cast as "the problem" that was causing the Nova community harm;
- Shared confidential information about H.E.'s gender identity, gender expression, and transition status with the other members of the community;
- Allowed community members to veto use of the most effective anti-bullying instructional materials;
- Signaled ambivalence about their anti-bullying position by selectively inviting families to "opt out" of any gender-related education (an invitation not extended for other types of curriculum);
- Undercut staff's ability to respond effectively to harassment by requiring prior Board

approval of any gender-related instructional materials (a hurdle not imposed for other types of harassment);

- Permitted and perhaps directly contributed to a retaliatory atmosphere that threatened staff who took steps to prevent and correct gender-based harassment; and
- Maintained or adopted a number of policies or practices that directly discriminate on gender grounds, thereby further signaling ambivalence about their anti-bullying position and undercutting any efforts to prevent or correct gender-based harassment.

Collectively, these decisions rendered Nova's approach to gender-based harassment unreasonable.

A few further observations regarding "opt outs": We noted above that there is an important legal question regarding whether the School could possibly meet its obligation to prevent and correct gender-based harassment, if a large portion of H.E.'s class or of the School elected to opt out of anti-bullying instruction. Arguably, the general opt-out provision in Minn. Stat. § 120B.20 should not trump the more specific provisions of federal, state, and local anti-harassment law, which require the delivery of effective anti-harassment instruction. Certainly, there is no need for § 120B.20 to trump anti-discrimination law based on a Free Exercise argument. *See Parker v. Hurley,* 514 F.3d 87 (1st Cir. 2008) (carefully assessing and rejecting First Amendment arguments). And the potential is high for opt-outs to undercut schools' efforts to ensure a climate of equality or simply teach any material at all. *See* Tommy Kevin Rogers, Dissertation: *Parental Rights: Curricular Opt-Outs in Public Schools* 52 (2010), available at http://digital.library.unt.edu/ark:/67531/metadc30507/m2/1/high_res_d/dissertation.pdf (describing cases in which parents sought to opt their children out of any materials that might present a challenge to traditional gender roles, including even "a boy making toast for a girl").

Nonetheless, to be clear, the Edwardses do not take the position that Nova violated the law simply by permitting opt outs. Rather, they argue that Nova cannot meet its obligation to take reasonable steps to prevent and correct gender-based harassment, if it selectively invites opt-outs only for the curriculum related to gender-based harassment. This is true for two reasons: One, selectively inviting opt-outs may serve to increase the percentage of students who do not receive this curriculum. More importantly, selectively inviting opt-outs negatively impacts the organizational climate, by signaling ambivalence about whether gender-based bullying is really a problem. *See* Ex. N (Fitzgerald Expert Report) at 6-7, 31, 44 (explaining importance of "organizational climate"). For these reasons, the Edwardses ask the Department, as part of its review of their Charge, to make clear that Sec. 183.05 bars schools from selectively inviting opt-outs of any anti-discrimination curriculum.

C. Nova Also Violated These Laws Because Its Policies and Practices Directly Discriminate on the Basis of Gender Expression and Gender Identity

It should be apparent to all that local, state, and federal laws bar schools from instituting such blatantly discriminatory policies as "no transgender students may ride the bus" or "gender diverse students are not permitted to attend prom." But schools continue to have an unfortunate tendency to adopt and defend other de jure forms of discrimination, which may seem subtler but are just as harmful, and just as unlawful.

To qualify as direct, de jure forms of discrimination, the policies at issue need not be "capital p" policies – written, formally adopted governing documents. What matters from the perspective of anti-discrimination law is what schools actually do, on a day-to-day basis – that is, not just their "capital p" policies but also their "small p" policies and practices.

The Edwardses submit that Nova has adopted a number of policies and practices that violate Sec. 183.05. As outlined above, Nova

- Treats gender-based bullying differently from other forms of unlawful identity-based bullying, by not permitting any preventative or corrective gender equality instruction without express, prior Board approval, regardless of the degree to which the interposed delay reduces the effectiveness of the instruction.

- Bars transgender students from full facilities access by denying transgender students access to the locker room that is consistent with their gender identity.

- Denies transgender students the right to be addressed by their appropriate pronouns.

- Invites Nova students to reject other students based on their gender identity, using officially-provided school forms.

- Denies students like H.E. the right to be themselves at school, by refusing to permit a gender transition without introducing delay and inviting (so-called) "opt outs" from other students.

Contrary to the assertions made by submissions to the Nova Board, *see, e.g.,* Ex. D at 65, 83, 154-69, 170-74, 182, 204, the law on these issues is clear.

Regarding pronoun use: it is clearly discriminatory to have different rules for cisgender and transgender students. Transgender students, like cisgender students, have a right to be addressed by pronouns that are consistent with their gender identity. The First Amendment does not create a competing right for students who are "uncomfortable" with trans people to refer to a trans student in the third person, against the trans person's stated preference. *See Harper v. Poway Unified School District*, 445 F.3d 1166, 1183 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007) ("Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses….Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self worth and their rightful place in society."); Emily Gold Waldman, *A Post-Morse Framework for Students' Potentially Hurtful Speech (Religious and Otherwise),* 37 J.L. & Educ. 463, 469 (2008) (explaining that schools have great latitude to restrict speech that is directed at a particular student, since this category of speech "essentially amounts to verbal bullying").

Regarding access to the locker room: it is clearly discriminatory to have different rules for cisgender and transgender students. Transgender students, like cisgender students, have a right to access the bathroom and locker room that corresponds to their gender identity.

Nova does not address this question in its Response letter, but numerous legal arguments on this point were submitted to the Board via public comment. *See generally* Ex. D. The opposition arguments were consistently misleading or outright false. The Board was told, for example, that "[t]he federal Eighth Circuit court, which has jurisdiction over MN, has specifically held that a transgender person's use of a women's restroom violated female employees' privacy interests (*Sommers v. Budget Mkt., Inc*. 667 F.2d 748, 750 (8th Cir. 1982))." Ex. D at 65; *see also* D at 160 (making same argument). This is false. *Sommers* merely held – as was typical for cases of that era – that a transgender woman had no right under Title VII to use the women's bathroom. The same was true for another case cited several times to the Board – *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001). *See* Ex. D at 182-84, 190, 193. The *Sommers* and *Goins* courts made no ruling regarding whether a transgender woman's use of the women's bathroom – had the employer permitted it – would violate other employee's privacy interests. Subsequently, the 8th Circuit did rule on this issue, and came to the opposite conclusion: permitting transgender employees to use gender-appropriate restrooms does *not* violate other employees' privacy rights or create a "sexually hostile work environment" for other employees. *Cruzan v. Special School Dist. #1*, 294 F.3d 981 (8th Cir. 2002).

Further, it is now clear under both state and federal law that transgender employees do have a right to use a gender-appropriate bathroom. In *Macy v. Dep't of Justice*, 2012 WL 1435995 (Apr. 12, 2012), the EEOC ruled that discrimination based on transgender status is sex discrimination in violation of Title VII, and in *Lusardi v. Dep't of the Army*, 2015 WL 1607756 (Mar. 27, 2015), the EEOC held that denying an employee equal access to a common restroom corresponding to the employee's gender identity is sex discrimination. *See* Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964, available at https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm. The Minnesota Human Rights Department has reached similar conclusions regarding transgender individuals' rights under the MHRA. *See Crosby* (Probable Cause finding), available at http://outfront.org/docs/Crosby_PC.pdf); Case Studies (Swimming Pool), available at https://www.outfront.org/docs/rochester%20pool%20case.pdf.

Federal law is also clear regarding the rights of transgender students to access bathrooms and locker rooms consistent with their gender identity. *See G.G. v. Gloucester Cnty. Sch. Bd.*, 2016 U.S. App. LEXIS 7026 (4th Cir. Apr. 19, 2016) (holding that the prohibition against sex discrimination under Title IX requires educational institutions to give transgender students restroom and locker access consistent with their gender identity); OCR, U.S. Dep't of Education, "Dear Colleague" Letter (May 13, 2016), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf ("A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.").

Because the law on the challenged policies is clear and the harm to students substantial, the Edwardses ask the Department to find that each of the policies listed above, standing alone, violates Sec. 183.05.

CONCLUSION

For all the reasons presented above, the Charging Parties respectfully request that the Department make a finding of probable cause as to all of their allegations.

Sincerely,

Jill R. Gaulding

Enclosures (Exhibits A-V)