

**No. 03-22-00126-CV**

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IN THE COURT OF APPEALS FOR THE THIRD  
DISTRICT OF TEXAS AT AUSTIN

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GREG ABBOTT, in his official capacity as Governor of the State of Texas;  
JAMIE MASTERS, in her official capacity as Commissioner of the Texas  
Department of Family and Protective Services; and TEXAS DEPARTMENT OF  
FAMILY AND PROTECTIVE SERVICES

*Appellants,*

v.

JANE DOE, individually and as a parent and next friend of MARY DOE, a minor;  
JOHN DOE, individually and as parent and next friend of MARY DOE, a minor;  
and DR. MEGAN MOONEY

*Appellees.*

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On Appeal from the 201st Judicial District, Travis County, Texas

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BRIEF for *AMICI CURIAE*  
TEXAS AMERICAN FEDERATION OF TEACHERS,  
ASSOCIATION OF TEXAS PROFESSIONAL EDUCATORS,  
TEXAS CLASSROOM TEACHERS ASSOCIATION,  
TEXAS ASSOCIATION OF SECONDARY SCHOOL  
PRINCIPALS, TEXAS COUNSELING ASSOCIATION, TEXAS  
SCHOOL NURSES ORGANIZATION, and TEACHERS,  
as *AMICI CURIAE* IN SUPPORT OF APPELLEES

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## INTRODUCTION

If child abuse is redefined to encompass gender-affirming care, teachers, school counselors, nurses, and other educators will be forced to report their own students and their parents as victims and perpetrators – on pain of criminal prosecution and job loss. This though the “abuse” in question is fully supported by established science and the medical community.<sup>1</sup> *Amici* are five statewide professional associations of public educators, Texas’s largest teachers’ union, and individual teachers. They respectfully urge this Court not to put over half a million Texas educators in that unwanted position.<sup>2</sup>

It isn’t surprising educators want to be heard in this case; they are the most frequent professional reporters of child abuse in Texas.<sup>3</sup> Accordingly, three basic propositions compel *Amici* to submit this brief supporting affirmance.

First, educators fear that the vague standard governing when they must report abuse – a provision criticized by the Texas Supreme Court as hazy and “ill-

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<sup>1</sup> *See, e.g.*, Brief of *Amici Curiae* Am. Acad. of Pediatrics, *et al.*, Tex. Sup. Court, No. 22-0229, April 1, 2022. By “gender-affirming care” *Amici* refer to specific interventions sometimes prescribed for gender dysphoria – puberty blockers and hormone therapy – not surgery, which is not performed on minors. *See id.* at 13-17.

<sup>2</sup> In 2022-22, Texas employed 567,400 educators, excluding auxiliary personnel. *See* Texas Education Agency, PEIMS Report, “2021-22 Staff Salaries and FTE Counts Excluding ESC Staff, Statewide Totals,” <https://rptsvr1.tea.texas.gov/cgi/sas/broker>.

<sup>3</sup> Texas Education Agency, *Child Abuse Prevention, An Overview*, <https://tea.texas.gov/texas-schools/health-safety-discipline/child-abuse-prevention/child-abuse-prevention-an-overview>.

defined” – will cause confusion and misreporting when applied to students who may be receiving gender-affirming care. Educators are neither experts in nor trained about gender dysphoria, and they should not be forced into hazarding criminal conviction and loss of their livelihoods by guessing when reporting is required in these unique and highly specialized circumstances.

Second, if gender-affirming care becomes reportable child abuse, educators will confront conflicting state and federal legal mandates. The federal government asserts that penalizing transgender minors violates several civil rights laws. While *Amici* take no position on whether this is legally correct, educators should not have to choose which sovereign to obey or face the prospect of costly federal lawsuits.

Finally, conscripting educators into policing gender-affirming care will compromise the trust they work so hard to foster with their students and each other. Educators uniformly believe that teacher-student relationships are essential to learning. Nurses try to maintain their students’ trust in order to provide the best care, while school counselors aim to encourage the honest and confidential communication essential to student support and effective education. Making these public servants report students whom they suspect may be receiving gender-affirming care will corrode that trust for everyone – transgender and other students alike. It will also disrupt collegiality among educators.

*Amici* respectfully submit that avoiding these harmful and unwelcome effects on educators, students, families, and their common goal of learning is a powerful reason to affirm the judgment below.

### **INTERESTS OF *AMICI CURIAE***

Texas American Federation of Teachers is Texas's largest teachers' union, with 66,000 members across the state. Members include teachers, teacher aides, coaches, bus drivers, and cafeteria workers. Texas AFT champions public education by pressing for adequate funding and resources for schools, supporting teachers and other employees, and promoting educators' ongoing professional development. It believes teachers are able to do their best to educate students when they enjoy open communication with them and their parents.

The Association of Texas Professional Educators was founded in 1980 by Texas educators seeking an alternative to national labor unions. With 90,000 members, it is the largest active educators' association of any kind in Texas, and one of the largest independent educator organizations in the United States. ATPE exists to serve the needs of Texas teachers, paraprofessionals, administrators, and all public education employees, and fights for Texas's schools on the local, state, and national levels.

The Texas Classroom Teachers Association is a statewide, non-profit professional association composed of professional educators in public schools, including classroom teachers, nurses, counselors, and paraprofessionals. TCTA

members are certified educators who devote significant time to classroom teaching or allied work with students – making them front-line professionals directly responsible for educating Texas schoolchildren.

The Texas Association of Secondary School Principals is a statewide professional association of over 6,000 campus-level administrators. Established in 1923, TASSP seeks to build and train an active network of educators committed to excellence in school leadership and to engaging partners in education, government, business, and the nonprofit sector in the crucial mission of improving and reforming Texas schools.

The Texas Counseling Association represents almost 7,000 licensed and/or certified professional counselors working in an array of settings – including elementary, middle, and high schools across Texas. TCA is the premiere resource for professional counselors and works to provide accessible, inclusive, ethical, and effective services to strengthen the mental health and well-being of students and others across Texas.

Created in 2003, the Texas School Nurses Organization has 2,468 members and is the only professional organization that exclusively represents the interest and practice of Texas's more than 6,000 school nurses. TSNO's mission is to enhance whole student wellness and learning by strengthening school nursing

practice. Its members understand that maintaining confidentiality to the fullest extent possible is imperative to student wellness.

Jenna Rosen teaches in Houston and has taught for fifteen years. Amy Taylor teaches in Denton and has taught for eleven years. Mark Johnson teaches in Houston and has taught for nineteen years. Jaclyn Brown teaches in Dickinson and has taught for six years. Matthew Coffey teaches in McAllen and has taught for fifteen years. John Fuller teaches in Houston and has taught for three years. Gregory Goedecke teaches in Spring and has taught for three years. Richard Gomez teaches in Dallas and has taught for two years. Kade Lasseigne teaches in Richmond and has taught for seven years. Emily Reader teaches in Missouri City and has taught for six years. James Smith teaches in Spring and has taught for thirteen years. Kaleigh Sutula teaches in Deer Park and has taught for seven years. Tommy Trinh teaches in Sugar Land and has taught for seven years.

*Amici* are vitally interested in this appeal because it presents questions essential to how educators practice their professions on a daily basis. As this brief explains, educators fear having to navigate confusing and conflicting legal mandates in an area far outside their expertise – likely to the detriment of their students and their families. To avoid that result, they support affirmance.<sup>4</sup>

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<sup>4</sup> No fee was paid or promised in association with preparing this brief. TEX. R. APP. P. 11.

## ARGUMENT

### **I. The Reporting Mandate: Treating Gender-Affirming Care as Child Abuse Will Force Educators to Report Students and Their Parents to the State**

Texas law requires teachers, nurses, school counselors, administrators, and other educators to report suspicions that a student has been or may be the victim of child abuse to Appellant Department of Family and Protective Services (“DFPS”). Consequently, if child abuse is arbitrarily redefined to include gender-affirming care, educators will be forced to report students whom they suspect may be receiving such medical interventions, their parents, their doctors, and others with knowledge to DFPS – or face criminal prosecution and firing.

The Texas Family Code requires “a professional [who] has reasonable cause to believe that a child has been abused or neglected or may be abused or neglected” to report the abuse to DFPS. TEX. FAM. CODE §§ 261.101(b), 261.103(c)(3).

Texas authorities equate “reasonable cause” to believe abuse has occurred or may occur with “suspicion” of past or future mistreatment.<sup>5</sup> The term “professionals”

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<sup>5</sup> See, e.g., 19 TEX. ADMIN. CODE § 61.10501(b)(1) (48-hour period preceding reporting deadline begins to run after educator learns of “facts giving rise to *the suspicion*” of abuse (emphasis added)); Texas Education Agency, *A Texas School Employee’s Guide to Reporting Suspected Abuse & Neglect*, 1, <https://tea.texas.gov/sites/default/files/Educators-Guide-2020-English.pdf> (“If you see something or *suspect abuse*, report it” (emphasis added)); Texas Department of Family and Protective Services, *Reporting Suspected Abuse or Neglect of a Child in Texas: Reporting Basics*, 1, [http://www.dfps.state.tx.us/Training/Reporting/documents/Reporting\\_Basics.pdf](http://www.dfps.state.tx.us/Training/Reporting/documents/Reporting_Basics.pdf) (person who “suspects child abuse” but fails to report may be sanctioned). Courts also describe the duty as triggered by suspicion only. See, e.g., *S.C.S. v. Tex. Dept. of Fam. and*

expressly includes teachers, nurses, and state-licensed professionals and, by regulation, extends to “every school employee, agent, or contractor.” TEX. FAM. CODE §§ 261.101(b); 19 TEX. ADMIN. CODE § 61.10501(b)(1).

Reports must be made within 48 hours of when “the professional first has reasonable cause to believe that the child has been or may be abused or neglected.” TEX. FAM. CODE §§ 261.101(b). To report to DFPS, an educator may either call the agency or, in “non-urgent situations,” use an online reporting system.<sup>6</sup> Because gender-affirming care has only now unilaterally been labeled child abuse, educators have no way of knowing whether they must report by phone or online. Educators may not delegate their duty to report abuse to others, such as supervisors or administrators, but must complete the report themselves. *Id.*, § 261.101(b).

DFPS exhorts reporting educators to be thorough and expansive: “it is crucial that you provide as many details as possible about the alleged abuse or neglect, as well as the family demographics, so that the Intake Specialist can make an accurate assessment of the situation.”<sup>7</sup> The agency seeks information on a variety of people, including household members, “alleged perpetrators” (in this

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*Protective Serv.*, 2010 WL 2889664 at \* 2 (Tex. App. – Ft. Worth, July 22, 2010) (“the family code merely requires that *suspected, not confirmed*, child abuse be reported” (emphasis added)).

<sup>6</sup> *See Reporting Suspected Abuse* at 2.

<sup>7</sup> *Id.* at 2.

case parents and their children’s doctors), and “collaterals” – defined as others with “information about the situation... other school employees, neighbors, other relatives, medical staff, etc.”<sup>8</sup> For each of these, DFPS seeks (i) identification (name, date of birth, social security number, race/ethnicity, and marital status); (ii) location (home address and directions to home, work address, phone numbers, and school); and (iii) any person’s special needs and how such needs “affect their normal functioning.”<sup>9</sup>

Educators reporting abuse are then “guided through a series of questions,” including the following and many others:

- What led you to suspect abuse or neglect?
- Did you witness something?
- If someone said something to you, who was it (the child or someone else)?
- What did the person say?
- Are you aware of anyone else who might have been told?
- What is the role of the parent/guardian?
- Do the parents or guardians seem protective?
- Are there factors at work that put additional stress on the family, such as drug or alcohol abuse, domestic violence, gang activity, recent marital problems or job loss?
- How is the family likely to react when we contact them?
- Does the child have medical needs (regular or acute) that are not being met?
- Have these needs been determined by a doctor or other professional?

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

- What medications should the child be taking and for what conditions are the medicines prescribed?
- What are the short and long term consequences of not receiving care?<sup>10</sup>

Educators should give “detailed and descriptive information” in response to these and other queries.<sup>11</sup> Altogether, “it’s not an easy process,” *Amicus* Jenna Rosen, a longtime high school teacher in Houston I.S.D., notes. “Calling takes forever. From all of the agents I’ve worked with, they are incredibly overloaded.”

Yet as burdensome as reporting abuse to DFPS can be, it’s often just the beginning. The requirement that DFPS report abuse to local law enforcement means that educators will then have to cooperate with police and prosecutors as the investigation moves forward.<sup>12</sup> This typically begins with a visit to school, where DFPS investigators or law enforcement officers meet with the educator who called in the abuse and then confront the student involved before locating and informing the student’s parents. As a result, educators’ duties as mandatory reporters often continue far beyond the initial report to DFPS, and can include service as a witness at trial.

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<sup>10</sup> *Id.* at 4-5.

<sup>11</sup> *Texas School Employee’s Guide* at 2.

<sup>12</sup> TEX. FAM. CODE § 261.105(b); 19 TEX. ADMIN. CODE § 61.10501(b)(7) (school district policy “must provide for cooperation with law enforcement child abuse investigations”); *Texas School Employee’s Guide* at 3 (“All reports made to the Texas Abuse Hotline or website are also sent to the appropriate law enforcement agency for possible prosecution”).

An educator's failure to make a required report of child abuse is a criminal offense: either a class A misdemeanor penalized by up to a year in jail and/or a fine up to \$4,000, or a felony subject to greater sanction if prosecutors prove that the educator intended to conceal the abuse. TEX. FAM. CODE §§ 261.109(a)-(1), (c), TEX. PENAL CODE § 12.21. Educators are also likely to lose their jobs and could face sanction from the State Board for Educator Certification if they are found to have violated the mandatory reporting duty, which is codified in school policies and individual educators' contracts as well as the Family Code.<sup>13</sup> To further encourage disclosure, educators and others enjoy immunity from civil or criminal liability, and may not be subject to retaliation from employers, for even erroneous reports made in good faith. TEX. FAM. CODE § 261.106(a), 261.110.<sup>14</sup>

In sum, reversing the order below could compel educators, on pain of criminal prosecution and termination, to undertake time-consuming, intrusive, and detailed reporting of any student they suspect of receiving gender-affirming care,

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<sup>13</sup> See, e.g., *Ysleta Indep. School Dist. v. Griego*, 170 S.W.3d 792 (Tex. App. – El Paso, 2005, pet. denied) (suit brought by teacher fired for failing to report); April Mabry & Karen Dooley, *Reporting Requirements for Child Abuse Allegations*, Texas Association of School Boards, May 02, 2019, <https://www.tasb.org/services/hr-services/hrx/hr-laws/reporting-requirements-for-child-abuse-allegations.aspx>.

<sup>14</sup> Educators only forfeit this immunity if they submit reports in bad faith or with malicious purpose, while knowingly submitting a false report with intent to deceive is a crime. TEX. FAM. CODE §§ 261.106(c), 261.107(a).

along with parents, doctors, and “collaterals,” followed by potentially extended work with investigators and prosecutors.

## **II. Existing Confusion Surrounding the Duty to Report Child Abuse Will be Magnified by Compelled Reporting of Gender-Affirming Care**

Educators’ duty to report child abuse under the Family Code is already a source of constant uncertainty, thanks to statutory vagueness and minimal training. Compelling educators to report gender-affirming care will make this problem worse and almost certainly produce unintentionally inaccurate reporting, with damaging consequences for all concerned.

The Texas Supreme Court has recognized the vagueness of the reporting abuse requirement for the general public, a provision closely analogous to the subsection governing educators. The general rule requires reporting whenever any person has “reasonable cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect.” TEX. FAM. CODE §§ 261.101(b); *see Perry v. S.N.*, 973 S.W.2d 301 (Tex. 1998). In *Perry*, the Court declined to base negligence *per se* liability on this provision, which it called “ill-defined,” in part because of its ambiguity:

Under these facts, there is no question [Defendants] had cause to believe abuse was occurring, and thus that the statute required them to make a report. In many other cases, however, a person may become aware of a possible case of child abuse only through second-hand reports or ambiguous physical symptoms, and it is unclear whether these circumstances are “cause to believe” that such conduct “may be”

taking place. A statute that conditions the requirement to report on these difficult judgment calls does not clearly define what conduct is required in many conceivable situations.

*Id.* at 307-09 (citations omitted).

As *Perry* recognized, the elastic “cause to believe” and “may be abused” language of § 261.101(a) – also present in subsection (b) governing educators – inevitably leaves many having to guess about what to report. And while the legislature has since amended these subsections to add the word “reasonable” before the phrase “cause to believe,” that change hardly adds clarity. *See, e.g., Green v. United States*, 356 U.S. 165, 197 (1958) (Black, J., dissenting) (referring to whether something is “reasonable” as “that irrepressible, vague, and delusive standard”), *overruled on other grounds, Bloom v. Illinois*, 391 U.S. 194 (1968). *Amicus* Amy Taylor, a veteran public school teacher in Denton, notes the “different levels of knowledge” school employees inevitably bring to the question of what might constitute abuse and when to report, and calls trying to apply the reporting standard “a mushy ‘you decide what constitutes abuse’” exercise. *Amicus* Rosen considers the standard as “very loosey-goosey.”

One common question that causes confusion is whether an educator must call in a report upon first acquiring information that might suggest abuse, or investigate further. Yet in a 2003 opinion, Texas’s attorney general was unable to say whether further factual investigation might be required, noting only that the

statute is silent on the question and that, after the fact, courts might indeed insist on such delving having occurred. *See* Tex. Att’y Gen. Op. No. GA-0106, 2003 WL 22433836 at \* 4 (2003). In other situations, educators’ preexisting relationships with students may complicate deciding whether to report. *See, e.g., Doe v. Rains County Indep. School Dist.*, 66 F.3d 1402, 1405 n. 2 (5<sup>th</sup> Cir. 1995) (teacher initially failed to report coach’s sexual abuse of student to honor promise of confidentiality and because she believed student was in no danger; report only occurred after teacher “and other school teachers and officials had various conversations” over a week).

True, school personnel complete annual training in child abuse reporting, but the online refresher class is a “click-your-way-through thing, nothing substantial,” Rosen explains, so that deciding what and when to report “really just goes on hunches.” In general, “[r]esearch finds that educational personnel are not consistently knowledgeable about, nor comfortable with reporting procedures.... Despite their role as mandated reporters, the training for educational personnel is often lacking in quality and substance, if provided at all.”<sup>15</sup>

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<sup>15</sup> Kathryn Krase, *Education Personnel as Reporters of Suspected Child Maltreatment*, 35 CHILDREN & SCHOOLS 147, 148 (July 2013); *see also* Maureen C. Kenney, *Child Abuse Reporting: Teachers’ Perceived Deterrents*, 25 CHILD ABUSE AND NEGLECT 81, 83 (2001) (“Several studies report that teachers do not receive adequate training on child abuse during their college education or in-service training programs”).

This background uncertainty about what § 261.101(b) requires will only mushroom if educators are compelled to report suspected recipients of gender-affirming care. The signs of traditional, universally recognized child abuse are frequently open and obvious. Taylor describes them as either “physical injuries” or “direct reports [of abuse] of some kind” from students. Rosen recalls witnessing “a special needs student who came to school with strangulation marks around her neck;” she recognized the bruising as likely proof of abuse and promptly reported the situation to DFPS.

By contrast, the physical effects of gender-affirming care are impossible to differentiate from most high schoolers’ biological development through adolescence. A child’s body will, without exception, change and grow during maturation. And while all students experience bodily changes, their rate, timing, and degree will vary greatly from person to person. *See, e.g.*, Reporter’s Record, Vol. III, 42 (quoting WPATH Standards of Care: “In children and adolescents, a rapid and dramatic developmental process (physical, psychological, and sexual) is involved, and there is greater fluidity and variability in outcomes, particularly in prepubertal children”).

How, then, should a teacher, counselor or nurse differentiate between the changes that flow from the student’s natural biological development and those caused by gender-affirming care? For example, is the student taking “puberty

blockers” or are they a late bloomer? Is the student growing facial hair due to a genetic predisposition or as a side effect of pharmaceutical treatment? *See, e.g., id.*, 100 (describing possible physical effects of masculinizing hormone treatment, including facial hair growth). In cases where students are not open about transitioning, gender-affirming care poses a textbook case of the hazards of educators reporting supposed “abuse” on the basis of “ambiguous physical symptoms.” *Perry*, 973 S.W.3d at 307.

Given the absence of clear evidence that students are receiving gender-affirming care, some educators may understandably fall back on reporting any student suspected as transgender, with attendant trauma to the student and their family. Students who act or dress differently, or who confide in educators by expressing certain views on gender nonconformity or disclosing details of their personal lives, may be subject to reporting as educators feel they have little choice but to err on the side of caution. After all, Texas law not only criminalizes failure to report – it deliberately encourages reporting in borderline situations by granting immunity to erroneous reporters acting in good faith. As one state resource for educators succinctly advises: “If you see something or suspect abuse, report it.”<sup>16</sup> Signs as innocuous as a student’s “changes in behavior” – hardly unusual in

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<sup>16</sup> *Texas School Employee’s Guide* at 1.

teenagers of all stripes, let alone among those who face especially intense bullying and ostracism – are identified as possible markers of abuse.<sup>17</sup>

To date, *Amici* confirm, there has been no training on reporting gender-affirming care as abuse; nor has there been any indication such training is planned or that appropriate training materials exist. That leaves educators given no information about gender dysphoria or its treatment to puzzle through when reporting is required – at pain of legal and professional sanction. “A lot of teachers aren’t educated about this,” Taylor said. “They might assume that anyone who is not using the pronouns on their attendance sheet [is] getting gender-affirming care.” Rosen echoes this concern: “Teachers could very easily make the wrong call. I have a gay student who wears foundation, pearl necklaces, and earrings, and he’s not trans – he’s just gay. I could very easily see another teacher calling that in to CPS.” “Even teachers who want to do the right thing won’t know what the right thing is,” Taylor adds. “The government is telling them one thing, and perhaps their gut is telling them something else. It puts us in a very difficult situation.”

What the Supreme Court noted in the context of drug testing in schools is equally applicable here. In *Bd. of Educ. of Indep. School Dist. No. 92 of Pottawatomie Cty. v. Earls*, the Court rejected the argument that, under the Fourth

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<sup>17</sup> *Id.* at 4.

Amendment, only students specifically suspected of drug use could be tested, as opposed to *all* students:

Moreover, we question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. A program of individualized suspicion might unfairly target members of unpopular groups.

536 U.S. 822, 837 (2002).

Here too, a system that compels educators to report students whom they suspect may be receiving gender-affirming care burdens busy professionals with tasks outside their competency and risks singling out students who simply appear or behave differently as well as their parents and innumerable “collaterals.” Even mistaken reports submitted in good faith will have serious, harmful consequences for the students and families named and then investigated, as witnessed by the experience of Appellee Mary Doe and her family. *See* Reporter’s Record, Vol. II, 92 (“it’s just like... living in a constant state of fear, basically. It’s been absolutely awful”).

The standard for when to report suspected child abuse is already vague and “ill-defined,” as the Texas Supreme Court commented. Yet the failure to observe it is dire: potential prosecution and termination. Accepting DFPS’s position in this case will only heighten educators’ burden and confusion in an area where they have little knowledge, training, or expertise.

### **III. Reclassifying Gender-Affirming Care as Child Abuse Would Subject *Amici* to Conflicting State and Federal Mandates, Exposing them to Potential Liability**

Compounding the uncertainty already surrounding § 261.101(b) and its application to gender-affirming care, DFPS's stance also confronts educators with inconsistent state and federal legal obligations. Whichever sovereign they obey, flouting the other will open them to serious legal penalties and financial losses.

Educators could expose their employers and in some cases themselves to civil liability under federal law if they follow DFPS's new rule and report students who receive gender-affirming care. The Office for Civil Rights of the U.S. Department of Health and Human Services and the U.S. Department of Justice have both issued guidance confirming the federal government's intention to enforce federal civil rights laws prohibiting discrimination in programs or activities that receive federal financial assistance.<sup>18</sup> These laws include provisions barring discrimination on the basis of disability as well as gender identity.

As for disability, Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act protect individuals in state and federal programs that receive federal funding. 29 U.S.C. § 794; 42 U.S.C. § 12132; *see also* 45

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<sup>18</sup> See U.S. Department of Health & Human Services, Office of Civil Rights, *HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy*, March 2, 2022, <https://www.hhs.gov/sites/default/files/hhs-ocr-notice-and-guidance-gender-affirming-care.pdf>; U.S. Department of Justice, Civil Rights Division, *Letter to State Attorneys General*, March 31, 2022, <https://www.justice.gov/opa/press-release/file/1489066/download>.

C.F.R. part 84. Gender dysphoria has been found to be a disability under the ADA, *see Williams v. Kincaid*, \_\_\_ F.4<sup>th</sup> \_\_\_, 2022 WL 3364824 at \*\* 3-6 (4<sup>th</sup> Cir., Aug. 16, 2022), and both that law and the Rehabilitation Act protect Texas students with disabilities from discrimination on that basis in the form of penalizing medically necessary and recognized treatment.<sup>19</sup>

The federal government also avers that discrimination based on gender identity may violate Title IX of the Education Amendments Act of 1972.<sup>20</sup> United States Department of Education guidance promulgated in 2021 reflects this conclusion.<sup>21</sup> According to DOJ, limiting or interfering with a student’s participation in a federally-funded educational program because the student is receiving gender-affirming care may violate Title IX.<sup>22</sup> Schools and individuals in violation of Title IX face the threat of substantial damages and attorney’s fees, as well as the potential loss of federal funding. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

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<sup>19</sup> *See Protecting Students with Disabilities*, at 2; *Letter to State Attorneys General*, at 3-4.

<sup>20</sup> *See id.*

<sup>21</sup> Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021) (to be codified at 34 CFR ch. 1)

<sup>22</sup> *See Letter to State Attorneys General*, at 3.

Then there is the Family Educational Rights and Privacy Act, or FERPA, 20 U.S.C. § 1232g *et seq.* FERPA requires schools to keep medical records and information – such as those reflecting the fact that students are receiving gender-affirming medical care – confidential.<sup>23</sup> Consequently, DFPS’s position that such care must be reported as child abuse would appear to run afoul of FERPA, opening educators to complaints against them with the U.S. Department of Education.<sup>24</sup>

Finally, individual students and parents may also be able to sue state actors, including schools and educators, under 42 U.S.C. § 1983 for constitutional violations of the Fourteenth Amendment’s Equal Protection Clause and parents’ substantive due process right to direct the upbringing and care of their children. *See, e.g., Eknes-Tucker v. Marshall*, \_\_\_ F. Supp. 3d \_\_\_, 2022 WL 1521889 (M.D. Ala., May 13, 2022) (enjoining Alabama law restricting gender-affirming care as violations of Constitution); *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021) (same).

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<sup>23</sup> U.S. Department of Health & Human Services & U.S. Department of Education, *Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records*, Nov. 2008, 2, <http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf> (“At the elementary or secondary level, a student’s health records, including immunization records, maintained by an educational agency or institution subject to FERPA, as well as records maintained by a school nurse, are ‘education records’ subject to FERPA.”).

<sup>24</sup> *See* U.S. Department of Education, “Protecting Student Privacy, File a Complaint,” <https://studentprivacy.ed.gov/file-a-complaint>.

To be clear, *Amici* take no position on whether the United States’ or private plaintiffs’ positions on these questions of federal civil rights and constitutional law are correct, though national and state education organizations have at least alerted their members to this risk.<sup>25</sup> The point is only that the conflicting state and federal directives put educators in an untenable position. They either fail to report gender-affirming care as child abuse if the temporary injunction is not upheld and risk jail time and firing at the hands of state authorities – or they report it and invite litigation against their employers or themselves from the Department of Justice or individual plaintiffs, followed by substantial defense costs and potential damages, attorney’s fees, and civil penalties. Either way, DFPS’s position threatens educators with inconsistent legal duties and, as a result, considerable personal and professional harm.

#### **IV. Requiring Educators to Report Their Students Will Reduce Student-Teacher Trust, Impair Learning, Distort In-School Medical and Behavioral Care, and Corrode Relations Among Staff**

Educators work hard to establish and maintain trust with their students because doing so is a basic element of effective teaching. School nurses cultivate

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<sup>25</sup> See, e.g., National Education Association, *Legal Guidance on Transgender Students’ Rights*, June 2016, 10-30, [https://www.nea.org/sites/default/files/2020-07/2018\\_Legal%20Guidance\\_Transgender %20 Student%20Rights.pdf](https://www.nea.org/sites/default/files/2020-07/2018_Legal%20Guidance_Transgender%20Student%20Rights.pdf); Texas Association of School Boards, *Legal Issues Related to Transgender Students*, TASB SCHOOL LAW ESOURCE, [https://www.tasb.org/services/legal-services/tasb-school-law-esource/students/documents/legal\\_issues\\_related\\_to\\_transgender\\_students.pdf](https://www.tasb.org/services/legal-services/tasb-school-law-esource/students/documents/legal_issues_related_to_transgender_students.pdf).

trust with students because they need an accurate medical picture of the people they serve. School counselors try to build trust with students so as to help guide their academic, emotional, and social development. But forcing these public servants to report certain students for receiving medically approved care can only compromise this trust. *Amici* fear that the inevitable result will be diminished learning and less effective physical and behavioral healthcare for the students in danger of being reported – and everyone else. It will also lower the trust and collegiality among educators, who will be put in the unwanted position of reporting one another as “collaterals” or violators of § 261.101(b).

“It is common knowledge,” this Court has observed, “that teachers interact with students on a continual basis to improve the learning environment by establishing rapport with the students. Often those interactions are on a personal level.” *Kobza v. Kutac*, 109 S.W.3d 89, 94 (Tex. App. – Austin 2003, pet. denied). From kindergarten to high school graduation, students spend most of their waking hours at school. School is a place for students to grow intellectually, socially, and personally, and the educators there are the ones who guide and foster that development.

Educators feel this acutely. As a recent report from The Education Trust noted: “Strong relationships with teachers and school staff can dramatically enhance students’ level of motivation and therefore promote learning. Students

who have access to more strong relationships are more academically engaged, have stronger social skills, and experience more positive behavior.”<sup>26</sup> Says Timothy Hilton, a high school teacher and writer in Los Angeles: “building relationships with students is by far the most important thing a teacher can do. Without a solid foundation and relationships built on trust and respect, no quality teaching will happen.”<sup>27</sup> The larger atmosphere within schools also affects this dynamic: “The most important thing schools can do to foster these relationships is to have a culture that explicitly values adults’ nurturing relationships with students and providing teachers and school staff with the time, space, and occasions to interact repeatedly with individual students, especially those that seem less engaged.”<sup>28</sup>

Not surprisingly, transgender students particularly need and benefit from teacher-student relation-building and access to trust-based relationships with their school nurses and counselors, given the bullying and misunderstanding they sometimes encounter at school. As the American Academy of Pediatrics and other

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<sup>26</sup> Education Trust and MDRC, *Strategies to Solve Unfinished Learning*, March 2021, 2, <https://edtrust.org/wp-content/uploads/2014/09/The-Importance-of-Strong-Relationships-as-a-Strategy-to-Solve-Unfinished-Learning-March-2021.pdf>.

<sup>27</sup> Timothy Hilton in Larry Ferlazzo, *Classroom Q&A With Larry Ferlazzo, Response: ‘Building Relationships with Students is the Most Important Thing a Teacher Can Do*, Education Week Opinion Blog, Oct. 8, 2018, <https://www.edweek.org/teaching-learning/opinion-response-building-relationships-with-students-is-the-most-important-thing-a-teacher-can-do/2018/10>.

<sup>28</sup> Education Trust and MDRC, *Strategies*, at 4.

*amici* note, transgender students face a greatly elevated risk of suicide and depression – conditions significantly lessened by gender-affirming care.<sup>29</sup> Thus, as the National Education Association confirms: “Transgender students often report that personal connections with school personnel who either serve as advocates on their behalf or intervene to stop harassment helped them to feel safer at school, allowing them to miss fewer days and engage more fully in the educational experience.”<sup>30</sup>

In light of the crucial role of student-educator trust in promoting a positive educational environment, mandatory reporting of students receiving gender-affirming care threatens learning – and not only for the transgender students who will inevitably stop confiding in teachers and school nurses and counselors. “Relationships are what build classrooms, for trans kids especially,” Taylor believes. By impeding communication, DFPS’s position “actually makes a less effective teacher, students less trusting, and less able to live their authentic selves.” Rosen seconds this: “If you know your teacher’s not listening to you, they don’t

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<sup>29</sup> See Brief of American Academy of Pediatrics, note 1 *supra*, at 9-10; see also James L. Madara, American Medical Association, Letter to Bill McBride, April 26, 2021, 1, available at <https://searchf.ama-assn.org/letter/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2021-4-26-Bill-McBride-opposing-anti-trans-bills-Final.pdf>.

<sup>30</sup> National Education Association, *Legal Guidance* at 9.

see you as who you are, they don't accept you, I think they tune out. I think it would be very natural to.”

In effect, DFPS would make educators adversaries of certain students and their families – a new and unwelcome posture that turns the usual learning dynamic on its head:

There is an ongoing relationship, in which the teacher must occupy many roles – educator, adviser, friend, and, at times, parent-substitute. It is rarely adversary in nature except with respect to the chronically disruptive or insubordinate pupil whom the teacher must be free to discipline without frustrating formalities.... [T]he relationship traditionally is marked by a coincidence of interests.

*Goss v. Lopez*, 419 U.S. 565, 594 and n. 13 (1975) (Powell, J., dissenting). *Amici* oppose a regime that pits them against some of their most vulnerable students and conveys the message to *all* students that some of their friends and their families must be exposed and reported to the state.

Nurses would face special problems related to this loss of trust. As medical providers, they are particularly likely to learn of students receiving gender-affirming care – and with good reason, since understanding and treating students requires a full, honest picture of their conditions and medications. Moreover, students sometimes provide health and medication records or statements in order to take part in athletics and other extracurriculars, or if the school is conducting voluntary drug testing. If students withhold information about their health and medical treatment for fear of being reported, their care may suffer – which is one

reason confidentiality of medical communications and data must ordinarily be kept confidential under Texas law. TEX. HEALTH & SAFETY CODE § 611.002. Hence the American Nurses Association’s Code of Ethics for Nurses provides:

The relationship that nurses create with their patients should be one of trust and compassion. Nurses should first identify and then set aside any bias or prejudice in the provision of nursing care.... It is understood that sexual orientation and gender identity patient information should be considered private patient information shared on a need-to-know basis.<sup>31</sup>

*Amicus* Texas School Nurses Organization therefore opposes any directive that compels them to deviate from their established professional standards, impedes their ability to maintain trust with students, and threatens student wellness by complicating the provision of fully informed, compassionate care.

School counselors would face unique problems, too. Texas law explicitly directs them to deliver a comprehensive school counseling program that includes “a responsive services component to intervene on behalf of any student whose immediate personal concerns or problems put the student’s continued educational, career, personal, or social development at risk,” and “system support to support the efforts of teachers, staff, parents, and other members of the community in promoting the educational, career, personal, and social development of students.”

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<sup>31</sup> ANA Ethics Advisory Board, *ANA Position Statement: Nursing Advocacy for LGBTQ+ Populations*, ONLINE J. ISSUES IN NURSING, v. 24, No. 1, November 19, 2018, <https://ojin.nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Vol-24-2019/No1-Jan-2019/ANA-Position-Statement-Advocacy-for-LGBTQ.html>.

TEX. EDUC. CODE § 33.005(a)-(b). By statute, school counselors must also “serve as an impartial, nonreporting resource for interpersonal conflicts and discord” among students, including accusations of bullying. *Id.*, § 33.006(b)(7). The American Counseling Association Code of Ethics directs professional counselors to “safeguard[] the integrity of the counselor-client relationship” and “avoid actions that cause harm.”<sup>32</sup> *Amicus* Texas Counseling Association believes that the state’s proposed redefinition of child abuse would compel school counselors to deviate from their professional standards, place them in conflict with their statutorily defined duties, and lower crucial trust with students and their families.

Lastly, treating gender-affirming care as reportable child abuse would also disrupt cooperation and collegiality among educators. Given the requirement to report other knowledgeable school employees as “collaterals,” educators will surely wonder whether they have to identify colleagues who taught or know the student in question. That, in turn, may lead authorities to ask: why didn’t these “collaterals” report the student, too? Such other educators may then face the legal and job-related consequences of failing to report the student themselves. Mark Johnson, a nineteen-year German-language teacher in Houston ISD, referred to this possibility as “a Stasi-like requirement to inform on our colleagues.” The damage

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<sup>32</sup> American Counseling Association, *2014 ACA Code of Ethics*, Preamble, A.4, <https://www.counseling.org/resources/aca-code-of-ethics.pdf>

will also trickle down to students, potentially souring the educational environment.

As one school superintendent and former principal and teacher writes:

Students also watch as teachers interact with each other. If there is a sense of kindness and respect among teachers, students know it. Similarly, if students see disrespect between the adults in the school, that disrespect permeates into the classrooms and the student interactions. Exemplary teachers understand this and work at relationships with adults in the school as much as with their students.<sup>33</sup>

Enlisting educators in the task of policing DFPS's new definition of child abuse would endanger the rapport and relationships teachers have devoted their careers to constructing with students and each other. Learning and education would be the biggest losers.

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<sup>33</sup> Jon Konen, *6 Questions to Tackle in Creating an Environment of Respect and Rapport*, TEACHER.ORG, Oct. 24, 2017, <https://www.teacher.org/blog/creating-environment-respect-rapport/>.

## CONCLUSION

*Amici* respectfully ask the Court to consider the significant harm DFPS's position entails for educators, their students, and the overall learning process when deciding this appeal, and affirm the order below.

August 25, 2022

Respectfully Submitted,

*/s/ Martin J. Siegel*

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I certify that this brief complies with the word limit of Tex. R. App. P. 9.4(i)(2) because this brief contains 6,368 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

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Dated: August 25, 2022

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Stacy Benson		Stacey.Benson@bakerbotts.com	8/25/2022 10:40:40 AM	SENT
Anjana Samant		asamant@aclu.org	8/25/2022 10:40:40 AM	SENT
Christine Choi		cchoi@aclu.org	8/25/2022 10:40:40 AM	SENT
Carolina Caicedo		ccaicedo@aclu.org	8/25/2022 10:40:40 AM	SENT
Parul Aggarwal		Parul.aggarwal@bakerbotts.com	8/25/2022 10:40:40 AM	SENT
Maia Zelkind		mzelkind@lambdalegal.org	8/25/2022 10:40:40 AM	SENT
Stephen Paul		spaul@lambdalegal.org	8/25/2022 10:40:40 AM	SENT
Shelly L.Skeen		ssskeen@lambdalegal.org	8/25/2022 10:40:40 AM	SENT
Brian Klosterboer		bklosterboer@aclutx.org	8/25/2022 10:40:40 AM	SENT
Maddy Dwertman		maddy.dwertman@bakerbotts.com	8/25/2022 10:40:40 AM	SENT
Currey Cook		ccook@lambdalegal.org	8/25/2022 10:40:40 AM	SENT
Camilla Taylor		ctaylor@lambdalegal.org	8/25/2022 10:40:40 AM	SENT
Chase Strangio		cstrangio@aclu.org	8/25/2022 10:40:40 AM	SENT
James Esseks		jesseks@aclu.org	8/25/2022 10:40:40 AM	SENT
Kath Xu		kxu@aclu.org	8/25/2022 10:40:40 AM	SENT
Savannah Kumar		skumar@aclutx.org	8/25/2022 10:40:40 AM	SENT
Andre Segura		asegura@aclutx.org	8/25/2022 10:40:40 AM	SENT
Brandt Roessler		brandt.roessler@bakerbotts.com	8/25/2022 10:40:40 AM	SENT
David Goode		david.goode@bakerbotts.com	8/25/2022 10:40:40 AM	SENT
Derek McDonald		derek.mcdonald@bakerbotts.com	8/25/2022 10:40:40 AM	SENT
Sharon McGowan		smcgowan@lambdalegal.org	8/25/2022 10:40:40 AM	ERROR
Shelly Skeen		slskeen@gmail.com	8/25/2022 10:40:40 AM	ERROR

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Martin Siegel

Bar No. 18342125

[martin@siegelfirm.com](mailto:martin@siegelfirm.com)

Envelope ID: 67649093

Status as of 8/25/2022 1:01 PM CST

Associated Case Party: Greg Abbott

Name	BarNumber	Email	TimestampSubmitted	Status
Judd Stone	24076720	<a href="mailto:judd.stone@oag.texas.gov">judd.stone@oag.texas.gov</a>	8/25/2022 10:40:40 AM	SENT
Natalie Thompson	24088529	<a href="mailto:natalie.thompson@oag.texas.gov">natalie.thompson@oag.texas.gov</a>	8/25/2022 10:40:40 AM	SENT
Courtney Corbello		<a href="mailto:courtney.corbello@oag.texas.gov">courtney.corbello@oag.texas.gov</a>	8/25/2022 10:40:40 AM	SENT
Ryan Kercher		<a href="mailto:ryan.kercher@oag.texas.gov">ryan.kercher@oag.texas.gov</a>	8/25/2022 10:40:40 AM	SENT

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Status as of 8/25/2022 1:01 PM CST

Associated Case Party: RoyL.Austin

Name	BarNumber	Email	TimestampSubmitted	Status
Alan York		ayork@reedsmith.com	8/25/2022 10:40:40 AM	SENT

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Alan York		ayork@reedsmith.com	8/25/2022 10:40:40 AM	SENT
Alan York		ayork@reedsmith.com	8/25/2022 10:40:40 AM	SENT

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Associated Case Party: Ronald Beal

Name	BarNumber	Email	TimestampSubmitted	Status
Ronald Beal		ron_beal@baylor.edu	8/25/2022 10:40:40 AM	SENT

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Status as of 8/25/2022 1:01 PM CST

Associated Case Party: Texas Medical Association

Name	BarNumber	Email	TimestampSubmitted	Status
Donald Wilcox		rocky.wilcox@texmed.org	8/25/2022 10:40:40 AM	SENT
Kelly Walla		kelly.walla@texmed.org	8/25/2022 10:40:40 AM	SENT
Eamon Reilly		eamon.reilly@texmed.org	8/25/2022 10:40:40 AM	SENT