AOC-105 Doc. Code: CI Rev. 1-07 Page 1 of 1 Commonwealth of Kentucky Court of Justice www.courts.ky.gov CR 4.02; CR Official Form 1	**CIVIL SUMMONS**	Case No. _____ Court [X] Circuit [ ] District County FAYETTE

PLAINTIFF

JOHN DOE and SPOUSE DOE for themselves and as Next Friends and Parents of CHILD DOE, ANN ROE and SPOUSE ROE for themselves and as Next Friends and Parents of CHILD ROE, MARY POE for herself and as Next Friend and Parent of CHILD POE 1 and CHILD POE 2, and JANE NOE and former SPOUSE NOE for themselves and as Next Friends and Parents of CHILD NOE for themselves and as putative class representatives on behalf of all individuals similarly situated

VS.

DEFENDANT

FAYETTE COUNTY BOARD OF EDUCATION, KENTUCKY ATTORNEY GENERAL DANIEL J. CAMERON in his official capacity

Service of Process Agent for Defendant:

Tyler Murphy, Chair
Fayette County Board of Education
c/o Superintendent's Office
450 Park Place, Lexington, KY 40511

THE COMMONWEALTH OF KENTUCKY
TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby notified a **legal action has been filed against you** in this Court demanding relief as shown on the document delivered to you with this Summons. **Unless a written defense is made by you or** by **an attorney on your behalf** within **20 days** following the day this paper is delivered to you, judgment by default may be taken against you for the relief demanded in the attached Complaint.

The name(s) and address(es) of the party or parties demanding relief against you are shown on the document delivered to you with this Summons.

Date: _____, 2_____ _____ Clerk

By: _____ D.C.

Proof of Service

This Summons was served by delivering a true copy and the Complaint (or other initiating document) to:

_____

this _____ day of _____, 2_____.

Served by: _____

_____ Title

AOC-105 Doc. Code: CI Rev. 1-07 Page 1 of 1 Commonwealth of Kentucky Court of Justice www.courts.ky.gov CR 4.02; CR Official Form 1	**CIVIL SUMMONS**	Case No. _____ Court [X] Circuit [ ] District County FAYETTE

PLAINTIFF

JOHN DOE and SPOUSE DOE for themselves and as Next Friends and Parents of CHILD DOE, ANN ROE and SPOUSE ROE for themselves and as Next Friends and Parents of CHILD ROE, MA, RY POE for herself and as Next Friend and Parent of CHILD POE 1 and CHILD POE 2, and JANE NOE and former SPOUSE NOE for themselves and as Next Friends and Parents of CHILD NOE for themselves and as putative class representatives on behalf of all individuals similarly situated

VS.

DEFENDANT

FAYETTE COUNTY BOARD OF EDUCATION, KENTUCKY ATTORNEY GENERAL DANIEL J. CAMERON in his official capacity

Service of Process Agent for Defendant:

Demetrius Liggins, Superintendent
Fayette County Board of Education
c/o Superintendent's Office
450 Park Place, Lexington, KY 40511

THE COMMONWEALTH OF KENTUCKY
TO THE ABOVE-NAMED DEFENDANT(S):

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Date: _____, 2_____ _____ Clerk

By: _____ D.C.

Proof of Service

This Summons was served by delivering a true copy and the Complaint (or other initiating document) to:

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this _____ day of _____, 2_____.

Served by: _____

_____ Title

AOC-105 Doc. Code: CI Rev. 1-07 Page 1 of 1 Commonwealth of Kentucky Court of Justice www.courts.ky.gov CR 4.02; CR Official Form 1	**CIVIL SUMMONS**	Case No. _____ Court [X] Circuit [ ] District County FAYETTE

PLAINTIFF

JOHN DOE and SPOUSE DOE for themselves and as Next Friends and Parents of CHILD DOE, ANN ROE and SPOUSE ROE for themselves and as Next Friends and Parents of CHILD ROE, MARY POE for herself and as Next Friend and Parent of CHILD POE 1 and CHILD POE 2, and JANE NOE and former SPOUSE NOE for themselves and as Next Friends and Parents of CHILD NOE for themselves and as putative class representatives on behalf of all individuals similarly situated

VS.

DEFENDANT

FAYETTE COUNTY BOARD OF EDUCATION, KENTUCKY ATTORNEY GENERAL DANIEL J. CAMERON in his official capacity

Service of Process Agent for Defendant:

Daniel J. Cameron, Kentucky Attorney General
Office of the Attorney General
700 Capital Avenue, Suite 118
Frankfort, KY 40601-3449

THE COMMONWEALTH OF KENTUCKY
TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby notified a **legal action has been filed against you** in this Court demanding relief as shown on the document delivered to you with this Summons. **Unless a written defense is made by you or** by **an attorney on your behalf** within **20 days** following the day this paper is delivered to you, judgment by default may be taken against you for the relief demanded in the attached Complaint.

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Date: _____, 2_____ _____ Clerk

By: _____ D.C.

Proof of Service

This Summons was served by delivering a true copy and the Complaint (or other initiating document) to:

_____

this _____ day of _____, 2_____.

Served by: _____

_____ Title

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL ACTION NO. _____
DIVISION _____

Filed Electronically

JOHN DOE and SPOUSE DOE for themselves and as Next Friends and Parents of CHILD DOE, and as representatives on behalf of individuals similarly situated, PLAINTIFFS

ANN ROE and SPOUSE ROE for themselves and as Next Friends and Parents of CHILD ROE, and as representatives on behalf of individuals similarly situated,

MARY POE for herself and as Next Friend and Parent of CHILD POE 1 and CHILD POE 2, and as representatives on behalf of individuals similarly situated,

And

JANE NOE and former SPOUSE NOE for themselves and as Next Friends and Parents of CHILD NOE, and as representatives on behalf of individuals similarly situated,

v.

FAYETTE COUNTY BOARD OF EDUCATION, DEFENDANTS

SERVE: Tyler Murphy, Chair of Fayette Co. Board of Education
450 Park Place
Lexington, Kentucky 40511

Demetrius Liggins, Superintendent of Fayette Co. Public Schools
450 Park Place
Lexington, Kentucky 40511

KENTUCKY ATTORNEY GENERAL DANIEL J. CAMERON, in his official capacity

SERVE: Attorney General of the Commonwealth of Kentucky
Office of the Attorney General
The Capitol
700 Capitol Avenue
Frankfort, Kentucky 40601
ServetheCommonwealth@ky.gov

CLASS ACTION COMPLAINT FOR A DECLARATION OF RIGHTS AND FOR INJUNCTIVE RELIEF

The Plaintiffs John Doe and Spouse Doe, Ann Roe and Spouse Roe, Mary Poe, and Mary Noe and former Spouse Noe, each of whom has been pseudonymously named herein, for themselves and as Next Friends and parents of Plaintiffs Child Doe, Child Roe, Child Poe 1 and Child Poe 2, and Child Noe (each also named pseudonymously herein), for themselves and behalf of all individuals similarly situated, by counsel, bring this class action for declaratory and injunctive relief against the Defendant Fayette County Board of Education (FBCE) and Defendant Daniel J. Cameron in his official capacity as Attorney General of the Commonwealth of Kentucky.

INTRODUCTION

1. Kentucky's commitment to the fundamental right of public education is enshrined in the 1891 Kentucky Constitution.

2. The General Assembly enacted Senate Bill 150 (SB 150) during the 2023 session of the Kentucky legislature. A true and correct copy of SB 150 is attached hereto as Exhibit A**.**

3. This action challenges the constitutionality of the educational provisions within SB 150. Plaintiffs are injured by the unconstitutional portions of SB 150, and respectfully request this Court to enter a judgment declaring certain of SB 150's educational provisions unconstitutional, and enjoining the Defendants FCBE and Attorney General Cameron from enforcing or implementing SB 150's unconstitutional portions, and ordering the Defendants to comply with the Plaintiffs' civil rights embodied in the "Sex Equity in Education" (SEE) Act, KRS 344.555(1) as more fully discussed below.

NATURE OF ACTION

4. This action is being brought as a class action that seeks a Declaration of Rights and

Injunctive Relief governed by the Declaratory Judgment Act, KRS 418.040, CR 57, and CR 65.

5. KRS 418.040 authorizes this Court to "make a binding declaration of rights, whether or not consequential relief is or could be asked" when a controversy exists. An actual and justiciable controversy exists regarding the constitutionality and legality of SB 150's educational provisions and the Defendant FCBE's policy implementation of same.

6. CR 57 also permits this Court to issue a declaratory judgment.

7. CR 65 permits this Court to issue a restraining order, temporary injunction and in final judgment, a permanent injunction that may restrict or mandatorily direct the doing of an act.

8. Plaintiffs request an expedited review pursuant to KRS 418.050 and CR 57. Absent injunctive relief, the rights of the Plaintiffs, and members of the putative Classes they seek to represent, will be irreparably harmed in violation of Kentucky's Constitution and multiple statutes and laws. This justiciable controversy presents an immediate concern that the Court should promptly resolve.

9. The pseudonymously named Plaintiffs request this Court to certify this action to proceed as a class action, and to permit them to represent the members of the putative Classes that are proposed to be defined in ¶¶ 58-61 below in this Complaint.

10. Plaintiffs also request this Court to declare and enjoin the unconstitutional portions of SB 150 §1 (codified as KRS 158.191), SB 150 § 2(d) & (e) (codified into KRS 158.1415(1)(d) & (e)), and SB 150 § 3 (codified as KRS 158.189), and to hold same null, void, and of no effect.

11. Plaintiffs further request this Court to enjoin the Defendants, and their agents, attorneys and any other persons in active concert or participation with them, from enforcing or implementing the unconstitutional portions of SB 150 and to require the Defendants to abide by, and comply with the civil rights of the Plaintiffs and members of the putative Plaintiffs' Classes.

THE PARTIES

The Doe Family

12. Plaintiff, John Doe and Spouse Doe (hereafter referred to as the "Doe parents"), are residents of Lexington, Fayette County, Kentucky, and are the Next Friends and parents of Child Doe who is a non-binary ten (10) year-old starting fifth (5th) grade in the 2023-24 school year in an elementary school within the Fayette County Public School (FCPS) system. Child Doe has attended another elementary school in the FCPS system for approximately five (5) years prior to the current year.

13. Upon information and belief, the Doe parents enrolled Child Doe into elementary school with an original, unedited birth certificate that bears a binary first name for Child Doe – a name typically used by a female that also reflects a distant family member's name of one of the Doe parents with whom the Doe family no longer associates for personal, familial reasons. Child Doe's birth certificate shows a birth-sex assignment as female.

14. Child Doe came out with a gender identity and gender expression as non-binary during fourth (4th) grade and asked FCPS teachers, administrators and staff, and student-peers to use Child Doe's preferred non-binary name and "they/them" pronouns when referring to Child Doe. The Doe parents knew Child Doe was non-binary from in-home discussions, and supported Child Doe's decision to come out at school and request school personnel and student-peers to refer to Child Doe by a non-binary name and to use "they/them" pronouns when referring to Child Doe.

15. On occasion during Child Doe's fourth (4th) grade year when a particular male student-peer purposefully called Child Doe a "girl" at school, and publicly refused to refer to Child Doe by any pronoun except a binary, female one, Child Doe came home from school in tears and in severe distress due to that student-peer's intentional disrespect and abusive "misgendering" of

Child Doe. Child Doe's educational success has been adversely impacted by that student-peer's intentional refusal to respect Child Doe's non-binary gender identity and gender expression.

16. FCPS school personnel who have interacted with Child Doe through elementary grades have generally respected Child Doe's preferred non-binary name and pronoun preferences with no incidents for almost two years. One elementary school office employee, however, intentionally refused to use Child Doe's preferred non-binary name and non-binary pronouns when conversing with John Doe (outside of Child Doe's presence). This employee's stated reason for this refusal was because the employee knew of Child Doe's binary name typically associated with females as shown on Child Doe's birth certificate provided to the school and/or maintained in the FCPS computer system. This employee is not a teacher and thus, had no instructional reason to know of Child Doe's birth certificate information except to intrude upon the Doe family's privacy.

17. As a result of this FCPS employee's refusal to use Child Doe's preferred name and pronouns, in April of 2023, the Doe parents initiated a legal proceeding to formally change Child Doe's name to a non-binary name, and incurred the legal expense to do so. This expense was worth it to the Doe family, however, because the formal name change provided the Doe parents with more assurance that Child Doe's preferred non-binary name and preferred gender pronouns would be respected and followed during school hours when Child Doe was at school and away from the Doe family where Child Doe's preferred non-binary name and gender pronouns were always used.

18. Prior to the 2023-24 school year, Child Doe has been permitted to use the girls restroom at all schools that Child Doe has attended within the FCPS system with no incident despite Child Doe's gender identity and gender expression as non-binary.

19. On or about August 27, 2023, the Doe parents for and on behalf of Child Doe, sent a letter to the school administrators of Child Doe's elementary school exercising Child Doe's

constitutional, statutory, and regulatory rights to privacy and confidentiality in any and all personally identifying information, chromosome information, and at-birth anatomy or assignment of sex information as may be shown on Child Doe's birth certificate or any other information as to same that may be maintained by the FCPS within its computer systems.

The Roe Family

20. Plaintiff, Ann Roe and Spouse Roe (hereafter referred to as the "Roe parents"), are residents of Lexington, Fayette County, Kentucky, and are the Next Friends and parents of Child Roe who is a ten (10) year old transgender girl starting fifth (5^{th}) grade in an elementary school within the FCPS system. Child Roe is a special education student with educational limitations and disabilities that require her to have an Individual Education Program (IEP) in accordance with KRS 157.200 - .290 and pertinent regulations, *e.g.*, 707 KAR 1:320 § 3 (2023).

21. Child Roe and the Roe family moved to Fayette County, Kentucky in or about 2020 from another state within the United States where the Roe parents adopted Child Roe pursuant to that other state's laws before moving to Kentucky. Child Roe was a traumatized child from birth and suffered abuse and neglect and was removed from her birth home and placed for adoption.

22. Upon her adoption by the Roe parents, Child Roe was issued a new birth certificate in the other state. Child Roe's new birth certificate shows Child Roe's gender assignment at birth to be female. Child Roe's original, unedited birth certificate – if it still exists in the other state – is sensitive, private, and confidential under both that other state's and Kentucky's law due to Child Roe's adoption. The other state's issuance of a new birth certificate is similarly handled in Kentucky when a child is adopted. *See* KRS 199.570(1) & (2); KRS 213.071(4) & (6).

23. Since moving to Fayette County, Child Roe has been attending public schools within the FCPS system for approximately three (3) years, and using the girls' restroom without

incident. Child Roe's physical anatomy has never, to the Roe parents' knowledge, been examined or inspected by any FCPS school employee or staff-person.

24. The Roe parents do not recall submitting Child Roe's "original, unedited birth certificate" to any FCPS official since they do not even possess such a certificate and have no access to it in the other state (if it still exists).

25. The Roe parents have never produced to anyone in the FCPS system any chromosome or at-birth identification-of-anatomy information on Child Roe, and they have no intent to ever do so even if requested by an FCPS official. Likewise, the Roe parents have never authorized anyone within or associated with the FCPS system to collect, screen for, test for, or otherwise obtain and maintain chromosome information on Child Roe, and never intend to do so.

26. On or about August 17, 2023, on the first day of school for Child Roe during the 2023-24 school year, Child Roe reported to her parents, after school, that she was refused admittance to the girls' restroom during a break in the school day when all children were permitted to use the restroom. School personnel instructed Child Roe to use another "special" restroom located on the other side of the school and nowhere near her classroom where her female friends used the restroom during restroom breaks. The location of this other restroom to which Child Roe was sent consumed far more time away from class for her than if she had simply been allowed to use the girls' restroom as she had always been allowed to do in previous years without incident.

27. The school restrooms that Child Roe and her friends have always used, have private stalls for each girl to use, but despite this fact, Child Roe was still refused and so humiliated and embarrassed by being segregated from the other girls during the first school-day's restroom break that Child Roe now reports to her parents that she will not use the restroom at school at all and will instead "hold it" until she gets home.

28. Upon information and belief, when a child repeatedly "holds" urinary or bowel movement functions for too long, the health of the child is adversely affected. Such "holding" is, moreover, easily foreseeable when a student is segregated from friends at school for restroom use. Maintenance-of-privacy in school restrooms is far less restrictive and more fairly attainable by directing students to sequentially use private stalls in a school restroom such that no discriminatory humiliation or embarrassment is created by segregating students as occurred to Child Roe by sending her, *and only her*, to a restroom away from her classroom to the other side of the school.

29. In light of the provisions of SB 150 § 3(1)(a), 2(c), 3 & 4 (codified as KRS 158.189(1)(a), 2(c), 3 & 4)), someone other than an FCPS employee – another student or parent, or someone else outside of the FCPS system – can infer that Child Roe was not assigned at birth as female. Such other person can deduce this based on the fact that FCPS school personnel have segregated her from other female students and made her use a separate restroom all by herself. This segregation invades the constitutional, statutory, regulatory and common law privacy and confidentiality rights of the Roe family in Child Roe's birth-assigned gender.

30. To the Roe parents' knowledge and belief, the only way anyone employed within the FCPS system could know that Child Roe is a transgender girl is that her highly confidential medical and neuropsychological records submitted to the FCPS to determine her eligibility for special educational services and an IEP, happen to mention, in passing, that at an early age she "transition[ed] from boy to girl, with a hyper-alertness to people's reactions and her ability to fit into her new identity." Her need for an IEP, however, stems from her traumatized, neglectful upbringing resulting in learning disabilities unrelated to her social transitioning from boy to girl.

31. Notwithstanding Child Roe's highly private and confidential medical/neurological records being in possession of the FCPS solely to develop an appropriate IEP for her, someone in

the FCPS system made a determination that she must be segregated from other girls for the purpose of restroom use pursuant to the privacy-invasive provisions of SB 150 § 3 (codified as KRS 158.189). This invasion of Child Roe's privacy has violated the Roe family's privacy and confidentiality rights as specified in 707 KAR 1:360 §§ 7, 8 & 9 (2023), the Kentucky Family Education Rights and Privacy Act (KFERPA), KRS 160.700-.730, and the Kentucky Constitution.

32. On or about August 28, 2023, the Roe parents for and on behalf of Child Roe, sent a letter to the school administrators of Child Roe's elementary school with copies to the main offices of the FCPS exercising Child Roe's constitutional, statutory, and regulatory rights to privacy and confidentiality in any and all personally identifying information, chromosome information, and at-birth anatomy or assignment of sex information as may be shown on Child Roe's birth certificate or any other information submitted to, or in the possession of the FCPS with respect to the development of an IEP for Child Roe or as may otherwise be maintained within the FCPS's computer systems.

The Poe Family

33. Plaintiff, Mary Poe, is a resident of Lexington, Fayette County, Kentucky, and is the mother and Next Friend of Child Poe 1 and Child Poe 2. Mary Poe has custody of both of the Poe children together with her ex-spouse who supports the claims asserted in this action on behalf of the Poe children challenging the constitutionality and legality of certain provisions in SB 150.

34. Child Poe 1 is a seventeen (17) year old transgender boy in the twelfth (12^{th}) grade assigned to a high school within the FCPS system. He is dually enrolled in the dual credit program offered by his high school in conjunction with the Bluegrass Community Technical College (BCTC), a part of the Kentucky Community Technical College System (KCTCS), pursuant to KRS 164.002(5) & 164.098. He attends classes presented by Opportunity Middle College.

35. Upon information and belief, Mary Poe enrolled Child Poe 1 into the public schools of the FCPS system approximately eight (8) years ago by submitting a birth certificate for Child Poe 1 on which is shown his gender assignment at birth as female. Child Poe 1 started telling his parents, however, that he was non-binary in or about 2019, and a year or so later, announced that he was transgender and started socially transitioning to male in or about November 2020.

36. For approximately three (3) or more years, Child Poe 1 has used the boys' restroom at his high school without incident. Child Poe 1 chooses now, however, to refrain from using the school restrooms except when he absolutely must do so. He is humiliated to have to use only girls' restrooms, and knows that female students would likewise be humiliated if he used the girls' school restrooms because female students know him as a male. As a result, he must "hold it" at his high school and use the restroom at home or the men's restroom on campus of his dual-credit college.

37. Child Poe 1 feels his educational opportunities and success are disrupted when others intentionally refuse not to recognize or treat him in accord with his transgender identity as male. For these reasons, the Poe family considers Child Poe 1's original, unedited birth certificate, and information regarding his chromosomes and at-birth anatomy to be private and confidential.

38. Child Poe 2 is a twelve (12) year old non-binary student entering the seventh (7^{th}) grade during the 2023-24 school year in a middle school within the FCPS system. Child Poe 2 has attended schools within the FCPS system for approximately eight (8) years prior to the current seventh (7^{th}) grade year.

39. Upon information and belief, Mary Poe enrolled Child Poe 2 into elementary school with an original, unedited birth certificate that bears a binary first name for Child Poe 2 – a name typically associated with males – and that shows Child Poe 2 to be assigned a birth gender of male.

40. Early into the 2022-23 school year, Child Poe 2 came out as non-binary in gender

identity and gender expression when Child Poe 2 was almost eleven (11) years of age during Child Poe 2's sixth (6th) grade year in school. That year, Child Poe 2 requested school personnel, and student-peers, to respect and use Child Poe 2's preferred, parent-approved, non-binary pronouns ("they/them") when referring to Child Poe 2. Child Poe 2's school personnel and student-peers respected and abided by Child Poe 2's request to be treated in accordance with Child Poe 2's gender identity and gender expression as non-binary without incident. Child Poe 2 has continually used the boys' school restroom without incident despite coming out as non-binary.

41. Because Child Poe 2's gender identity and gender expression are non-binary, and because Child Poe 2 is the sibling of Child Poe 1, the Poe family considers Child Poe 2's original, unedited birth certificate, and information regarding Child Poe's chromosomes and at-birth anatomy to be private and confidential.

42. Accordingly, on or about September 27, 2023, Mary Poe, for and on behalf of Child Poe 1 and Child Poe 2, sent letters to each child's school administrators at the high school/dual-credit program (on behalf of Child Poe 1) and to the middle school (on behalf of Child Poe 2) with copies of such letters sent to the main offices of the FCPS exercising Child Poe 1's and Child Poe 2's constitutional, statutory, and regulatory rights to privacy and confidentiality in any and all personally identifying information, chromosome information, and at-birth anatomy and assignment of sex information as shown on either Poe child's birth certificate or any other information as to either Poe child maintained by the FCPS within its computer systems.

The Noe Family

43. Plaintiff, Jane Noe and former Spouse Noe (hereafter referred to as the "Noe parents"), are residents of Lexington, Fayette County, Kentucky, and Next Friends of Child Noe who is a fourteen (14) year old transgender boy that started ninth (9th) grade in a high school within

the FCPS system during the current 2023-24 school year.

44. When Child Noe was eleven and a half (11½) years of age during his sixth (6th) grade school year, he informed the Noe parents that he was "trans." Much earlier between the ages of three (3) and nine (9), Child Noe predominantly wore boy's clothes as he was not comfortable with "feminine" appearance. At age ten (10), he briefly wore some girls' clothes, but after ten and a half (10 ½) years of age until present, he has only worn boys' clothes. When he came out as "trans," the Noe family worked with him to bind his chest, and later to help him when monthly periods began at the onset of puberty. Being medically diagnosed with gender dysphoria, Child Noe becomes severely distressed if his body or clothing display typical female characteristics.

45. Child Noe is in the marching band at his high school and for almost three (3) years since his sixth (6th) grade year when he came out as a transgender boy, Child Noe has been permitted in the FCPS system to use the boys' restrooms without incident although in middle school a non-binary restroom was made available to him, and he mostly used it. The Noe parents, and Child Noe, have informed his high school administrators that Child Noe is a transgender boy.

46. Child Noe currently insists he must "hold it" and not use the school restrooms because he fears that if he does, school personnel pursuant to SB 150 § 3 (codified as KRS 158.189), will make him use only the girls' restrooms. Upon information and belief, his high school's boys' restrooms have separate stalls that Child Noe could use to maintain privacy between himself and other students using the restroom at the same time. Child Noe's fear of being forced to use only girls' restrooms aggravates his gender dysphoria, and makes him take unhealthy actions – *i.e*, "holding it" – which adversely impacts his educational opportunities for success in school.

47. On or about September 25, 2023, Jane Noe, for and on behalf of Child Noe, sent a letter to the school administrators of his high school with copies to the main offices of the FCPS

exercising Child Noe's constitutional, statutory, and regulatory rights to privacy and confidentiality in any and all personally identifying information, chromosome information, and at-birth anatomy or assignment of sex information as may be shown on Child Noe's birth certificate or any other information as to same that may be maintained by the FCPS within its computer systems.

Defendant Fayette County Board of Education (FCBE) and Defendant Kentucky Attorney General Daniel J. Cameron

48. Defendant, Fayette County Board of Education (FCBE) is the governing body of the FCPS and is vested with such powers as are afforded to school boards and school districts within various statutes codified into the Kentucky Education Code, KRS Chapters 156-163, and regulations promulgated by the Kentucky Board of Education (KBE). The Defendant FCBE is imbued with specific powers and functions in KRS 160.160 and KRS 160.290 which include the "control and management of the public schools" within the FCPS system and "provid[ing] courses and other services as it deems necessary for the promotion of education and the general health and welfare of pupils, consistent with the administrative regulations of the [KBE]." KRS 160.290(1).

49. The Kentucky Department of Education (KDE) and Defendant FCBE responded to the enactment of SB 150's educational provisions by issuing policies and guidance, copies of which are attached as Exhibit B **(**KDE Legislative Guidance, pp. 7-11 – updated 6/5/23); Exhibit C (FCPS Policy 08.13531 – dated 6/26/23); Exhibit D (FCPS Policy 09.141 – dated 6/26/23); Exhibit E (FCPS SB 150 Guidance).

50. On July 6, 2023, the Kentucky Office of Attorney General (OAG) issued an opinion (OAG Op. No. 23-04) that purports to interpret SB 150 in reaction to the KDE legislative guidance (Exhibit B), a copy of which opinion is attached as Exhibit F.

51. Defendant Daniel J. Cameron is joined in this action in his official capacity as the

elected occupant of the Kentucky constitutional office of "Attorney General" prescribed in Kentucky Constitution § 93. Defendant Attorney General Cameron heads the Commonwealth's "Department of Law" with duties and responsibilities as set out within KRS Chapter 15.

52. KRS 15.020(1) states that Attorney General Cameron "is the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and . . . and shall exercise all common law duties and authority pertaining to the office of the Attorney General under the common law."

53. The Attorney General's common law duties include the "responsibility to ... vindicate public rights." *Comm. of Ky OAG ex rel. Beshear v. Comm. of Ky., Office of Gov. ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016). The Attorney General has "power to institute, conduct and maintain suits and proceedings for the enforcement of [state] laws…, the preservation of order, and the protection of public rights," *id*. at 362, and to take any action "necessary to protect the public interest," *Comm. of Ky. ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974). He not only has "power to bring suit …, but appears to have even the duty to do so.'" *Beshear*, at 362.

JURISDICTION AND VENUE

54. An actual, justiciable controversy exists, and this Court has subject matter jurisdiction over this action pursuant to KRS 418.040, KRS 23A.010, CR 57 and CR 65.

55. Venue is proper in the Fayette County Circuit Court pursuant to KRS 452.005(2)(a) and 452.460(1) because this action is against the Defendant FCBE which operates within Fayette County, Kentucky. The named Plaintiffs, and the putative Class members, likewise reside in Fayette County. Moreover, since this action seeks declaratory and injunctive relief in a challenge to the constitutionality of certain Kentucky statutes (*i.e.*, SB 150), it is properly filed in this Court.

56. In accordance with KRS 418.075 and KRS 452.005(1) & (3), and because Attorney

General Cameron is named as a co-Defendant in his official capacity in this action, Plaintiffs certify that a true and correct copy of this Complaint has been served upon the Attorney General.

CLASS ACTION ALLEGATIONS

57. Plaintiffs initiate this action for themselves individually, and as Next Friends and Parents of their respective children, and also as representatives on behalf of individuals similarly situated, to redress violations of the Kentucky Constitution, state statutory and regulatory laws, and the common law, and they request the Court to certify this action to proceed as a class action.

Proposed Class Definitions

58. The "**Fayette County Parents of School-Aged Children Class**" (sometimes referred to as the "**FCPS Parents' Class**"), which should be defined as:

> All parents of school-aged children residing in Fayette County, Kentucky who have at least one child
>
> **a.** currently enrolled in a public school within the FCPS system and subject to, or governed by Defendant FCBE's policies, procedures, and oversight,
>
> **OR**
>
> **b.** not currently enrolled in a school within the FCPS system, but entitled to become enrolled in a future year,
>
> **AND**
>
> **c.** The parent of each such child is subject to either or both of the following:
>
> **(i)** The FCPS system obtaining or using their child's "original, unedited birth certificate" for any purpose other than determining their child's residency and age, or eligibility to participate in interscholastic athletic activities or sports,
>
> **AND/OR**
>
> **(ii)** The FCPS system, or any person or entity on its behalf, collecting, testing, screening for, or otherwise obtaining and retaining, or requiring parents to collect, test, screen for, or otherwise obtain and disclose to a school within the FCPS system for the school's retention, any information regarding their child's "chromosomes" and physical "anatomy" as "identified at birth."

59. The "**Students and Parents for Complete Education Class**" (sometimes referred to as the "**Students-Parents for Complete Education Class**" or simply "**Complete Education Class**"), which should be defined as:

> All students who attend or could attend a public school within the FCPS system subject to, and governed by Defendant FCBE's policies, procedures, and oversight who are being denied a complete and full education (*i.e.*, instruction, curricula, and/or presentations) at appropriate grade levels on such topics as human sexual body parts, organs, and functions; appropriate and inappropriate touching of human sexual body parts and organs; physical, mental, and emotional changes that occur with the onset of puberty; the risks and prevention of sexually transmitted diseases; different gender identities, gender expressions and sexual orientations, and transgender persons. This "Complete Education Class" also includes the consenting parents of each student who is being denied such complete and full education.

60. The "**LGBTQIA[1] Students and Supportive Parents Class**" (sometimes referred to as the "**LGBTQIA Student/Supportive-Parent Class"** or simply "**LGBTQIA Class"**), which should be defined as:

> All students who identify as LGBTQIA and who attend or could attend a public school within the FCPS system subject to, and governed by the Defendant FCBE's policies, procedures, and oversight. This "LGBTQIA Class" also includes all supportive parents of such LGBTQIA students who attend or could attend a public school within the FCPS system.

61. The "**Trans-Students and Supportive Parents Class**" (sometimes referred to as the "**Trans Student/Supportive-Parent Class**" or simply "**Trans Class**"), which should be defined as:

[1] In this Complaint, the acronym "LGBTQIA" is used to stand for "Lesbian, Gay, Bisexual, Transgender, Questioning, Intersexual, and Asexual." As medical science progresses, terminology such as "intersexual" may become outdated. If a discordance exists at birth among three human processes or bodily functions such as chromosomal, gonadal, and phenotypic sex determination, a "disorder of sex development" (DSD) is now considered to be the result. The acronym "DSD" is therefore emerging as a more appropriate reference to "intersex" after the 2006 International Consensus Conference on Intersex organized by the Lawson Wilkins Pediatric Endocrine Society and the European Society for Pediatric Endocrinology. *See* K. Mehmood & R. Rentea, *Ambiguous Genitalia and Disorders of Sexual Differentiation* (Mar. 20, 2023), published as a portion of the "Continuing Education Activity" by the National Library of Medicine, National Center for Biotechnology Information. For purposes of this Complaint, however, the acronym "LGBTQIA," and specifically the "I" in that acronym, is used for "intersexual" instead of any newer terminology such as DSD.

> All students who identify as transgender and who seek to start, have already started, or completed social transitioning of their gender (male to female or female to male), and who attend or could attend a public school within the FCPS system subject to, and governed by the Defendant FCBE's policies, procedures, and oversight. This "Trans Class" of students also includes all supportive parents of such transgender students who attend or could attend a public school within the FCPS system.

62. Numerosity. The four classes proposed to be defined above in ¶¶ 58-61 are comprised of individuals too numerous to count, and far more than 25-50 persons. The members of the "Students-Parents for Complete Education Class," the "LGBTQIA Student/Supportive-Parent Class," and the "Trans-Students and Supportive Parents Class" partially overlap with, and thus constitute a sub-class of, the members of the "FCPS Parents' Class," but the "FCPS Parents' Class" does not have student or school-aged members as the "Complete Education Class," the "LGBTQIA Class," and the "Trans Class." Also, the members of the "LGBTQIA Class" and the "Trans Class" overlap with regard to transgender students and their supportive parents.

63. Upon information and belief, there are approximately 41,415 K-12 students enrolled in the FCPS system.[2] And assuming that at least one parent of each school-aged child resides in Fayette County, the "FCPS Parents' Class" could easily include more than 41,415 members.

64. Likewise, if at least one parent of each school-aged child resides in Fayette County, the size of the "Complete Education Class" could number 82,830 members. There are often multiple children within a single Fayette County household because the typical American household statistically has just under two (2) children per household. *See* Statista Research. Assuming Fayette County households follow the typical American statistic of just under two (2) children in the household, the size of this Class could be 62,123 ((41,415 students) + (½ x 41415

[2] School population data obtained from *Public School Review* re: "Fayette County School District," as found here: Fayette County School District (2023) - Lexington, KY (publicschoolreview.com).

- one parent of a 2-parent multi-child household) = ~62,123). But, this Class could include both parents residing in Fayette County, and so easily number between 62,123 and 82,830. Regardless how calculated, the size of the "Complete Education Class" easily exceeds required numerosity.

65. Upon information and belief, and based on average state population data, there were approximately 294,345 high school aged students (13-17 years of age) statewide during 2020-21.

66. Upon information and belief, and based on average county population data, there were approximately 21,231 high school aged students (13-17 years of age) in Fayette County, Kentucky during 2020-21.

67. According to the "Williams Institute" of the University of California at Los Angeles (UCLA) Law School, as of September 2020, there were a total of 27,000 "LGBT" students in Kentucky between the ages of 13-17 (generally high school population) and a total of 1,850 transgender students within those ages. *See* LGBT-Youth-US-Pop-Sep-2020.pdf (ucla.edu).

68. Based on this "Williams Institute" data, the statewide percentage of (a) the "LGBT" youth population in Kentucky between 13-17 years of age is equal to 9.2% (27000/294345 = ~.092) and (b) the Kentucky transgender youth population in the same age range is equal to .63% (1850/294345 = ~.0063). Assuming these statewide percentages apply evenly in each county including Fayette County, then the "LGBT" youth population in Fayette County between 13-17 years of age is equal to 1,953 "LGBT" young people (0.092 x 21231 = ~1,953) and the transgender youth population in Fayette County is equal to 134 transgender people (.0063 x 21231 = ~134).

69. Upon information and belief, the number of students in high schools within the FCPS system total to approximately 13,400 students, and these students' age ranges roughly include 13-17 years of age (give or take a year). Applying the above estimated numbers of Fayette County's "LGBT" and transgender young people to the approximate number of FCPS high school

students, it can be estimated that the number of "LGBT" students within high schools in the FCPS system is approximately 1,233 students (13400 x .092 = ~1233) and the number of transgender students in FCPS high schools is approximately 84 students (13400 x .0063 = ~84).

70. Assuming at least one parent of each "LGBT" and transgender student in a high school within the FCPS system is supportive of their child, the approximate size of the "LGBTQIA Student/Supportive-Parent Class" as proposed in ¶ 60 above is at least 2,466 members (1233 x 2 = ~2446) and the approximate size of the "Trans Student/Supportive-Parent Class" as proposed in ¶ 61 above is at least 168 members (84 x 2 = ~168). The membership of these two Classes is likely to be more than these numbers, perhaps up to twice as many more, since often both parents of an "LGBT" or a transgender student is supportive.

71. Furthermore, since the members of the two putative Classes discussed in ¶¶ 67-70 above focus on 13-17 year olds, the entire membership of those Classes is likely undercounted because the estimated Class sizes do not include middle and elementary school aged students – *i.e.*, those younger than 13 years of age or 18 years of age or older. As a result, the size of the "LGBTQIA Student/Supportive-Parent Class" likely numbers much more than 2,446 and the "Trans Student/Supportive-Parent Class" much more than 168 when accounting for FCPS students under 13 years of age and 18 years or older.

72. This action should proceed as a class action because each of the four proposed Classes easily satisfy the numerosity requirements of CR 23.01.

73. Commonality. Common questions of law and fact exist as between the members of the putative Classes as exemplified in ¶ 77 below.

74. It is also more desirable to have the common questions adjudicated in this single class action within the Fayette County Circuit Court rather than to have individual adjudications

in multiple forums in differing divisions of this Court or another court outside of Fayette County. Likewise, the difficulties in adjudicating these common questions in a class action format are no more complicated, indeed much easier, if the questions are litigated in this one action.

75. Finally, because of the highly sensitive and private nature of many of the common questions, several putative Class members have not to date chosen, and may not later choose to individually prosecute the common questions raised in this action for fear of retaliation by one or both of the Defendants or others who may support SB 150's educational provisions. Counsel for the Plaintiffs knows that this fear exists and is severe, and that many putative Class members are too afraid to individually prosecute the common questions raised in this action.

76. For the aforementioned reasons, the Court should find that this action may proceed as a class action, and the Court should approve of the proposed definitions of the four Classes (as recited in ¶¶ 58-61 above), and permit the putative members of each of these proposed Classes to litigate the common questions as set out below.

77. **Common Questions.** The resolution of the following common questions will likely dispose of the legal issues, claims, and defenses that must be litigated between the Plaintiffs (and the putative Plaintiff Class members) and the Defendants. These common questions include, but are not necessarily limited to:

Common Privacy and Confidentiality Questions Raised by the "FCPS Parents' Class," the "LGBTQIA Student/Supportive-Parent Class," and the "Trans Student/Supportive-Parent Class"

a. Whether SB 150 § 1(4), (5)(b) & (5)(c) violate students' fundamental, constitutional right to an education and entitlement to a safe and welcoming school climate and learning environment in public school by arbitrarily permitting school personnel or other students to invade their privacy and confidentiality rights, and similarly to violate their parents' rights to have their children be provided such climate and environment since parents must send their children to school under compulsory school attendance laws?

b. Whether SB 150 § 3(1)(a), (2)(a), (2)(c), (2)(e) & (3) and FCPS Policy No. 09.141 (Exhibit D) violate (i) students' fundamental, constitutional right to an education by arbitrarily, and in violation of each student's right to privacy and confidentiality, requiring school officials to "determine[]" each student's "chromosomes" and physical "anatomy" as "identified at birth" before permitting the student to use a school restroom, locker room, or shower room, and (ii) parents' rights to have public schools respect parental decisions regarding their child's upbringing and control, and provide their child with a safe and healthy school climate and welcoming learning environment that allows the child to use a school restroom, locker room, or shower room without school officials arbitrarily invading their child's and family's rights to privacy and confidentiality?

Common Questions Raised by the "Students-Parents for Complete Education Class," "LGBTQIA Student/Supportive-Parent Class," and the "Trans Student/Supportive-Parent Class"

c. Whether SB 150 § 2(1)(d) & 2(1)(e) and FCPS Policy No. 08.13531 (Exhibit C) violate students' fundamental right to an education by prohibiting instruction, curriculum or presentations on topics of mental and physical self-knowledge and wellness and preventing sufficient knowledge to make informed social and political system choices pursuant to core values, and sufficient advanced training to enable intelligent pursuit of life's work and skills to compete favorably with other states' students in the academic or job market – each of which is identified as a fundamental capacity of a student's constitutional right to receive a public education within *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989), and enshrined as their right to an appropriate and quality education in, *e.g.*, KRS 158.645; KRS 7.410(1); KRS 157.195; and KRS 158.6451(2)?

d. Whether SB 150 § 2(1)(d) & 2(1)(e) and FCPS Policy No. 08.13531 (Exhibit C) violate students' fundamental right to education by prohibiting instruction, curriculum or presentations on "human sexuality" with no definition of that term, and requiring schools to adopt a "policy to respect parental rights," but forbidding students in grade five (5) and below from receiving any instruction on "human sexuality" irrespective of parental approval, and forbidding any student "regardless of grade level" or parental consent from receiving instruction with "a goal or purpose of … studying or exploring gender identity, gender expression, or sexual orientation"?

e. Whether SB 150 § 2(1)(d) and FCPS Policy No. 08.13531 (Exhibit C) violate Kentucky Constitution §§ 1, 2, 3, 59 &/or 60 because (i) this law arbitrarily singles out for discriminatory and unequal-protection-of-the-law prohibition a facet of education regarding students' mental and physical wellness in violation of *Rose* and statutes enshrining its holding into Kentucky's "general" education laws and (ii) this law amounts to "special" legislation because Kentucky's education code contains "general acts" that

govern development of school curriculum and instruction tied to statewide educational academic standards, school accountability, and school assessment? In light of these existent "general" laws, does SB 150 § 2(1)(d) and FCPS Policy No. 08.13531 (Exhibit C) violate the equal protection, non-arbitrariness and anti-discrimination guarantees of, and/or special legislation prohibitions in, Kentucky Constitution §§ 1, 2, 3, 59 &/or 60?

f. Whether SB 150 § 2(d) and FCPS Policy No. 08.13531 (Exhibit C) violate Kentucky Constitution §§ 1, 2, 3, 5 & 8's guarantees of free speech, freedom of thought, and rights of conscience by banning education on "human sexuality" in elementary grades (without defining what that entails) and further singling out and banning any instruction, curriculum or presentation "regardless of grade level" with the "goal or purpose of … studying or exploring gender identity, gender expression, or sexual orientation" in grade six (6) or above even with advance parental notification and a parent's written consent to such instruction in contravention of the Kentucky Constitution's prohibition on laws intended to operate as vehicles for content discrimination?

Common Questions Raised by the "LGBTQIA Student/Supportive-Parent Class" and the "Trans Student/Supportive-Parent Class"

g. Whether SB 150 §§ 1-3 (and FCPS's policies implementing same) violate Kentucky's "general" civil rights laws requiring schools to offer equal educational programs, benefits and services to every Kentucky student free of any form of discrimination "on the basis of sex" per the SEE Act, KRS 344.550 *et seq.*, which is a "general act" enacted simultaneously with the "Kentucky Education Reform Act" (KERA) that enshrines *Rose's* constitutional requirement that public schools must provide equal educational opportunities, programs, benefits, and services to *all* students without discrimination or segregation based on sex, gender identity, gender expression, or sexual orientation?

h. Whether SB 150 §§ 1-3 violate Kentucky Constitution §§ 1, 2, 3, 59, and/or 60 as "special act" provisions that alter, amend, or repeal (in whole or in part) the "general" anti-discrimination school law provisions of the SEE Act prohibiting any form of sex or gender discrimination, or that restrict – contrary to equal protection – the SEE Act's "general" civil rights guarantee to *all* students not to be discriminated against in public school on the basis of sex, gender identity, gender expression, or sexual orientation, or that grant special powers or privileges to any school employee or student not to be required by the school district to use another student's preferred, parent-approved pronouns despite the employee's or student's refusal to use such pronouns infringing on the other student's right to be respected in school and provided a safe, welcoming school climate and learning environment?

Common Question Raised by the "Trans Student/Supportive-Parent Class"

i. Whether SB 150 § 1(4) & (5)(b) & (5)(c) and SB 150 § 3(1)(a), (2)(a), (2)(c), (2)(e) & (3) and FCPS Policy No. 09.141 (Exhibit D) violate Kentucky Constitution §§ 1, 2, 3 & 8 by arbitrarily singling out transgender students for discriminatory and unequal treatment in the public schools and depriving such students of equal access to the same educational programs, benefits and services as are provided to *all* other students in violation of the foregoing Constitutional Sections and the SEE Act, KRS 344.550 *et seq.*?

78. **Typicality**. The claims alleged by and on behalf of the Plaintiffs and the resultant harms to them are typical of the claims of each member of the proposed Classes defined in ¶¶ 58-61 above. Typicality exists because all absent members of the proposed Classes are injured or at risk of similar injury by the Defendants' employees or agents committing the same violations of the above-referenced state constitutional and statutory rights and protections.

79. **Adequacy of Representation**. Adequacy of representation exists because the Plaintiffs will fairly and adequately protect the interests of each member of the putative Classes. Moreover, there is no conflict of interest between any of the Plaintiffs and absent Class members. Each Plaintiff-student appears by a "Next Friend," who is the student's parent or guardian, and who has sufficient knowledge of the child's situation to fairly and adequately represent the child's interests in this action as well as those of the prospective members of each putative Class.

80. Plaintiffs are furthermore represented by Douglas L. McSwain, Michelle D. Wyrick, Mitzi D. Wyrick, and Jordan P. Saylor of Wyatt, Tarrant & Combs, LLP, a law firm with offices in Lexington and Louisville, Kentucky, as well as Indiana and Tennessee. Collectively, these attorneys have extensive experience litigating complex class action lawsuits as well as substantial experience in representing clients in education matters and litigating those issues when required. Plaintiffs' attorneys have committed sufficient resources to investigate these claims and are well-suited to fairly and adequately represent the interests of each putative Class member.

81. Given the likely size of each proposed Class, joinder of each class member as an individual party is impracticable, and the prosecution of common questions in separate actions is overly burdensome and likely to create unacceptable risks of varying adjudication results or incompatible standards of conduct for the Defendants. Moreover, individual adjudications as to one or a few putative Class members would, as a practical matter, be dispositive of the interests of similarly situated individuals. Accordingly, the requirements of CR 23.02(a)(i) and (ii) are easily satisfied to proceed as a class action.

82. The Defendants have acted, and will continue to act in the future, on the same grounds generally applicable to the proposed Classes, making it appropriate to grant final injunctive and declaratory relief to, and on behalf of, each member of the proposed Classes as a whole. Accordingly, the requirements of CR 23.02(b) are also fully satisfied.

SB 150's LEGISLATIVE HISTORY

83. SB 150, originally titled "AN ACT relating to rights in public schools" included only Sections 1 and 2 of the final bill. SB 150 was referred to the Senate Education Committee on February 8, 2023. The Committee met and passed the bill on February 9, 2023. Then, on February 16, 2023, the Committee considered and passed a Senate Substitute (1) of SB 150. The Substitute bill made minor changes to the original bill's language, and was then passed by the full Kentucky Senate on that same date.

84. SB 150 was received in the Kentucky House of Representatives on February 17, 2023 and had two readings before an emergency meeting of the House Education Committee was called with only six minutes notice provided to anyone (including the public) to discuss the provisions of SB 150. This six-minute notice violated Kentucky's Open Meetings law. KRS 61.823 requires every public agency (including legislative committees) to provide written notice

of their special meetings, which must consist of the date, time, and place of the special meeting and the agenda. In addition, KRS 61.823 requires that written notice be delivered to every member of the public agency as well as each media organization which has filed a written request to receive notice of special meetings. The notice must be received "as soon as possible," but "it ***shall be received*** at least 24 hours before the special meeting." (Emphasis added).

85. At this emergency meeting, a House Committee Substitute for SB 150 was first presented. The House clerk did not have a digital copy of the newly drafted House Committee Substitute to share, nor was the bill available to the public at the time. The House Committee Substitute was passed and the bill's title was changed to "AN ACT relating to children."

86. Approximately an hour after this House Committee meeting was called — and about 30 minutes after the Committee vote — the bill came up for a vote on the Kentucky House of Representatives floor. SB 150 was passed by the House and returned to the Kentucky Senate for concurrence, where the Senate concurred in its passage as amended in House.

87. Governor Andrew G. Beshear vetoed SB 150, but the veto was overridden by both the Kentucky Senate and the Kentucky House of Representatives on March 29, 2023.

CLAIMS

COUNT I

Violations of the Fundamental Right to a Public Education and Privacy Rights

SB 150 §§ 1-3 Violate Plaintiffs' Fundamental Rights to a Public Education, Privacy and Confidentiality in Contravention of Kentucky Constitution §§ 1, 2, 3 & 183

88. The allegations in Paragraphs 1 through 87 are realleged and incorporated herein by reference.

89. SB 150 has three educational sections – §§ 1, 2 & 3 – and SB 150 § 4 restricts medical procedures for transgender children. SB 150 § 1 is codified into KRS 158.191; SB 150 §

2 is codified into KRS 158.1415; and SB 150 § 3 is codified into KRS 158.189. Hereafter, SB 150's educational sections may be referenced by their Kentucky Revised Statute (KRS) numbers.

90. Defendants' enforcement of KRS 158.189(1)(a), (2)-(4) and KRS 158.191(5)(c) violate the fundamental, constitutional right to a public education that is possessed by the Plaintiffs and the putative members of the proposed "FCPS Parents' Class," the "LGBTQIA Student/Supportive-Parent Class," and the "Trans Student/Supportive-Parent Class."

The Fundamental Right to a Public Education

91. Parents and children in Kentucky have a fundamental, constitutionally based right to receive a public education. The Kentucky Supreme Court held in *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) that the framers of Kentucky Constitution §183 believed "education is essential to the welfare of the citizens of the commonwealth." *Id.* at 206. Therefore, the Court expressly "recognize[d] that ***education is a fundamental right in Kentucky***." *Id.* (emphasis added). The Court found that "education is perhaps the most important function of state and local governments" and that no child can "reasonably be expected to succeed in life if he is denied the opportunity of an education. ***Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms***." *Id.* at 190 (emphasis added). "The premise for the existence of common schools is that ***all children in Kentucky have a constitutional right to an adequate education***." *Id.* at 213 (emphasis added).

92. The *Rose* decision not only recognized a fundamental, constitutional right to a public education, but further found "[t]hat [such] ***fundamental right is reiterated and expanded in our statutes,***" citing "KRS 158.010, *et seq.*" *Id.* at 201 (emphasis added). This reiteration and expansion can be easily seen in, *e.g.*, KRS 158.645; KRS 7.410(1); KRS 157.195.

93. KRS 157.310 declares: "It is the intention of the General Assembly to assure

substantially ***equal public school educational opportunities*** for those in attendance in the public schools." (Emphasis added). Pursuant to "general" legislation of the General Assembly for the "management of common [public] schools" (Ky. Const. § 59, Twenty-fifth), public school students, and their parents, are imbued with statutory rights, privileges, and responsibilities spelled out in various post-*Rose* enacted statutes within the "Kentucky Education Reform Act" (KERA), as amended, which were passed to fulfill the legislature's obligation to provide an efficient system of common schools that meets and satisfies ***every child's*** fundamental right to a public education.

94. Two additional "general acts" pertaining to the "management of common schools" further enshrine ***each and every*** Kentucky child's fundamental, constitutional public education right into Kentucky law. These acts reflect protections provided under federal civil rights laws and family educational privacy rights. *See* KRS 344.550 - .575 (the SEE Act was enacted post-*Rose* in 1990 simultaneously with KERA) and KRS 160.700 - .730 (KFERPA was enacted in 1994).

95. Under the aforementioned statutes, parents of school-aged children and students are responsible for attending schools pursuant to state compulsory school attendance laws. KRS 159.010; KRS 158.030. They are also responsible to "assist schools with efforts to assure student attendance, preparation for school, and involvement in learning" – a "necessary" condition for public education that requires "cooperation" between "all" [*i.e.*, schools, students and parents] "to assure that desired outcomes are achieved." KRS 158.645. In exchange for fulfilling these "cooperation" responsibilities, the General Assembly promises students and parents "a system of public education ***which shall allow and assist all students*** to acquire the … capacities" recited in *Rose*, at 212. KRS 158.645 (emphasis added). This statutory promise extends to ***every*** student.

96. KRS 157.195 "declares that ***all students*** of the Commonwealth ***have a right*** to an ***appropriate and quality education*** in the public schools and ***the right to achieve the capacities***

under KRS 158.645." (Emphasis added). KRS 7.410(1) recites the General Assembly's intent "to provide an efficient system of common schools which … shall have the goal of ***providing all students with at least the*** … ***capacities*** referred to in KRS 158.645." (Emphasis added). KRS 158.030(1) further provides: "No school shall be deemed a 'common school' or receive support from public taxation unless ... ***every child residing in the district*** … has had ***the privilege of attending it***." (Emphasis added). Notably, the "capacities" named in KRS 158.645 and referenced in other "general" legislation pertaining to public education mirror the constitutionally mandated "capacities" recited in *Rose*, at 212. And these "capacities" outline the *minimum* parameters required of a public education to fulfill the fundamental constitutional right of ***every*** student.

97. Kentucky's fundamental, constitutional right to a public education is unconditional save for students' and parents' need to fulfill "cooperation" responsibilities to attend, prepare for, and be involved in learning within their schools per KRS 158.645. When they do so, the General Assembly ***must*** fulfill its constitutional duty and statutory promise to "***allow and assist all students to acquire***" the minimum capacities that comprise the fundamental right to a public education. *Id.* (emphasis added).

98. By virtue of this fundamental, constitutional right, the General Assembly, and the Defendants, possess no power or authority to establish or enforce arbitrary, discriminatory, and privacy-invasive conditions that restrict or burden the right of *every* child to receive – and the right of *every* parent's child the opportunity to receive – an appropriate and quality public education.

99. Any undue, unwarranted, arbitrary, discriminatory, or privacy-invasive burdens on this fundamental, constitutional right are subject to strict scrutiny by this Court.

KRS 158.191(5)(c) Unconstitutionally Burdens the Fundamental Right to a Public Education Through Arbitrary and Discriminatory Invasions of Privacy Rights

100. KRS 158.191(4) requires schools to "respect the rights of parents to make decisions

regarding the upbringing and control of the[ir] student [child]" by following "procedures [that] encourag[e] students to discuss mental or physical health or life issues with their parents or through facilitating the discussion with their parents."

101. KRS 158.191(5)(c), however, inconsistently, and thus arbitrarily, prohibits school districts (including the Defendant FCBE) from "requir[ing] school personnel or students to use pronouns for students that do not conform to that particular student's biological sex" – a prohibition that prevents school districts from following the statute's mandate to "respect the rights of parents to make decisions regarding the upbringing and control" of their child, and this violates the parent's right to have their child's schools respect their student's preferred, parent-approved pronouns.

102. KRS 158.191(5)(c)'s defines the term "biological sex" by incorporating the preceding subsection (*i.e.*, KRS 158.191(5)***(b)***) where the term is defined to mean a student's "original, unedited birth certificate issued at the time of birth" and provided to school "pursuant to KRS 156.070(2)(g)2." This "biological sex" definition, however, is arbitrary, discriminatory and invades privacy rights.

103. "KRS 156.070(2)(g)2." is a statute that concerns student eligibility to participate in interscholastic athletic activities or sports. It requires students to provide "an original, unedited birth certificate," ***or*** a sworn medical professional's affidavit "establishing the student's biological sex at the time of birth," and more importantly, its requirements to establish "biological sex" exist solely "***for the purpose of*** determining eligibility to participate in an athletic activity or sport." (Emphasis added).

104. It is self-evident that not all students participate in, or seek eligibility to participate in, a school's interscholastic athletic activities or sports.

105. The definition of "biological sex" in KRS 158.191(5)(b) becomes operative based

on what a specified birth certificate says if provided to school "pursuant to KRS 156.070(2)(g)2." KRS 158.191(5)(b) & (5)(c), however, convert this otherwise benign sports-related eligibility law – that exists solely "for the purpose of" athletic activities or sports – into an arbitrary and discriminatory law that purports to permit a school employee or student to invade another student's privacy by discerning whether the other student's preferred, parent-approved, pronouns conform to the "biological sex" shown on the other student's "original, unedited birth certificate."

106. KRS 158.032(3) plainly allows a student to be enrolled in school without a birth certificate because it permits, using the disjunctive "or," other "reliable proof of the student's identity and age" to be provided to the school instead of a child's birth certificate.

107. In fact, Defendant FCBE recites on the FCPS "Registration and Enrollment" webpage under "Paperwork Checklist," only the following "Must-Have[]" enrollment documents:

> FCPS must receive a legal copy of the child's birth certificate ***or another official document proving the child's identity and date of birth***. The following are acceptable alternatives: Adoption records; Valid passport or other federal government identification; Military identification or immigration card; Valid Kentucky drivers' license or permit; Prior school records (other than FCPS) identifying the student by name and date of birth, or [a]; Statement: "At this time, I am unable to provide the school with one of the acceptable forms of proof listed above. I understand that this constitutes a written notice that Kentucky state law requires that I provide the certified birth certificate or one of the above-listed items to the school within 30 days of student enrollment. (Emphasis added).

108. Furthermore, not every child or parent even has access to an "original, unedited birth certificate." This is especially true for adopted children and their parents. Indeed, school officials are legally prohibited from viewing an adopted child's original birth certificate without a court order. *See e.g.*, KRS 199.570(2) (a new birth certificate is issued upon adoption); KRS 199.570(1)(a) (court order is required to inspect original birth certificate of an adopted child); KRS 213.071(4), (6) (an adopted child's original birth certificate is "sealed").

109. For adopted students and their parents, it invades their privacy and confidentiality

rights to provide a school an "original, unedited birth certificate," and it burdens their fundamental right to a public education to have to provide such a certificate so that each school employee or another student will show respect to the adopted student by using the student's preferred, parent-approved pronouns.

110. KRS 158.191(5)(c) in effect licenses a school employee to show *disrespect* towards a student by the intentional "misgendering" of a student if the student's preferred pronouns do not conform to the "biological sex" shown on the student's "original, unedited birth certificate." However, no statute can authorize a school employee to intentionally show disrespect toward a student. This violates the student's "[r]ight to freedom from abuse and threat of abuse by members of school faculties and administration personnel." KRS 160.295(6)(e). And it invalidates the "expectation" that every public school student is promised, and every parent expects, and that is that the student will always "be treated with respect" – an expectation grounded in the fundamental right to a public education and "general" school laws carrying that right out. And it is never an option for an FCPS employee to disregard respecting a student on the basis of gender, gender identity or expression or sexual orientation as reflected in the "2023-24 Statement on Expectations and Responsibilities: Code of Conduct Student Guide" ("FCPS School Conduct Code" or "SCS") §§ 3.06, 3.01, 3.02, pp. 11 & 9 (each student is promised "[t]o be treated ***respectfully***, regardless of race, color, national origin, age, religion, sex, gender identity, sexual orientation, or disability" and likewise each school employee "is responsible for ... behavioral expectations to achieve a safe, civil, equitable and ***respectful***" learning "environment") (emphasis added)).

111. Furthermore, no statute can grant permission to refuse to use a student's preferred, parent-approved pronouns based on whether the preferred pronouns conform to what shows on the student's "original, unedited birth certificate" – a certificate the school may not possess, has no

power to make parents provide, and cannot ever require parents of adopted students to provide.

112. Because birth certificates – whether unedited and original or newly created after a child's adoption – contain personal, private and confidential information, it is a violation of, and a burden on the fundamental, constitutional right to a public education for KRS 158.191(5)(c) to impose arbitrary, discriminatory, and privacy-invasive conditions on a student's right to be treated with respect by school employees in order to realize that right, and also an unconstitutional burden on the parental right to expect schools to respect the parents' decisions as to their child's upbringing and control – a right that parents possess due to compulsory school attendance laws.

113. The fundamental right to a public education possessed by the Plaintiffs and the putative members of the "FCPS Parents' Class," the "LGBTQIA Class," and the "Trans Class" are unconstitutionally burdened by KRS 158.191(5)(c) because it requires them to forfeit, without consent, their constitutional and statutory rights of privacy and confidentiality in so-called "biological sex" information indicated on their student's "original, unedited birth certificate."

114. Likewise, the Plaintiffs and the putative parent members of the "FCPS Parents' Class," of the "LGBTQIA Class," and of the "Trans Class" have a right to expect school personnel not to intentionally disrespect their student through "misgendering." Indeed, the Plaintiffs and putative members of each these Classes cannot constitutionally be compelled to forfeit their privacy and confidentiality rights in birth certificate information just to be assured that each school employee will comply with the legal obligation to always show respect towards, and abide by, each student's right to be free from abuse, or threat of abuse, and never subjected to disrespect through an employee's intentional "misgendering" the student.

115. To comply with KRS 158.191(5)(c), school districts including the Defendant FCBE have no choice but (a) to make arbitrary or discriminatory demands on parents to provide the

school with their student's "original, unedited birth certificate" to determine what it says regarding the student's birth-assigned gender (or failing that, to make arbitrary or discriminatory assumptions about what it says), and (b) if a school does somehow obtain that specific certificate, to make privacy-invasive disclosures, directly or indirectly, to others as to what "biological sex" information shows on it, without the express consent required by, and thus in violation of, the student's and family's privacy rights protected in Kentucky's Constitution and in KFERPA, KRS 160.700 *et seq.*.

116. Beyond "school personnel," KRS 158.191(5)(c) extends its prohibition on school districts (including the Defendant FCBE) to prevent districts from "requir[ing] … ***students*** [emphasis added] to use pronouns for [other] students that do not conform to [the other student's] … biological sex." KRS 158.191(5)(c)'s extended applicability to "students" (beyond just "school personnel") precludes schools from being able to provide a positive and welcoming learning environment that creates a sense of "belonging" for *all* students because it negates school officials' authority to maintain order and control over any student who intentionally or willfully disrespects, verbally abuses, or harasses another student who has non-conforming gender identity, gender expression, or non-majority sexual orientation, by repeatedly "misgendering" the other student.

117. KRS 158.191(5)(c)'s extended applicability to "students" also negates school districts' "general" school law duty to implement and employ a multitiered system of supports and interventions to assist every student having difficulty with appropriate behavior towards other students. *See* KRS 158.305(2)-(3); 704 KAR 3:095; adopted by the Defendant FCBE in the FCPS School Conduct Code § 2.01, "Behavior Management Philosophy, pp. 5-7.

118. Also, KRS 158.191(5)(c)'s extended applicability to "students" arbitrarily and discriminatorily obliges school officials to violate the students' and family's privacy rights under

KFERPA, KRS 160.700 *et seq.*, by revealing, directly or indirectly, without the requisite KFERPA consent, the private and confidential personal information that shows on the student's birth certificate to another student who refuses to use the student's preferred, parent-approved pronouns.

119. Finally, KRS 158.191(5)(c)'s extended applicability to "students" arbitrarily and discriminatorily impedes school officials from vigorously, consistently, and equitably enforcing the school's statutory duties to prevent, correct, and discipline unwanted student-on-student harassment, bullying, verbal abuse, harassing communications, or other social misbehavior among students that has the potential to be repeated and to materially disrupt the educational process or interfere with the equal educational opportunities of every student. *See* KRS 158.148 (school conduct codes to require anti-bullying, prescribe acceptable student behavior, and specify potential discipline); KRS 160.295(7) (students to refrain from "infring[ing] on the rights of others"); KRS 158.150(1)(a) (a student's willful abuse of another can be cause for suspension or expulsion); KRS 525.070(1)(f) & .080(1)(c) (criminalizing student-on-student harassment, a student-created hostile learning environment, and the utterance of harassing communications to another student).

KRS 158.189(1)(a) & (3)-(4) and FCPS Policy No. 09.141 (Exhibit D) Unconstitutionally Burden the Fundamental Right to a Public Education Through Arbitrary and Discriminatory Privacy Invasions

KRS 158.189(1)(a)'s Definition of "Biological Sex" is Useless and Unworkable

120. KRS 158.189(1)(a) defines "[b]iological sex" [to] mean[] the ***physical condition of being male or female***, which is determined by a person's ***chromosomes***, and is ***identified at birth by a person's anatomy***." This definition involves two conjunctive parts: first, a student's "chromosomes," and second, an identification "at birth" of a student's "anatomy" and "physical condition of being male or female."

121. As to the first part regarding "chromosomes," it is a matter of scientific fact that a

person's "chromosomes" contain genetic information. Students and their biologically related parents – indeed, entire biologically related families – share in common their genetic information. "Chromosomes" and genomic information are highly sensitive, personal, private and confidential information protected by the Kentucky Constitution and numerous statutes and laws.

122. KRS 158.189 provides no authority to schools to collect, test, screen for, or contract with others to collect, test, or screen for a student's "chromosomes." The statute utterly fails to answer "how" a school is supposed to obtain the highly confidential and private information of "chromosomes," and it utterly fails to provide "how" a school – if able to obtain a student's "chromosomes"– must handle and secure the student's chromosome information once obtained.

123. As to the second part of this statute's "biological sex" definition, the statute again utterly fails to answer "how" a school is supposed to determine, and what documentary or testimonial evidence suffices to verify, that a student's "physical condition" and "anatomy" was "identified at birth" as "being male or female" by someone years earlier in the student's life.

124. KRS 158.189 is devoid of answers to either of these "how" questions that arise out of the statute's "biological sex" definition. And notably, KRS 158.189 confers no power or authority onto school districts or school officials to compel parents to provide their student's "chromosomes" or to provide evidence of an at-birth "identif[ication]" of their student's "physical condition" and "anatomy" as "male or female."

125. Plaintiffs and the putative members of the "FCPS Parents' Class," the "LGBTQIA Class," and the "Trans Class" possess privacy and confidentiality rights in their personal "biometric records," "personally identifiable information," "health and personal data," chromosomes and chromosome information, and at-birth anatomical information regarding a student's "biological sex" (as defined in KRS 158.189(1)(a)), which are protected within the

Kentucky Constitution (*e.g., Comm. v. Wasson,* 842 S.W. 2d 487, 497-500 (Ky. 1992)), and in multiple statutes and regulatory laws (*e.g.,* KRS 160.700-.730 (KFERPA); KRS 213.131(1) (birth certificate is private and confidential not subject to public disclosure absent court order); KRS 213.991 (2)(e) & (3), and Cabinet for Health & Family Services' Kentucky Registrar Guidelines, pp. 5 & 36-37 (reciting "confidentiality" of birth certificate and limiting verification of same to other government agencies including "School Systems"); KRS 211.670(1) (establishing confidentiality of hospitals' and medical laboratories' birth registry records); KRS 311.705(2) (establishing statutory guidelines for maintaining privacy, confidentiality, security, and integrity of genetic testing information, which includes chromosomes, and prohibiting release of same without a person's consent).

FCPS Policy No. 09.141 (Exhibit D) Provides No Clarity in Defining "Biological Sex"

126. The Defendant FCBE adopted FCPS Policy No. 09.141 (Exhibit D) on June 26, 2023, to implement KRS 158.189. But this FCBE policy provides no answers to the "how" questions raised in ¶¶ 121-123 above. FCPS Policy No. 09.141 (Exhibit D) utterly fails to clarify what school officials must do to obtain the information required to make KRS 158.189(1)(a)'s two-part definition work. As a result, school officials within the FCPS system are left with the choice of not enforcing the statute in accordance with the dictates of its two-part definition or enforcing it arbitrarily and discriminatorily against only select students, and neither choice may be constitutionally left up to an individual school employee to choose on an arbitrary *ad hoc* basis.

127. Even if a school official could somehow obtain a test or screening result regarding a student's "chromosomes" and also verify an at-birth "identif[ication]" of the student's "physical condition" and "anatomy," KRS 158.189(1)(a) provides no standards to school officials to "determine[]" from these two pieces of information what a student's "biological sex" is. Such a

"determin[ation]" involves medical and counseling competencies that only qualified professionals who have been licensed by the Kentucky Board of Medical Licensure may perform. *See* KRS 311.690(5), (9)(a)-(d), (g) & KRS 311.691. School officials are unlicensed and untrained to make such a "determin[ation]" as is required by KRS 158.189(1)(a), and thus, any "determin[ation]" a school employee attempts to make regarding a student's "biological sex" inevitably violates the Kentucky Constitution's prohibition on arbitrary, discriminatory, and privacy-invasive action.

128. In the absence of answers to the above "how" questions and lacking FCBE policy clarity, as well as the impossibility of school officials making "determin[ations]" as required by the definition of "biological sex," KRS 158.189 cannot be enforced without violating Kentucky Constitution §§ 1, 2, 3 and 183's fundamental right to a public education since enforcement of this statute is unavoidably arbitrary and discriminatory, and necessarily invades the privacy and confidentiality rights of the Plaintiffs and the putative members of the "FCPS Parents' Class," the "LGBTQIA Class," and the "Trans Class."

129. An unfortunate example of how KRS 158.189 has already given rise to unconstitutional arbitrary and discriminatory action that is invasive of privacy and confidentiality rights can be seen in the invasion of privacy that agents or employees of the Defendant FCBE perpetrated against the Plaintiff Child Roe and the Roe family as pleaded in ¶¶ 30 -31 above.

KRS 158.189(2)-(4) Cannot Constitutionally Be Enforced

130. KRS 158.189(2) goes on to recite "find[ings]" as to students' "privacy rights," to wit: that "[c]hildren and young adults have natural and normal concerns about privacy ..., and most wish for members of the opposite biological sex not to be present" while in various states of undress. It further "finds" that "[a]llowing students to use restrooms, locker rooms, or shower rooms … reserved for students of a different biological sex … [w]ill create a significant potential

for disruption of school activities and unsafe conditions" and "potential embarrassment, shame, and psychological injury to students." It then "finds" that "[p]arents have a reasonable expectation that schools will not allow minor children to be viewed in various states of undress by members of the opposite biological sex" and that school personnel have a "duty to protect the dignity, health, welfare, and privacy rights of students" and to respect students' privacy rights "including the right not to … undress or be unclothed in the presence of members of the opposite biological sex."

131. KRS 158.189(3) requires local boards of education including the Defendant FCBE to "adopt policies necessary to protect the privacy rights outlined in [KRS 158.189(2)] and [to] enforce" same, but mandates: "policies shall, at a minimum, not allow students to use restrooms, locker rooms, or shower rooms that are reserved for students of a different biological sex."

132. KRS 158.189(4)(a) goes on to provide that:

> A student who asserts to school officials that his or her gender is different from his or her biological sex and whose parent or legal guardian provides written consent to school officials shall be provided with the best available accommodation, but that accommodation shall not include the use of school restrooms, locker rooms, or shower rooms designated for use by students of the opposite biological sex while students of the opposite biological sex are present or could be present.

KRS 158.189(4)(b) then adds "[a]cceptable accommodations may include but are not limited to access to single-stall restrooms or controlled use of faculty bathrooms, locker rooms, or shower rooms."

133. As a result of KRS 158.189(1)(a)'s definition of "biological sex," school officials must determine *every* student's "physical condition of being male or female" by inspecting every student's "chromosomes" and every student's physical "anatomy" as "identified at birth." Without inspecting and determining *each and every* student's "biological sex," school officials cannot know if a restroom, locker room, or shower room may legally be used by a specific student or must be "reserved for students of a ***different biological sex***." KRS 158.189(2)(c) (emphasis added).

134. Likewise, school officials cannot fulfill their duty to protect "privacy rights" under KRS 158.189(2)(e), and their duty not to compel any student "to undress or be unclothed in the presence of members of the ***opposite biological sex***" (emphasis added), without determining the "biological sex" as defined in KRS 158.189(1)(a) for *each and every* student in the school.

135. Even if school officials could determine each student's "biological sex," they next must segregate each "student who asserts his or her gender is different from his or her biological sex" and do so regardless if parental written consent exists to support the student's assertion in order to provide the asserting-student the "best available accommodation." But the school remains unconditionally prohibited from providing any "accommodation" that "include[s] the use of school restrooms, locker rooms, or shower rooms designated for use by students of the opposite biological sex while students of the opposite biological sex are present or could be present." This prohibition applies no matter whether another "accommodation," such as "single-stall restrooms," exists or the school can provide "controlled use of faculty bathrooms, locker rooms, or shower rooms."

136. The purported "best accommodation" and alternative "accommodations" set out in KRS 158.189(4)(a) and (4)(b), are unconstitutionally arbitrary and illusory because they, as with the rest of KRS 158.189's provisions, are incapable of enforcement without oppressive and discriminatory action that invades the privacy and confidentiality rights of students and parents.

137. Neither are the purported accommodations in KRS 158.189(4)(a) and (4)(b) the least restrictive alternatives available due to the mandatory unconditional prohibition in subsection (4)(a) that forbids any student from using a school restroom while other students are present or could be present irrespective of whether private stalls or some other privacy-protective measure exists in the school's restrooms or could otherwise be deployed by the school.

138. Each subsection of KRS 158.189 is unconstitutional because its provisions impose

unconstitutional burdens and restrictions on the fundamental right to a public education. No child can attend a public school and be a student therein without ready access to a school restroom.

139. As a result, the fundamental educational rights of each of the Plaintiffs and the putative members of the "LGBTQIA Class" and the "Trans Class" are violated due to KRS 158.189's arbitrary and discriminatory removal of access to school restrooms for the Plaintiff-students and student members of such Classes by barring schools from providing feasible, non-segregation-based, lesser restrictive accommodations – such as private stalls – that would avoid discriminatory segregation during a common classroom release of students to use the restroom.

KRS 158.1415(1)(d) & (1)(e)) and FCPS Policy No. 08.13531 (Exhibit C) Unconstitutionally Burden the Fundamental Right to a Public Education

Neither KRS 158.1415, Nor FCPS Policy No. 08.13531 (Exhibit C), Define "Human Sexuality"

140. KRS 158.1415(1) provides that "[i]f a school council or, if none exists, the principal adopts a curriculum for human sexuality or sexually transmitted diseases, instruction shall include but not be limited to . . . (d) A policy to respect parental rights." This subsection goes on to prescribe that the school's "policy to respect parental rights" must "ensur[e] that:

> 1. Children in grade five (5) and below do not receive any instruction through curriculum or programs on human sexuality or sexually transmitted diseases; or
>
> 2. Any child, regardless of grade level, enrolled in the district does not receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation; and
>
> (e) A policy to notify a parent in advance and obtain the parent's written consent before the parent's child in grade six (6) or above receives any instruction through curriculum or programs on human sexuality or sexually transmitted diseases authorized in this section.

141. The Defendant FCBE adopted FCPS Policy No. 08.13531 (Exhibit C) on June 26, 2023 to implement KRS 158.1415(1)(d) *et seq.*, and this policy opts to ban instruction on "human

sexuality or sexually transmitted diseases" in grade five (5) and below. It omits mention of KRS 158.1415(1)(d)2.'s ban in all grades on "any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation."

142. The Defendant Attorney General Cameron's OAG Op. No. 23-04 (Exhibit F) takes the position that the FCPS policy's omission in mentioning any ban "regardless of grade level" of students studying "gender identity, gender expression, or sexual orientation" is based on an incorrect reading of KRS 158.1415(1)(d) & (1)(e). *See* Exhibit F.

143. Other than in its title, KRS 158.1415 uses the term "human sexuality" seven (7) times, but fails to define what this two-word term ("human sexuality") means. The Defendant FCBE's FCPS Policy No. 08.13531 (Exhibit C) uses the term too, but also fails to define it.

144. No straightforward dictionary definition clarifies what this two-word term means, or what its breadth or scope entails. Because no clear definition exists, it remains unclear what students in grade five (5) and below can and cannot legally be taught. This lack of clarity in the meaning and scope of "human sexuality" casts a chilling effect on whether elementary grade students can be taught anything about, *e.g.,* (a) identification of human sexual organs, functions, and private body parts; (b) what is and is not appropriate touching of a student's private sexual body parts and what to do if inappropriately touched; and (c) what to expect in physical, emotional, mental, and hormonal changes in human sexual organs, body parts, and functions during puberty (*e.g.*, the onset and frequency of menstruation, body hair growth, breast development, etc.).

KRS 158.1415(1)(d) Violates the Fundamental, Constitutional Right to a Public Education

145. Each of the topics (a)-(c) in ¶ 143 above (and no doubt other topics), constitute minimally what a child must be taught in public education pursuant to *Rose's* fourth enumerated (*i.e.*, "(iv)") fundamental educational capacity, 790 S.W.2d at 212, which is incorporated into KRS

158.645(5). *Rose* holds that the fundamental, constitutional right to a public education "must have ***as its goal*** to provide each and every child with ***at least*** the … following capacities: … [inclusive of] (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness." *Rose,* at 212 (emphasis added); *cf.* KRS 158.645(5); KRS 158.6451(1)(e); KRS 157.195; KRS 7.410(1).

146. Both KRS 158.1415(1)(d)1., and FCPS Policy No. 08.13531 (Exhibit C), fail this *Rose* "goal" test and instead, actually prevent, public education from providing students in grade five (5) and below with "sufficient self-knowledge and knowledge of … mental and physical wellness" to safely protect themselves from the tragic offense of child sexual abuse. On occasion, a parent or other adult or minor living in the same household with an elementary grade student will commit child sexual abuse, and because this occurs, it is matter of absolute safety for students in the lowest of these elementary grades to be taught in public school what is and is not appropriate touching of the student's private sexual body parts. If these children do not learn such things in school, they may never learn such things before the devastation of sexual abuse occurs to them.

147. Similarly, KRS 158.1415(1)(d)1. and FCPS Policy No. 08.13531 (Exhibit C) also fail this *Rose* "goal" test of public education providing students with sufficient understanding of what to expect as their bodies, minds, and emotions mature, and as they prepare for, and start to undergo physical, emotional, and hormonal changes attendant to puberty. Menstruation for some females can occur during elementary grades – for a few children as early as third (3^{rd}) or fourth (4^{th}) grade. It is an utter and complete failure of a public educational system to ban instruction in grade five (5) and below regarding what puberty will entail in the lives of each and every student.

148. This utter and complete failure in the public educational system created by KRS 158.1415(1)(d)1. cannot be justified for grade five (5) and below based on a purported "policy to respect parental rights." Such "respect" does not and cannot constitutionally – consistent with the

fundamental right to a public education – include requiring schools to "ensure[] that" no instruction occurs *at all* "on human sexuality or sexually transmitted diseases" within every elementary grade. The constitutional goalpost for education in such grades is to provide "sufficient self-knowledge and knowledge of … mental and physical wellness," and a complete ban on teaching the topics in (a)-(c) in ¶ 143 above, blocks achieving that fundamental "goal." *Rose*, at 212; KRS 158.645(5).

149. The General Assembly's evident intent with KRS 158.1415(1)(d) appears on the face of subdivision (1)(d)***2.***, which states: "Any child, regardless of grade level, enrolled in the district does not receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation." The legislative purpose behind this statutory subdivision was, in whole or in part, to impose a ban on instruction at any and all grade levels regarding "gender identity, gender expression, or sexual orientation."

150. Indeed, the Defendant Attorney General's OAG Op. No. 23-04 (Exhibit F) confirms this was the legislative "goal" when he opines the "intent of the legislature is clear":

> ... KRS §158.1415(1)(d) seeks to ensure school districts respect parental rights by prohibiting two things: either (1) instruction on human sexuality or sexually transmitted diseases to students in grades 5 or below; or (2) instruction or presentations to students of any age that have the goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation. ... ***[T]he legislature['s] use of the disjunctive "or" in this section … means that both things*** [*i.e.*, both (1) and (2) as above-recited]***… are prohibited***. (Emphasis added).

151. Aside from the incorrect statutory construction that the Defendant Attorney General's opinion makes regarding how to read KRS 158.1415(1)(d), OAG Op. No. 23-04 (Exhibit F) embodies the General's *admission* that the legislative intent and purpose in passing KRS 158.1415(1)(d) was to accomplish a "goal" *other than* that required by *Rose* to provide students with the "capacity" to have "sufficient self-knowledge and knowledge of … mental and physical wellness." *Rose*, at 212. Thus, KRS 158.1415(1)(d)1., is unconstitutional because it not only fails

to provide, but actually *prohibits* students in grade five (5) and below from being taught *any* age-appropriate physical wellness and sexual health information so as to satisfy this fundamental "capacity" in public school elementary grades. KRS 157.195; KRS 158.645(5); KRS 7.410(1).

KRS 158.1415(1)(d)2.'s Ban on Any Instruction Regarding Gender Identity, Gender Expression, or Sexual Orientation Violates the Fundamental Right to a Public Education

152. KRS 158.1415(1)(a)-(b), which pre-existed the enactment of SB 150, states that "[i]f a school … adopts a curriculum for human sexuality or sexually transmitted diseases, instruction shall include this core value: that "[a]bstinence from sexual activity is the desirable goal for all school-age children … [and] the only certain way to avoid unintended pregnancy, sexually transmitted diseases, and other associated health problems" and that "[t]he best way to avoid … [such] diseases and … [such] health problems is to establish a permanent mutually faithful monogamous relationship."

153. KRS 158.1415(1)(d), added to the foregoing language by Section 2 of SB 150, now states that *if* a school provides curriculum for "human sexuality or sexually transmitted diseases," it must adopt a "policy of respecting parental rights" that "ensure[s] …. [no] instruction or presentation [regardless of grade level, is taught] that has a goal or purpose of students studying or exploring gender identity, gender expression ***or sexual orientation***." *Id*. at §(1)(d)2. (emphasis added). KRS 158.1415(1)(e) appears to authorize instruction on "human sexuality or sexually transmitted diseases" in grade six (6) or above but only if an advance parental notification policy is adopted and a "parent's written consent" is "obtain[ed]." *Id*. at § (1)(e). Unfortunately, this apparent authorization to instruct on "human sexuality and sexually transmitted diseases" in grade six (6) or above within subsection (1)(e) of KRS 158.1415, is illusory, and thus unconstitutional.

154. Nowhere in KRS 158.1415, and nowhere else in Kentucky's "general" school laws, is the term "sexual orientation" defined. Merriam-Webster's Dictionary defines it as a singular

noun with two iterations of meaning: (1) "a person's sexual identity or self-identification as bisexual, heterosexual, gay, etc." and (2) "the state of being bisexual, heterosexual, gay, etc." Merriam-Webster.com Dictionary.[3] Black's Law Dictionary defines it as meaning: "A person's predisposition or inclination toward sexual activity or behavior with other males or females; heterosexuality, homosexuality, or bisexuality." Black's Law Dictionary (11th ed. 1931). Notably, pursuant to both of these dictionary definitions, the term "sexual orientation" includes a person's preference for same-sex sexuality or bisexuality *and* heterosexuality as well as sexual identity.

155. Given KRS 158.1415's failure to define "human sexuality" and in light of the above dictionary definitions for "sexual orientation," KRS 158.1415(1)(d)2. entirely negates what KRS 158.1415(1)(e) appears to permit schools to teach regarding "human sexuality or sexually transmitted diseases" in grade six (6) or above despite any school-adopted policy requiring parental content notification and consent. Subdivision (1)(d)2. flatly prohibits "instruction or presentation[s]" in each grade level, with the "goal or purpose of students studying gender identity, gender expression, or *sexual orientation*." The result of this prohibition in view of the dictionary meaning of the term "sexual orientation" is that no instruction or presentations can ever be provided regarding human sexual health and wellness in any grade within the public school system.

156. For the above reasons, KRS 158.1415(d)(1)2. is unconstitutional because it was not enacted with a "goal" consistent with at least four of *Rose's* enumerated fundamental educational "capacities" and another fundamental educational "capacity" contained in the "general" school laws, *i.e.*, KRS 158.645(3). *Rose* specifies seven (7) "capacities," four of which are pertinent: "(iv) sufficient self-knowledge and knowledge of … [human] mental and physical wellness"

[3] Merriam-Webster online ("Sexual orientation"), https://www.merriam-webster.com/dictionary/sexual%20orientation. (accessed Sept. 26, 2023)

(*Rose*, at 212; KRS 158.645(5)); "(ii) sufficient knowledge of … social[] and political systems to enable the student to make informed choices" (*Rose*, at 212; KRS 158.645(2)); "(vi) sufficient training or preparation for advanced training … to enable each child to choose and pursue life work intelligently" (*Rose*, at 212; KRS 158.645(7)); and "(vii) sufficient levels of academic or vocational skills … to compete favorably" with students "in surrounding states, in academics or in the job market." *Rose* at 212; *cf.* KRS 158.645(8); *see also* KRS 158.760(2)(e) (mandating the goal of the "Schools-to-Careers System" "shall be" to "[m]ake all students aware of employer expectations" for success). KRS 158.645(3) also adds this fundamental "capacity": "[c]ore values and qualities of good character to make moral and ethical decisions throughout … life." *Id.*

157. KRS 158.1415(1)(d)2. was enacted, however, with the legislative intent and "goal" of banning instruction on "gender identity, gender expression, or sexual orientation" in every grade level as the Defendant Attorney General Cameron has opined. This ban violates the fundamental, constitutional right to a public education because it deprives public school students from receiving instruction on the *Rose* enumerated "capacities" of "(ii)," "(iv)," "(vi)," and "(vii)," and also the "capacity" added with KRS 158.645(3). Each of these "capacities" comprise components of every student's fundamental, constitutional right to a public education. *Rose*, at 212; KRS 158.645(2), (3), (5), (7) & (8); *see* KRS 157.195; KRS 7.410(1); KRS 158.6451(2); and KRS 158.760(2)(g).

158. This is true regarding *Rose's* enumerated capacity "(iv)" for the Plaintiff Doe, Poe, and Noe families, and the putative members of the "Complete Education Class," the "LGBTQIA Class," and the "Trans Class." For these Plaintiffs and putative Class members, having the opportunity to receive age-appropriate "human sexuality and sexually transmitted disease[]" education in grade six (6) or above – with parental notification and consent – that includes mention of gender identity, gender expression, and sexual orientation is critical because it provides students

with the fundamental "capacities" of "(iv) sufficient self-knowledge and knowledge of … [others'] mental and physical wellness" (*Rose,* at 212; KRS 158.645(5)); "(ii) sufficient knowledge of … social, and political systems to … make informed choices" (*Rose,* at 212; *cf.* KRS 158.645(2)); and "[c]ore values … to make moral and ethical decisions throughout … life." KRS 158.645(3).

159. Social, political, and core value choices and decisions regarding "gender identity, gender expression, [and] *sexual orientation*" are topics daily discussed in current events, news, and schools. Depriving students "regardless of grade level" from any education about these topics violates their, and their consenting parents' rights to an adequate, fundamental public education. Further, there logically cannot be any education regarding "[a]bstinence from sexual activity" being "desirable … for all school-age children … [and] the only … [and best] way to avoid unintended pregnancy, sexually transmitted diseases, and other associated health problems" before "establish[ing] a permanent mutually faithful monogamous relationship," as mandated within KRS 158.1415(1)(a)-(c), when KRS 158.1415(1)(d)2. flatly prohibits any instruction on "sexual orientation," a term that *includes* heterosexuality, same-sex sexuality, bisexual sexuality, etc..

160. Additionally, for the Plaintiff Poe and Noe families, and the putative high school members of the "Complete Education Class," the "LGBTQIA Class," and the "Trans Class" who are nearing post-secondary higher education and/or the world of work, the opportunity to receive instruction or presentations on gender identity, gender expression, and sexual orientation is critical to provide such students with the *Rose* enumerated "capacities": "(vi) sufficient ***training or preparation for*** advanced training to … choose and pursue life work intelligently" (*Rose,* at 212; *cf.* KRS 158.645(7)); and "(vii) sufficient levels of … skills … to compete favorably with … [students from other] states, in academics or in the job market" (*Rose,* at 212; *cf.* KRS 158.645(8)).

161. Students preparing to enter life's work must be provided "essential workplace

ethics instruction" including "[w]orking well with others [via] … effective communication skills, [and learning] respect for different points of view and diversity of coworkers, the ability to cooperate and collaborate, … and the ability to provide appropriate leadership to or support for colleagues," as provided in KRS 158.1413(1)(g). Students must also be made "aware of employer expectations in order to be successful." KRS 158.760(2)(e).

162. A fundamental education regarding essential workplace ethics and employer expectations for successful work necessarily includes being taught the legal and moral imperatives *never* to perpetrate or tolerate discrimination "on the basis of sex" or commit sexual assault or abuse within the workplace – an employment work ethic that also includes no discrimination, assault, or abuse on the basis of gender identity, gender expression, or sexual orientation. *See Bostock v.Clayton County, Ga.*, 590 U.S. ___, 140 S. Ct. 1731, 1741 (2020) (Title VII's "message" is simple: "An individual's homosexuality or transgender status is not relevant to employment decisions.… because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.").

163. Kentucky's workplace civil rights laws apply *Bostock's* Title VII "message" to each and every employer in the state. *See* KRS 344.020(1)(a) & (1)(b); KRS 344.040(1)(a) & (1)(b).

164. Banning all instruction "regardless of grade level" on "gender identity, gender expression, or sexual orientation" violates *Rose's* enumerated capacities "(vi)" and "(vii)," and KRS 158.645(7) & (8), KRS 158.1413(1)(g), and KRS 158.760(2)(e). And as a result, KRS 158.645(1(d)2. violates the fundamental right to a public education belonging to the Plaintiff Poe and Noe families, and the putative high school members of the "Complete Education Class," the "LGBTQIA Class," and the "Trans Class" in contravention of Kentucky Constitution § 183.

165. KRS 158.1415(1)(d)2.'s requirement that schools adopt a "policy to respect

parental rights" does not justify these violations of the fundamental, constitutional right to a public education of the Plaintiffs and the putative members of the "Complete Education Class," the "LGBTQIA Class," and the "Trans Class." "[P]arental respect" does not and cannot constitutionally – consistent with their fundamental right – require schools to "ensure[] that" no instruction "regardless of grade level" ever occurs with the "goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation" in high school where students are nearing the age of legal majority (and without parental consent, may engage in human sexual relations in or out of matrimony) and preparing to enter (if not already entered during high school) post-secondary higher education or the beginning of life's work.

166. As a result of the above-described constitutional violations of the fundamental right to a public education, and of constitutional protections against unequal protection, arbitrary governmental action and discrimination, special legislation, and invasion of privacy rights, the Plaintiffs, and the putative members of the "FCPS Parents' Class," the "Complete Education Class," the "LGBTQIA Class," and the "Trans Class" request the Court to declare the provisions of KRS 158.1415(1)(d)-(e), KRS 158.189, and KRS 158.191(5)(b)-(c) to be in contravention of Kentucky Constitution §§ 1, 2, 3, 59, 60 & 183, and to hold those provisions null and void, and enjoin same from enforcement.

COUNT II

Violations of Equal Protection and Arbitrariness, and Prohibitions on Special Legislation

SB 150 §§ 1-3 (codified into KRS 158.1415(1)(d)-(e), 158.189 and 158.191(5)(b)-(c)) Violate Kentucky Constitution §§ 1, 2, 3, 59 & 60

167. The allegations in Paragraphs 1 through 166 are realleged and incorporated herein by reference.

168. The educational provisions of SB 150 §§ 1-3 (codified into KRS 158.1415(1)(d)-

(e), KRS 158.189 and KRS 158.191(5)(c)) violate Kentucky's Constitutional protections against unequal protection of the laws and prohibitions on "special" legislation in Kentucky Constitution §§ 1, 2, 3, 59 & 60.

169. Kentucky Constitution § 59, Twenty-fifth prohibits the passing of "special acts" for the purpose of "provid[ing] for the management of common schools." Kentucky Constitution § 60 prohibits "indirectly" passing "special" legislation "by the repeal in part of a general act" and further prohibits any law from being enacted "that grant[s] powers or privileges … where the granting of such powers or privileges shall have been provided for by a general law." Kentucky's Constitutional prohibitions on "special acts" are triggered when the special laws apply to a particular person as opposed to classes of persons.

KRS 158.191(5) Violates Equal Protection and Prohibitions on Special Legislation

170. KRS 158.191(5)(b) and (c) violate the Constitutional "special" law prohibitions because they apply to a specific student – *i.e.,* the student whose preferred pronouns do not conform to the "biological sex" as shown on the student's "original, unedited birth certificate."

171. KRS 158.191(5)(c) violates equal protection of the law because it purports to grant to a school employee or a student the special power or privilege to not be required by the school district to act in a way that no "general" school law permits.

172. KRS 160.295 requires local school boards to adopt school conduct codes specifying students' "rights and responsibilities" and to include in such codes the "[r]ight to freedom from abuse and threat of abuse by members of school … personnel." *Id.* at § (6)(e). KRS 160.295(7) further requires in such codes that students "shall refrain … from infring[ing] on the rights of others." KRS 158.148 requires school boards to include in such codes the expectations of students for acceptable school behavior and school discipline guidelines. *Id.* at § 5(a). And KRS 158.150(1)

requires all students to comply with the school's conduct code and provides a student's "[w]illful disobedience or defiance" of school officials' authority and "abuse of other students" can constitute cause for suspension or expulsion.

173. KRS 158.6451(1) requires schools to develop students' ability to become "self-sufficient individuals of good character exhibiting the qualities of … justice … [and] ***respect*** …." (Emphasis added). KRS 158.6451(1)(e) goes on to require schools to "reduce physical and mental health barriers to learning."

174. KRS 158.4416(2) provides that "all schools must provide a place ***for students to feel safe and supported*** …. [and] adopt a trauma informed approach to education … where all students … can be ***safe,*** successful, and ***known well by at least one (1) adult in the school setting***." (Emphasis added). Schools must also "assess[] … ***school climate*** … [and] ***inclusiveness and respect for diversity***" (158.4416(5)(b) (emphasis added) and "[p]rovid[e] services and programs designed to … foster a ***positive and safe school environment for every student***" (158.4416(5)(e)(emphasis added).

175. KRS 158.305(2)-(3) requires the KDE to promulgate administrative regulations and to assist school districts in implementing a district-wide, multitiered system of supports and interventions that can identify and assist any student having difficulty with, *inter alia*, behavior. KRS 158.305(11) requires the KDE to provide teachers access to evidence-based research and age-appropriate instructional resources to use in improving the behaviors of students who communicate or act in ways that interfere with the learning of other students. The KDE has promulgated 704 KAR 3:095 accordingly, and the Defendant FCBE devotes pages of its FCPS School Conduct Code explaining its "Positive Behavioral Interventions and Supports" (PBIS), the behavioral component of FCPS's "Multi-Tiered System of Supports" (MTSS), adopted pursuant

to these "general" school laws. *See* SCS § 2.01, "Behavior Management Philosophy, pp. 5-7.

176. School conduct codes must include prohibitions on "bullying" – which means "any unwanted verbal … [or] social behavior among students that involves a … perceived power imbalance and is repeated or has the potential to be repeated … [and] disrupts the education process." KRS 158.148(1)(a) & (1)(c). Codes must state expected behaviors from each student and specify "consequences for the failure to obey [code] standards, and the importance of the standards to the maintenance of a safe learning environment where orderly learning is possible and encouraged." *Id.* at § (1)(d). School principals must apply codes "uniformly and fairly to each student at the school without partiality or discrimination." *Id.* at § (1)(f).

177. In the FCPS School Conduct Code, each student is "General[ly] Expect[ed]" to be "Respectful" by "[b]ehaving in a way that does not create disruption, disorder, or infringe on the rights of others." (SCS § 2.0, p. 7). Students are entitled to expect to "be treated ***respectfully, regardless of*** … ***sex, gender identity, sexual orientation*** …." (SCS §§ 3.06, 3.05, pp. 10-11)(emphasis added), and be "free from bullying, harassment, or abuse (of a verbal, physical, or sexual nature) or threat of [same] … by other students, [or by FCPS] employees …." (SCS § 3.06, p. 11). The Code further provides:

> Before disciplinary action is taken, students must first be ***supported in learning the skills necessary to enhance a positive school climate and avoid negative behavior***. ***Schools will teach positive school rules and social skills***, positively reinforce appropriate student behavior, ***provide early intervention and support strategies for misconduct,*** and use logical, ***meaningful consequences,*** including restorative practices." (SCS § 3.0, p. 9) (emphasis added).

178. The FCPS School Conduct Code specifies school personnel's responsibility for: "Defining, ***teaching***, reinforcing, ***modeling***, and reviewing ***school level behavioral expectations*** to achieve a safe, civil, equitable and respectful classroom environment that: 1) Is conducive to learning; and 2) promotes the rights of others." (SCS §§ 3.1 & 3.2, p. 9) (emphasis added).

179. In violation of the aforementioned "general" laws and the legally required provisions included within school conduct codes and in the FCPS School Conduct Code, KRS 158.191(5)(c) arbitrarily and discriminatorily grants special powers or privileges to "school personnel or students" to never be required by their school district's officials to have to comply with these "general" laws and abide by conduct standards that require a school employee to always show respect towards a student and a student to always show respect towards another student.

180. Disrespect occurs in school whenever a school employee intentionally "misgenders" a student by using gendered pronouns that the student does not want or prefer (and that the student's parent does not consent or approve to be used for the student). When a school employee purposefully and repeatedly uses "misgendering" pronouns for a student, it is no different than if the employee refuses to call the student by the correct name. If the student asks the school employee to use the student's correct name, and the employee still, intentionally refuses to use it, the employee violates the student's "[r]ight to [be] free[] from abuse or threat of abuse by members of school … personnel." KRS 160.295(6)(e).

181. Likewise, disrespect in school occurs whenever a student "misgenders" another, and the "misgendered" student considers it unwanted or unwelcome. If a power imbalance exists or is perceived to exist between the students, and the "misgendering" gets repeated or could be, it amounts to "bullying." KRS 158.148(1)(a); SCS § 4.01, p. 16). If it is severe or pervasive and discriminatorily motivated by gender identity, gender expression, or sexual orientation, and infringes on the student's right to be respected at school, it amounts to a sexually hostile learning environment. *See* KRS 160.295(7); SCS § 4.01, p. 19. If the "misgendering" is intended to harass or annoy, communicated for no legitimate purpose, and reasonably likely to make the "misgendered" student feel humiliated or embarrassed, it amounts to criminal harassment and/or

criminal harassing communication. KRS 525.070(1)(f)3. & .080(1)(c); SCS SCS § 4.01, p. 19. If the "misgendering" can reasonably be perceived as belittling or derogatory name-calling, it amounts to "verbal abuse." *See* KRS 160.295(7); SCS § 4.01, p. 23.

182. The foregoing legal prohibitions required under the "general acts" of Kentucky with respect to intentional disrespectful misconduct within the public schools that stem from willful or intentional "misgendering" cannot be taken away by a purported grant of "special" powers or privileges to willfully choose to misbehave and show disrespect under KRS 158.191(5)(c) wherein this subsection purports to prohiibt school districts (including the Defendant FCBE) from ever requiring a school employee or student to use pronouns for another student that do not conform to the gender shown on the other student's "original, unedited birth certificate." KRS 158.191(5)(c) unconstitutionally strips schools from the authority to prevent, correct, or discipline misbehavior inherent in any school employee's or student's intentional "misgendering" of another student.

183. Neither can this "special" power or privilege be justified as founded on a religious or political right. No one in the public schools has the legal prerogative to refuse to show respect towards a student by intentionally and repeatedly "misgendering" the student because such misbehavior is contrary to each and every one of the aforementioned "general" school laws and school conduct codes adopted thereunder. To the extent that KRS 158.191(5)(c) is an attempt to override those "general" legal prohibitions, it violates equal protection and is prohibited as "special" legislation by its purported grant of special powers or privileges to an individual (*i.e.*, a school employee or a student) to act in such a way that no one else is privileged or permitted to do within the public school system. As a result, it violates the equal protection guarantees of, and prohibitions on special legislation in Kentucky Constitution §§ 1, 2, 3, 59 & 60.

KRS 158.189 Violates Equal Protection and Prohibitions on Special Legislation

184. KRS 158.189(2) and (3) likewise violate the same Kentucky Constitutional provisions as discussed above because they apply to a specific student of a particular "biological sex" (as defined in KRS 158.189(1)(a)) who must be distinguished from a "student" of a "different" or "opposite" "biological sex." KRS 158.189(4) also violates the same Constitutional provisions because it applies to any "student who asserts … to school officials that [the student's] gender is different from [the student's] biological sex" (as defined in KRS 158.189(1)(a)).

KRS 158.1415(1)(d)2. Violates Prohibitions on Special Legislation

185. KRS 158.1415(1)(d)2.'s ban on instruction or curriculum regarding "gender identity, gender expression, or sexual orientation" was enacted, as the Defendant Attorney General opines, with the specific legislative intent and purpose of imposing a special interest ban on instruction regarding those specified topics.

186. "General" school laws already exist regarding the development of public school curriculum and instruction that require schools to follow statewide academic standards tied to statutory goals, school accountability, and assessment. *E.g.,* KRS 156.160(1)(a), (b), (d)-(e) & (h); KRS 158.6451(2); KRS 158.6453(18); KRS 160.345(2)(g); KRS 160.345(2)(i); *see also* 704 KAR 8:030 §§ 1 & 2 (KBE regulations adopting Academic Standards for Health Education). Notably, KRS 161.164(5) governs "controversial" instructional topics as to "public policy or social affairs" and requires such instruction to be based on students' "range of knowledge, understanding, age, and maturity" and to be "relevant, objective, nondiscriminatory, and respectful to" different views.

187. KRS 158.1415(1)(d) amounts to nothing more than a legislative attempt to enact "special" legislation to directly or indirectly repeal or amend the above "general" laws governing the development of age-appropriate school curriculum and instruction. As such, it is designed

merely to further a "specific purpose" that "favors a special interest to the detriment of the rest of society." *Calloway Cnty. Sheriff's Dep't v. Woodall*, 607 S.W.3d 557, 576 (Ky. 2020) (J. Keller, concurring), quoting *Yeoman v. Comm., Health Policy Bd.*, 983 S.W.2d 459, 468 (Ky. 1998).

188. As a result of these equal protection, arbitrariness, and special legislation violations, the Plaintiffs, and the putative members of the "Complete Education Class," the "LGBTQIA Class," and the "Trans Class" request the Court to declare the provisions of KRS 158.1415(1)(d)2., KRS 158.189 and KRS 158.191(5) to be in contravention of Kentucky Constitution §§ 1, 2, 3, 59 & 60, and to declare those provisions to be null and void, and enjoin same from enforcement.

COUNT III

Violations of Free Speech, Freedom of Thought, and Rights of Conscience

SB 150 § 2(1)(d) (codified into KRS 158.1415(1)(d)) Violates Kentucky Constitution §§ 1, 2, 3, 5 & 8

189. The allegations in Paragraphs 1 through 188 are realleged and incorporated by reference.

190. Kentucky Constitution §§ 1, 2, 3, 5 & 8 guarantee Kentuckians free speech, freedom of thought, and freedom of conscience rights. Kentucky's Bill of Rights prohibits the General Assembly from exercising legislative power to enact laws that infringe upon Kentuckians' free speech, freedom of thought, and rights of conscience protections within these Kentucky Constitutional sections. Ky. Const. § 26.

191. The legislature may possess legislative power to enact general laws pertaining to the management of common schools. Ky. Const. § 59, Twenty-fifth. And it may even possess power to restrict the teaching of certain subjects in the public schools – such as human sexual relations but solely with parental consent, but it does not possess the power to proscribe such subjects in contravention of *Rose's* requirement that sufficient knowledge and adequate education

be provided to all students in each of the minimum "capacities" constitutionally required to satisfy a student's fundamental right to a public education pursuant to Kentucky Constitution § 183.

KRS 158.1415(1)(d)2. & (e) Violate the Free Speech and Freedom of Thought Protections in Kentucky Constitution §§ 1, 2, 3, 5 & 8

192. The General Assembly cannot exercise its legislative power, however, to enact laws, and require their enforcement, if such laws function or operate as "vehicles for content discrimination unrelated to [the law's] distinctively proscribable content." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992). This quote from the *R.A.V.* decision, while not a binding interpretation on what the Kentucky Constitution's Bill of Rights guarantees, does embody the same non-arbitrariness, free speech and freedom of thought guarantees against arbitrary and discriminatory governmental action that operates as content discrimination in violation of protections in the Kentucky Bill of Rights within Kentucky Constitution §§ 1, 2, 3, 5 & 8.

193. Students and their parents have a fundamental, constitutional right to receive public educational instruction on each of the "capacities" recited in *Rose* and in KRS 158.645, and their right to receive such instruction cannot be restricted or prohibited based on intentional content discrimination against specified topics within those "capacities" (*i.e.*, "gender identity, gender expression, or sexual orientation"). Prohibited content discrimination can appear facially or by intentional, discriminatory purpose, and with KRS 158.1415(1)(d)2., such discrimination is both.

194. The Defendant Attorney General has opined what the General Assembly's intent was in enacting KRS 158.1415(1)(d) in his opinion in OAG Op. 23-04 (Exhibit F). As such, KRS 158.1415(1)(d)2.'s content discrimination is admittedly intentional. Furthermore, KRS 158.1415(1)(d)2.'s content discrimination appears facially within the text of the statute which discriminatorily singles out and proscribes any instruction on "gender identity, gender expression, or sexual orientation," "regardless of grade level" and ***despite*** a parent's advance notification of

instructional content and consent for their student to receive such instruction. The facial disparity in allowing instruction on "human sexuality and sexually transmitted diseases" in grade six (6) and above – subject to required parental notification and consent per subsections (1)(e), (2) & (3) of the statute – but prohibiting any such instruction whatsoever regarding "gender identity, gender expression, or sexual orientation" at any grade level (including grade six (6) and above) regardless of a parent's consent, demonstrates on its face the statute's impermissible content discrimination.

195. This intentional and facial content discrimination inherent in KRS 158.1415(1)(d)2. and (1)(e) is subject to strict scrutiny judicial review.

196. As a result of the above-described content discrimination in KRS 158.1415(1)(d)2. and (1)(e), the Plaintiffs, and the putative members of the "Complete Education Class," the "LGBTQIA Class," and the "Trans Class" request the Court to declare the provisions of KRS 158.1415(1)(d)2. and (1)(e) to be in violation of Kentucky Constitution §§ 1, 2, 3, 5 & 8, and to hold those provisions to be null and void, and enjoin same from enforcement.

KRS 158.1415(1)(d)2. & 158.191(5) Violate the Freedom of Thought and Rights of Conscience Protections in Kentucky Constitution §5

197. KRS 158.1415(1)(d)2., together with KRS 158.191(5)(c), further violate the freedom of thought and rights of conscience guarantees within Kentucky Constitution § 5. Section 5 of the Constitution guarantees religious freedom, and goes further to guarantee that no person's

> civil rights, privileges or capacities … shall be taken away, or in anywise diminished or enlarged, on account of [the person's] belief or disbelief of any religious tenet, dogma or teaching. ***No human authority shall, in any case whatever, control or interfere with the rights of conscience***. (Emphasis added).

198. The provisions of KRS 158.1415(1)(d)2. and 158.191(5)(c) were enacted to further the viewpoints of "human authorit[ies]" whom the General Assembly has arbitrarily and discriminatorily chosen to favor over those held by the Plaintiffs, and the putative members of the

"Complete Education Class," the "LGBTQIA Class," and the "Trans Class." As such, these statutes interfere with, diminish, or take away the civil rights and privileges and capacities of the rights of conscience and freedom of thought guaranteed to the Plaintiffs and the putative members of those Classes as protected in Kentucky Constitution § 5.

199. As a result of the above-described violations of free speech. freedom of thought, and rights of conscience, the Plaintiffs, and the putative members of the "Complete Education Class," the "LGBTQIA Class," and the "Trans Class" request the Court to declare the provisions of KRS 158.1415(1)(d)2. and 158.191(5)(c) to be in contravention of Kentucky Constitution §§ 1, 2, 3, 5 & 8, and to declare those provisions to be null and void, and enjoin same from enforcement.

COUNT IV

Violations of the SEE Act, KRS 344.550 *et seq.*, Equal Protection, Arbitrariness and Prohibitions on Special Legislation

SB 150 §§ 1(5)(b)-(c) & 3 (codified into KRS 158.191(5)(b)-(c) and KRS 158.189) Violate the SEE Act, KRS 344.555

200. The allegations in Paragraphs 1 through 199 are realleged and incorporated by reference.

201. KRS 344.555(1) states in pertinent part: "No person 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 state financial assistance." (Emphasis added).

202. KRS 344.010(5) defines for KRS Chapter 344 the term "[d]iscrimination" as "any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons, or the aiding, abetting, inciting, coercing, or compelling thereof …."

203. KRS 344.020(1)(a) recites the "purposes and construction" of the civil rights

protections within KRS Chapter 344 (which includes the SEE Act, KRS 344.550 - .575)), and it specifies that the Chapter's provisions must be construed "[t]o provide for execution within the state of the policies embodied in the Federal Civil Rights Act [CRA] of 1964 as amended …."

204. Title VII of the Civil Rights Act, codified at 42 U.S.C. § 2000e, prohibits discrimination on the basis of sex, gender identity, gender expression, or sexual orientation. *See Bostock v. Clayton Cnty., Ga.*, 590 U.S. ___, 140 S. Ct. 1731, 1741 (2019) (Title VII's simple "message" is that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.").

205. Given *Bostock's* plain text reading of what the same words "on the basis of sex" mean as used within the SEE Act, KRS 344.555(1), the SEE Act's prohibition on any form of "direct or indirect" discrimination based on sex within the public schools necessarily forbids any discrimination or segregation purportedly permitted against LGBTQIA and transgender students pursuant to the provisions of KRS 158.191(5)(b)-(c) and KRS 158.189.

206. KRS 344.280(1) makes it unlawful for any one or more persons to discriminate against any other person because of the latter's opposition to any of the civil rights violations created by KRS 158.191(5)(b)-(c) and KRS 158.189 in contravention of the SEE Act's "general" legislative requirements that equal educational opportunities and services must be provided to each and every public school student without discrimination on the basis of sex. KRS 344.555(1).

207. KRS 344.280(2), (3) & (5) make it unlawful for any one or more persons to "aid, abet, incite, compel or coerce" another "person" to engage in any form of discrimination prohibited in; or to "obstruct or prevent" another "person" from complying with the requirements of; or to "interfere with" anyone's exercise of civil rights protected within the SEE Act, KRS 344.555(1). "Person" is defined in KRS Chapter 344 to include the Defendants FCBE, the Kentucky Attorney

General, the Plaintiffs, and the putative members of the proposed Classes herein, as well as "the state, any of its political or civil subdivisions or agencies." KRS 344.010(1).

208. KRS 344.450 provides that "[a]ny person injured by any act in violation of the provisions of [*inter alia*, the SEE Act, KRS 344.555(1)] shall have a civil cause of action in Circuit Court to enjoin further violations, … together with the costs of the law suit. …[and an award of] a reasonable fee for the plaintiff's attorney of record."

209. The SEE Act, together with KRS 344.280 & 344.450, provide the Plaintiffs, and the putative members of the "LGBTQIA Class" and the "Trans Class" with a civil rights cause of action against the Defendants to declare the unlawfulness of, and to enjoin enforcement of, the provisions of KRS 158.191(5)(b)-(c) and KRS 158.189 because their provisions purport to create and establish forms of discrimination and segregation that violate the civil rights of LGBTQIA and transgender students "on the basis of sex."

The SEE Act is Violated by KRS 158.191(5)(c)

210. For example, KRS 158.191(5)(c) prevents public school districts from *ever* "requir[ing] [a] school [employee] or student[] to use pronouns for [an LGBTQIA] student[] that do not conform to that particular student's biological sex" as shown on the student's "original, unedited birth certificate." KRS 158.191(5)(b)-(c). The SEE Act, however, demands equality in treatment and equal opportunities, benefits and services for all students so that all may enjoy a safe and respectful school climate with a welcoming learning environment free of discrimination "on the basis of sex."

211. The SEE Act's commands for equality without discrimination based on sex may sometimes oblige school districts to *require* a school employee or student to show respect for an LGBTQIA or transgender student by using that student's preferred, parent-approved pronouns,

and not to willfully or repeatedly "misgender" such a student with unwelcome, unwanted pronouns that the student, and student's parent, perceive as insulting, belittling, humiliating, or embarrassing and an infringement on the student's sense of "belonging" at the school or school-related functions.

212. If a school district can never "require" an LGBTQIA student's preferred, parent-approved pronouns to be used by a school employee or student and those pronouns do not satisfy the "biological sex" definition in KRS 158.191(5)(b) as incorporated into subsection (5)(c), no school can provide an equally safe, respectful and welcoming learning environment to *all* students because it cannot prevent or correct harmful "misgendering" behavior, nor discipline the perpetrator after-the-fact, which may sometimes be required to ensure equal educational opportunities, programs, benefits, and services to and for *every* student regardless of sex, gender identity, gender expression or sexual orientation pursuant to the SEE Act.

The SEE Act is Violated by KRS 158.189

213. Likewise, KRS 158.189 violates the SEE Act's command that "[n]o [student] 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." KRS 344.555(1). This SEE Act command forbids any form of "discrimination," which includes injurious *segregation* on the basis of gender identity, gender expression, or sexual orientation.

214. KRS 158.189(3) and (4), however, purport to require local boards of education, including the Defendant FCBE, to adopt policies such as FCPS Policy No. 09.141 (Exhibit D) that compel the segregation of any student who asserts, even with parental approval or consent, that the student's gender is different from the student's "biological sex" (as that term is defined in KRS 158.189(1)(a)), and requires that such a student not be allowed to use a school restroom, locker room, or shower room while a student of the "opposite biological sex" is present or could be

present. This segregation in the use of school facilities is mandatory irrespective of whether a lesser restrictive alternative such as separate single-stall restrooms or some other equally privacy-protective measure exists within the school, or could be employed by the school.

215. The SEE Act, KRS 344.555(1), completely forbids forced, unnecessary, injurious and humiliating segregation between students on the basis of sex, gender identity, gender expression, or sexual orientation, and declares same to be a prohibited form of discrimination per the "general" civil rights laws made specifically applicable to the public schools. The SEE Act was enacted simultaneously in 1990 with the post-*Rose* KERA law, and the SEE Act's equality "on the basis of sex" provisions are equally enshrined into the fundamental, constitutional right of all students to receive a public education.

There is No Defense to KRS 158.189's and KRS 158.191(c)'s Violations of the SEE Act

216. It is no defense that the discriminatory provisions against LGBTQIA and transgender students within KRS 158.191(5)(b)-(c) or KRS 158.189 may be argued to amend, or partially repeal, the "general" civil rights protections contained in the SEE Act. The SEE Act is constitutionally grounded, and its guarantees extend to ***all students***, as *Rose* requires, with respect to their fundamental and equal right to a public education without discrimination based on sex. The SEE Act's guarantees cannot simply be amended away, and certainly not in an arbitrary and discriminatory way that violates equal protection and Kentucky Constitution §§ 1, 2, 3, 59 & 60.

217. Furthermore, the provisions in KRS 158.191(5)(c) purport to grant "special" powers or privileges to any school employee or student to never be required by a school district to have to use the preferred pronouns of an LGBTQIA or transgender student – despite the approval of the student's parents to have such pronouns used for the student – because these powers or privileges arbitrarily violate the constitutional guarantees of equal protection and constitutional

prohibitions on special legislation within Kentucky Constitution §§ 1, 2, 3, 59 & 60.

218. Furthermore, the "general" school laws already provide protections to every public school teacher and any other employee of a school district's board of education against discrimination "because of [] political or religious opinions or affiliations." KRS 161.164(4).

219. Also, the "general" school laws already protect the right of every student to say or express a student's religious or political views to others including to an LGBTQIA or transgender student, but a student's right in this respect is *not absolute* and cannot be so within the public school system. Instead, this right is *conditioned* on the student's exercise of it in such a way as *not* to "[i]nfringe on the rights of the school" to "[m]aintain order and discipline" among students, and to "[p]revent disruption of the educational process," and the student's exercise of this right must not "[h]arass other persons" or "[o]therwise infringe on [o]the[r's] rights." KRS 158.183(1).

220. This conditional right within KRS 158.183(1) – that a student may express the student's religious or political viewpoints (including the use of pronouns for others that the student thinks should be used) – must always be, and remain subject to the school's right to maintain discipline and order, prevent educational disruption, and prevent or stop harassment or infringement on another student's rights. This condition preserving the school's right to maintain discipline and order, prevent disruption, or stop harassment cannot be constitutionally taken away by a "special act" such as KRS 158.191(5)(c) that violates the constitutional guarantee of equal protection and special legislation prohibition within Kentucky Constitution §§ 1, 2, 3, 59 & 60.

221. KRS 158.191(5)(c) amounts to nothing but a violation of these Constitutional Sections because it strips public school districts from the authority to ensure that LGBTQIA and transgender students are not intentionally and repeatedly disrespected, insulted or harassed through "misgendering," and prevents school officials from maintaining order and discipline among

students which may sometimes require the prevention, correction, or discipline of a student who harasses or abuses an LGBTQIA or transgender student by repeatedly using unwanted and unwelcome pronouns for such a student and infringes on such student's equal enjoyment of a safe, non-hostile, and respectful school climate, and welcoming learning environment to which each and every student in Kentucky is fundamentally entitled pursuant to *Rose* and pursuant to the SEE Act regardless of the student's sex, gender identity, gender expression, or sexual orientation .

222. As a result of the above-described violations of the SEE Act and the constitutional violations of equal protection, special legislation, and the fundamental right to a public education, the Plaintiffs, and the putative members of the "LGBTQIA Class," and the "Trans Class" request the Court to declare the provisions of KRS 158.1415(1)(d)2., 158.189, and 158.191(5)(b)-(c) to be in violation of the SEE Act, the fundamental right to a public education, and Kentucky Constitution §§ 1, 2, 3, 59, 60 & 183, and to hold those provisions null and void, and to enjoin same from enforcement.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs, for themselves and for similarly situated individuals, by their counsel, pray for and demand relief as follows:

I. For an expedited review of this action pursuant to KRS 418.050 and CR 57.

II. For an Order that permits this case to proceed as a class action and that makes a finding that a class action method of adjudicating the common questions raised herein is appropriate and certifies the proposed Classes as defined in ¶¶ 58-61 above, to appoint the Plaintiffs as representatives of the members of the respective Classes pursuant to Kentucky Rules of Civil Procedure (CR) 23.01(a) and CR 23.02, and to appoint attorneys within the law firm of Wyatt, Tarrant & Combs, LLP as class counsel.

III. For an Order and Judgment declaring that KRS 158.1415(1)(d) *et seq.*, KRS 158.189, and KRS 158.191(5)(b)-(c) violate Sections 1, Third & Fourth, 2, 3, 5, 8 , 59, Twenty-fifth, and 60 of the Kentucky Constitution, the SEE Act, KRS 344.550 - .575, and KFERPA, KRS 160.700-.730.

IV. For the Court to issue a restraining order, temporary injunction, and/or permanent injunction, restraining and enjoining the Defendants FCBE and Attorney General Cameron, their agents, attorneys, representatives, and any other persons in active concert with them, from implementing or enforcing the statutory provisions specified in this Prayer for Relief, Paragraph III. above, and mandatorily ordering the Defendants to comply with the Plaintiffs' civil rights as embodied in the SEE Act, KRS 344.555(1), and prohibiting any further discrimination within the Fayette County public schools on the basis of sex.

V. For any and all further relief to which Plaintiffs and the putative members of the respective Classes defined in ¶¶ 58-61 above may appear to be entitled, including costs and an award of reasonable attorneys' fees.

Respectfully submitted,
WYATT, TARRANT & COMBS, LLP

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EXHIBIT A

CHAPTER 132

(SB 150)

AN ACT relating to children.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔SECTION 1. A NEW SECTION OF KRS CHAPTER 158 IS CREATED TO READ AS FOLLOWS:

(1) As used in this section:

(a) "External health care provider" means a provider of health or mental health services that is not employed by or contracted with the school district to provide services to the district's students;

(b) "Health services" has the same meaning as in KRS 156.502;

(c) "Mental health services" means services provided by a school-based mental health services provider as defined in KRS 158.4416 but shall not include academic or career counseling; and

(d) "Parent" means a person who has legal custody or control of the student such as a mother, father, or guardian.

(2) Upon a student's enrollment and at the beginning of each school year, the district shall provide a notification to the student's parents listing each of the health services and mental health services related to human sexuality, contraception, or family planning available at the student's school and of the parents' right to withhold consent or decline any of those specific services. A parent's consent to a health service or mental health service under this subsection shall not waive the parent's right to access the student's educational or health records held by the district or the notifications required under subsection (3) of this section.

(3) Except as provided in subsection (5) of this section, as part of a school district's effort to provide a safe and supportive learning environment for students, a school shall notify a student's parents if:

(a) The school changes the health services or mental health services related to human sexuality, contraception, or family planning that it provides, and shall obtain parental consent prior to providing health services or mental health services to the student; or

(b) School personnel make a referral:

1. For the student to receive a school's health services or mental health services; or

2. To an external health care provider, for which parental consent shall be obtained prior to the referral being made.

(4) School districts and district personnel shall respect the rights of parents to make decisions regarding the upbringing and control of the student through procedures encouraging students to discuss mental or physical health or life issues with their parents or through facilitating the discussion with their parents.

(5) (a) The Kentucky Board of Education or the Kentucky Department of Education shall not require or recommend that a local school district keep any student information confidential from a student's parents. A district or school shall not adopt policies or procedures with the intent of keeping any student information confidential from parents.

(b) The Kentucky Board of Education or the Kentucky Department of Education shall not require or recommend policies or procedures for the use of pronouns that do not conform to a student's biological sex as indicated on the student's original, unedited birth certificate issued at the time of birth pursuant to KRS 156.070(2)(g)2.

(c) A local school district shall not require school personnel or students to use pronouns for students that do not conform to that particular student's biological sex as referenced in paragraph (b) of this subsection.

(d) Nothing in this subsection shall prohibit a school district or district personnel from withholding information from a parent if a reasonably prudent person would believe, based on previous conduct and history, that the disclosure would result in the child becoming a dependent child or an abused or

neglected child as defined in KRS 600.020. The fact that district personnel withhold information from a parent under this subsection shall not in itself constitute evidence of failure to report dependency, neglect, or abuse to the Cabinet for Health and Family Services under KRS 620.030.

(6) Prior to a well-being questionnaire or assessment, or a health screening form being given to a child for research purposes, a school district shall provide the student's parent with access to review the material and shall obtain parental consent. Parental consent shall not be a general consent to these assessments or forms but shall be required for each assessment or form. A parent's refusal to consent shall not be an indicator of having a belief regarding the topic of the assessment or form.

(7) Nothing in this section shall:

(a) Prohibit a school district or the district's personnel from seeking or providing emergency medical or mental health services for a student as outlined in the district's policies; or

(b) Remove the duty to report pursuant to KRS 620.030 if district personnel has reasonable cause to believe the child is a dependent child or an abused or neglected child due to the risk of physical or emotional injury identified in KRS 600.020(1)(a)2. or as otherwise provided in that statute.

➔Section 2. KRS 158.1415 is amended to read as follows:

(1) If a school council or, if none exists, the principal adopts a curriculum for human sexuality or sexually transmitted diseases, instruction shall include but not be limited to the following content:

(a) ~~[(1)]~~ Abstinence from sexual activity is the desirable goal for all school-age children;

(b) ~~[(2)]~~ Abstinence from sexual activity is the only certain way to avoid unintended pregnancy, sexually transmitted diseases, and other associated health problems;~~[and]~~

(c) ~~[(3)]~~ The best way to avoid sexually transmitted diseases and other associated health problems is to establish a permanent mutually faithful monogamous relationship***;***

(d) A policy to respect parental rights by ensuring that:

1. Children in grade five (5) and below do not receive any instruction through curriculum or programs on human sexuality or sexually transmitted diseases; or

2. Any child, regardless of grade level, enrolled in the district does not receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation; and

(e) A policy to notify a parent in advance and obtain the parent's written consent before the parent's child in grade six (6) or above receives any instruction through curriculum or programs on human sexuality or sexually transmitted diseases authorized in this section.

(2) Any course, curriculum, or program offered by a public school on the subject of human sexuality provided by school personnel or by third parties authorized by the school shall:

(a) Provide an alternative course, curriculum, or program without any penalty to the student's grade or standing for students whose parents have not provided written consent as required in subsection (1)(e) of this section;

(b) Be subject to an inspection by parents of participating students that allows parents to review the following materials:

1. Curriculum;

2. Instructional materials;

3. Lesson plans;

4. Assessments or tests;

5. Surveys or questionnaires;

6. Assignments; and

7. Instructional activities;

(c) Be developmentally appropriate; and

(d) Be limited to a curriculum that has been subject to the reasonable review and response by stakeholders in conformity with this subsection and KRS 160.345(2).

(3) A public school offering any course, curriculum, or program on the subject of human sexuality shall provide written notification to the parents of a student at least two (2) weeks prior to the student's planned participation in the course, curriculum, or program. The written notification shall:

(a) Inform the parents of the provisions of subsection (2) of this section;

(b) Provide the date the course, curriculum, or program is scheduled to begin;

(c) Detail the process for a parent to review the materials outlined in subsection (2) of this section;

(d) Explain the process for a parent to provide written consent for the student's participation in the course, curriculum, or program; and

(e) Provide the contact information for the teacher or instructor of the course, curriculum, or program and a school administrator designated with oversight.

(4) Nothing in this section shall prohibit school personnel from:

(a) Discussing human sexuality, including the sexuality of any historic person, group, or public figure, where the discussion provides necessary context in relation to a topic of instruction from a curriculum approved pursuant to KRS 160.345; or

(b) Responding to a question from a student during class regarding human sexuality as it relates to a topic of instruction from a curriculum approved pursuant to KRS 160.345.

➔SECTION 3. A NEW SECTION OF KRS CHAPTER 158 IS CREATED TO READ AS FOLLOWS:

(1) As used in this section:

(a) "Biological sex" means the physical condition of being male or female, which is determined by a person's chromosomes, and is identified at birth by a person's anatomy; and

(b) "School" means a school under the control of a local board of education or a charter school board of directors.

(2) The General Assembly finds that:

(a) School personnel have a duty to protect the dignity, health, welfare, and privacy rights of students in their care;

(b) Children and young adults have natural and normal concerns about privacy while in various states of undress, and most wish for members of the opposite biological sex not to be present in those circumstances;

(c) Allowing students to use restrooms, locker rooms, or shower rooms that are reserved for students of a different biological sex:

1. Will create a significant potential for disruption of school activities and unsafe conditions; and

2. Will create potential embarrassment, shame, and psychological injury to students;

(d) Parents have a reasonable expectation that schools will not allow minor children to be viewed in various states of undress by members of the opposite biological sex, nor allow minor children to view members of the opposite sex in various states of undress; and

(e) Schools have a duty to respect and protect the privacy rights of students, including the right not to be compelled to undress or be unclothed in the presence of members of the opposite biological sex.

(3) Each local board of education or charter school board of directors shall, after allowing public comment on the issue at an open meeting, adopt policies necessary to protect the privacy rights outlined in subsection (2) of this section and enforce this subsection. Those policies shall, at a minimum, not allow students to use restrooms, locker rooms, or shower rooms that are reserved for students of a different biological sex.

(4) (a) A student who asserts to school officials that his or her gender is different from his or her biological sex and whose parent or legal guardian provides written consent to school officials shall be provided

with the best available accommodation, but that accommodation shall not include the use of school restrooms, locker rooms, or shower rooms designated for use by students of the opposite biological sex while students of the opposite biological sex are present or could be present.

(b) Acceptable accommodations may include but are not limited to access to single-stall restrooms or controlled use of faculty bathrooms, locker rooms, or shower rooms.

➔SECTION 4. A NEW SECTION OF KRS CHAPTER 311 IS CREATED TO READ AS FOLLOWS:

(1) As used in this section:

(a) "Minor" means any person under the age of eighteen (18) years; and

(b) "Sex" means the biological indication of male and female as evidenced by sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth.

(2) Except as provided in subsection (3) of this section, a health care provider shall not, for the purpose of attempting to alter the appearance of, or to validate a minor's perception of, the minor's sex, if that appearance or perception is inconsistent with the minor's sex, knowingly:

(a) Prescribe or administer any drug to delay or stop normal puberty;

(b) Prescribe or administer testosterone, estrogen, or progesterone, in amounts greater than would normally be produced endogenously in a healthy person of the same age and sex;

(c) Perform any sterilizing surgery, including castration, hysterectomy, oophorectomy, orchiectomy, penectomy, and vasectomy;

(d) Perform any surgery that artificially constructs tissue having the appearance of genitalia differing from the minor's sex, including metoidioplasty, phalloplasty, and vaginoplasty; or

(e) Remove any healthy or non-diseased body part or tissue.

(3) The prohibitions of subsection (2) this section shall not limit or restrict the provision of services to:

(a) A minor born with a medically verifiable disorder of sex development, including external biological sex characteristics that are irresolvably ambiguous;

(b) A minor diagnosed with a disorder of sexual development, if a health care provider has determined, through genetic or biochemical testing, that the minor does not have a sex chromosome structure, sex steroid hormone production, or sex steroid hormone action, that is normal for a biological male or biological female; or

(c) A minor needing treatment for an infection, injury, disease, or disorder that has been caused or exacerbated by any action or procedure prohibited by subsection (2) of this section.

(4) If a licensing or certifying agency for health care providers finds, in accordance with each agency's disciplinary and hearing process, that a health care provider who is licensed or certified by the agency has violated subsection (2) of this section, the agency shall revoke the health care provider's licensure or certification.

(5) Any civil action to recover damages for injury suffered as a result of a violation of subsection (2) of this section may be commenced before the later of:

(a) The date on which the person reaches the age of thirty (30) years; or

(b) Within three (3) years from the time the person discovered or reasonably should have discovered that the injury or damages were caused by the violation.

(6) If a health care provider has initiated a course of treatment, for a minor, that includes the prescription or administration of any drug or hormone prohibited by subsection (2) of this section and if the health care provider determines and documents in the minor's medical record that immediately terminating the minor's use of the drug or hormone would cause harm to the minor, the health care provider may institute a period during which the minor's use of the drug or hormone is systematically reduced.

➔Section 5. Whereas situations currently exist in which the privacy rights of students are violated, an emergency is declared to exist, and Sections 1 to 3 of this Act take effect upon its passage and approval by the Governor or upon its otherwise becoming a law.

Veto Overridden March 29, 2023.

EXHIBIT B

The 2023 General Assembly adjourned March 30. The following education-related bills contained emergency clauses impacting one or more sections of each bill, which means at least part or all of the bill became effective upon signature by the governor or veto override by the General Assembly.

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House Bills

HB 5

HB 5 provides tax relief to distilling manufacturers for distilled spirits aging in Kentucky warehouses. The measure phases out the ad valorem tax on distilled spirits beginning in 2026, until completely phased out in 2043. The phased-out tax will impact school districts with spirits aging in their district. To offset any revenue loss, the law creates a new section of KRS Chapter 138 that provides an industry replacement tax for school districts to be assessed by the Kentucky Department of Revenue. Additionally, it creates a new section of KRS 157.310 to 157.440 that modifies the Support Educational Excellence in Kentucky (SEEK) funding formula to exclude the assessed value of distilled spirits in the local effort calculation. Any questions regarding impact to districts should be directed to Krystal Smith. The Kentucky Department of Education (KDE) expects to release additional information regarding the impact and implementation of HB 5 as information becomes available.

HB 32

A school district may employ classified personnel without a high school diploma or high school equivalency diploma if the district provides the employee the opportunity to obtain a high school equivalency diploma at no cost to the employee. Licenses or credentials issued by a governmental entity that require specialized skill or training may substitute for a high school diploma or equivalent. As an example, a district could employ an individual without a high school diploma or equivalent as a school bus driver if the employee possessed a Commercial Driver's License with the required endorsements to operate a school bus. In this case, the school bus driver possesses a license that requires specialized skill and training issued by a governmental entity.

Districts that receive Title I funds must continue to adhere to the Every Student Succeeds Act's (ESSA's) requirements for the employment of paraprofessionals. More information regarding ESSA's paraprofessional requirements can be found on KDE's Paraeducator Requirements in Title I Schools webpage. Importantly, paraprofessionals working in a program supported with Title I, Part A funds must continue to have a high school diploma or GED.

HB 153

HB 153 prohibits any law enforcement agency or officer, as well as any public agency or official, from enforcing, assisting or cooperating in the enforcement of a federal firearms ban enacted on or after Jan. 1, 2021. The legislation also prohibits a public agency from adopting a policy to enforce, assist or cooperate with a federal firearms ban enacted on or after Jan. 1, 2021.

KRS 527.070 is state law that prohibits the possession of a firearm, either open or concealed, on any school campus, bus, athletic field or other property owned or used by a public educational institution. Furthermore, the Gun Free Schools Act contained in Sec. 8561 of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, requires that states have laws in place requiring expulsion for not less than one year if a student brings a firearm to school, and allowing school officials to modify the expulsion requirement in writing. This federal requirement was in place prior to Jan. 1, 2021.

As such, school districts should continue to prohibit firearms on all district property, including school campuses. School districts should continue posting all signage required by KRS 527.070 and board policies, providing notice to students, staff and visitors that both open and concealed firearms are prohibited on school property.

HB 553

HB 553 provides a mechanism for "growth districts" to receive additional funding. The calculation compares the 2nd month growth factor collected in the 2018-2019 or 2019-2020 school years, dependent upon the school district's choice of Adjusted Average Daily Attendance (AADA), and the 2022-2023 2nd month growth factor. Additionally, the bill provides that KDE "shall recalculate the exact final amount" for each district's fiscal year 2022-2023 Final SEEK. Payments for districts that receive growth using this calculation will be included in the district's May and June SEEK payments. On April 12, 2023, KDE distributed information to superintendents regarding these changes, including the specific amount of SEEK payment increases for impacted districts. Questions should be directed to Krystal Smith.

Senate Bills

SB 5

SB 5 (2023) creates a new section of KRS Chapter 158 to define "harmful to minors;" requires local boards of education to adopt a complaint resolution policy to address parent complaints about materials that are harmful to minors; and requires the school to ensure that a student whose parent has filed a complaint does not have access to the material.

As used in Section 1, "harmful to minors" means materials, programs or events that:

- Contain the exposure, in an obscene manner, of the unclothed or apparently unclothed human male or female genitals, pubic area, or buttocks or the female breast, or visual depictions of sexual acts or simulations of sexual acts, or explicit written descriptions of sexual acts;
- Taken as a whole, appeal to the prurient interest in sex; or
- Is patently offensive to prevailing standards regarding what is suitable for minors.

SB 5 requires the Kentucky Department of Education (KDE) to establish a model complaint resolution policy. KDE worked in collaboration with the Kentucky School Boards Association (KSBA) to establish this model policy, as well as school district procedures for implementing SB 5. Please view the SB 5 supplemental guidance document for detailed requirements for the complaint resolution policy. KSBA will include the model policy and procedure in its policy updates to school districts subscribed to the KSBA policy service.

For questions regarding SB 5 (2023), please contact Office of Teaching and Learning Chief Academic Officer Micki Ray.

SB 7

SB 7 prohibits public employers from performing payroll deductions for the benefit of certain organizations. The bill provides:
A public employer shall not deduct from the wages, earnings, or compensation of any public employee for: (1) Any dues, fees, assessments, or other charges to be held for, transferred to, or paid over to a labor organization; or (2) Political activities.

The bill defines “labor organization" as “any organization of any kind, or any agency or employee representation committee, association or union which exists for the purpose, in whole or in part, of dealing with employers concerning wages, rates of pay, hours of employment or conditions of work, or other forms of compensation.” Except in certain circumstances, “’labor organization’ shall not include organizations which primarily represent public employees working in the protective vocations of active law enforcement officer, jail and corrections officer, or active fire suppression or prevention personnel.”

SB 7 defines “political activities" as “any contribution or independent expenditure made: (a) To any committee; (b) To any contributing organization; (c) To any candidate; (d) To any slate of candidates; (e) To any fundraiser; (f) For any electioneering communications; (g) For any testimonial affair; (h) In any manner intended to influence the outcome of any election; (i) In any manner intended to otherwise promote or support the defeat of any: 1. Candidate; 2. Slate of candidates; or 3. Ballot measure; or (j) In any manner intended to advance any position held by any person or entity other than the public employee regarding any: 1. Election; 2. Candidate; 3. Slate of candidates; or 4. Ballot measure.” The legislation defines a “contributing organization" as “a group which merely contributes to candidates, slates of candidates, campaign committees, caucus campaign committees, or executive committees from time to time from funds derived solely from within the group, and which does not solicit or receive funds from sources outside the group itself.”

School districts are already receiving requests from various membership groups to continue payroll deduction for member employees. School districts must determine for each organization requesting payroll deduction whether the organization is: (1) a "labor organization;" or (2) engaged in "political activities."

If the organization exists in whole or in part for the purpose of dealing with employers (i.e. school districts) concerning wages, rates of pay, hours of employment or conditions of work, or other forms of compensation, then payroll deduction for the organization is no longer permitted under SB 7. Likewise, if the organization is engaged in "political activities," including acting as a "contributing organization," payroll deduction is no longer permitted under SB 7. Whether or not organizations meet these definitions must be determined on a case-by-case basis by the employer school district. The school district is in the best position to gather relevant facts from entities seeking payroll deduction and to make a determination as to whether payroll deduction is permitted under SB 7.

KDE recommends that school districts develop an assurance document to be completed by any organization seeking payroll deduction that requires the organization to answer specific questions and certify that it is not a "labor organization" or engaged in "political activities" as defined in SB 7. SB 25

SB 25 relates to postsecondary readiness indicators for demonstrating career readiness. This bill provided clean-up language to clarify that earning a minimum of three (3) hours of dual credit or a minimum of three (3) hours of postsecondary articulated credit can be achieved by:

a. Successfully completing a career and technical education (CTE) or general education dual credit course which is equivalent to a minimum of three (3) hours of college credit; or
b. Passing a CTE End-of-Program Assessment associated with an articulation agreement.

This bill also added language to the Work-Based Learning (WBL) indicator for postsecondary readiness to indicate that apprenticeships, cooperatives and internships *are not limited* to being offered as a high school course or during the regular school day, week or year. WBL experiences for students must still be aligned with a credential or associate degree and be approved by the Kentucky Board of Education (KBE) after receiving input from the Local Superintendents Advisory Council (LSAC) to qualify for postsecondary readiness.

The passage of SB 25 means that the following are methods to demonstrate postsecondary readiness through the WBL indicator:

a. Completing a Kentucky Department of Education (KDE) approved or labor cabinet-approved apprenticeship; or

b. Successfully completing a KBE-approved cooperative or internship that is aligned with a credential or associate degree and which provides a minimum of 300 hours of on-the-job work experience.

The KDE Office of Career and Technical Education (OCTE) has developed a data collection system for hours of on-the-job work experience associated with cooperative and internship courses within Infinite Campus (IC). The WBL tab in IC will be available in May.

The KBE and the KDE are working to establish minimum criteria for approval of a cooperative or internship that is not offered as a high school course. Further guidance will be provided to districts once the Local Superintendents Advisory Council (LSAC) has provided input and an approval process has been established.

Available data submitted by July 31 each year may be used in that year's fall accountability reporting.

SB 49

Senate Bill 49 was signed by Gov. Andy Beshear on March 22, 2023. The bill contains an emergency clause, and therefore became effective upon the governor's signature. Section 1 of the bill amends KRS 161.048 to allow the one-year temporary provisional certificate issued to a teacher candidate in the Option 6 or Option 7 alternative route to be renewed up to four (4) times. Previously, the statute only allowed the temporary provisional certificate to be renewed a maximum of two (2) times.

At its April 10, 2023, meeting, the Education Professional Standards Board approved amendments to the Option 6 [16 KAR 9:080] and Option 7 [16 KAR 9:100] regulations to allow a candidate in these routes renew the one-year temporary provisional certificate four times unless the candidate is pursuing teacher certification for exceptional children or interdisciplinary early childhood education. Federal regulation related to the Individuals with Disabilities Education Act [34 C.F.R. § 300.156 (c)(2)(i)(C)] provides that those teaching under alternative certifications can only assume functions as a special education teacher for a maximum of three years. To comply with the federal law, those candidates pursuing certification to teach exceptional children or interdisciplinary early childhood education through the Option 6 or Option 7 route will only be eligible for two (2) renewals of the one-year temporary provisional certificate.

SB 49 also authorizes any person receiving emergency certification during the 2022-2023 school year to renew that certification for the 2023-2024 school year. Additionally, at the April 10, 2023, meeting, the Education Professional Standards Board waived the requirements of 16 KAR

2:120, Section 2(3)(b)-(c) to allow reissuance of emergency certification for the 2023-2024 school year. This waiver will allow anyone that has previously been issued an emergency teaching certificate to be issued another emergency teaching certificate for the 2023-2024 school year unless KRS 161.120(1) applies.

SB 107

SB 107 subjects the commissioner of education to Senate confirmation upon appointment or reappointment, limits each term to four years, and prohibits ex officio and non-voting members to be represented by proxy at any meeting of the Kentucky Board of Education.

SB 150

Section One

Section 1 of SB 150 creates a new section of KRS Chapter 158 aimed at providing notice to parents of certain health services and mental health services offered by a school. If schools or districts provide health services or mental health services related to human sexuality, contraception or family planning, districts should provide comprehensive notice of those health services and mental health services available to students upon enrollment and at the beginning of each school year, allowing parents or guardians to opt out of those specific services. These notification requirements *do not* apply to those health services and mental health services unrelated to human sexuality, contraception and family planning. Additionally, schools should develop and implement procedures for notifying families of *referrals* for *any* health services or mental health services, regardless of whether they are related to human sexuality, contraception or family planning. SB 150 does not impact a school district's ability to seek or provide emergency medical or mental health services for a student.

This section also provides that, "A district or school shall not adopt policies or procedures with the intent of keeping any student information confidential from parents." As school leaders 7his this creates some confusion regarding student privacy required by the Family Educational Rights and Privacy Act (FERPA). Despite this provision in SB 150, districts are reminded of their obligations under FERPA. The definition of "parent" in SB 150 is not the same as the definition of "parent" in FERPA at 34 CFR 99.3. Furthermore, "[w]hen a student becomes an eligible student, the rights accorded to, and consent required of, parents under [FERPA] transfer from the parents to the student." 34 CFR 99.5(a)(1). Exceptions to this rule exist for students who are considered "dependent" as defined in section 152 of the Internal Revenue Code, allowing school districts to share information and records with parents or guardians of dependent students, even after they reach the age of 18. However, not every student over 18 is considered "dependent" as defined by the Internal Revenue Code. School districts must have FERPA policies in place to protect the rights of these eligible students.

The U.S. Department of Education published An Eligible Student Guide to the Family Educational Rights and Privacy Act (FERPA), which may be a helpful resource. To the extent there is any conflict between SB 150 and FERPA, districts should comply with FERPA, SB 150 notwithstanding. It should be noted that SB 150 provides that school districts may withhold information from a parent or guardian, "if a reasonably prudent person would believe, based on previous conduct and history, that the disclosure would result in the child becoming a dependent child or an abused or neglected child as defined in KRS 600.020."

KDE is no longer able to provide guidance to schools or districts related to the use of requested pronouns as a result of the General Assembly's passage of SB 150. School districts should remain aware of the legal landscape applicable to transgender students, including current and proposed Title IX regulations. The United States Court of Appeals for the Sixth Circuit previously held: "Under settled law in this Circuit [which includes Kentucky], gender nonconformity as defined in *Smith v. City of Salem,* is an individual's 'fail[ure] to act and/or identify with his or her gender … . Sex stereotyping based on a person's gender non- conforming behavior is impermissible discrimination." *Dodds v. United States Department of Education*, 845 F.3d 217, 221 (2016). Districts should consult with board counsel for legal advice regarding usage of requested pronouns and potential liability concerns.

Section Two

Section two of SB 150 amends KRS 158.1415 regarding instruction in courses and programs.

The first subsection of KRS 158.1415 provides certain conditions that must be met, "if a school council or, if none exists, the principal adopts a curriculum for human sexuality or sexually transmitted diseases[.]" First, it is important to note that as a result of SB 1 from the 2022 legislative session, neither school councils nor principals adopt curriculum. Curriculum adoption is now determined by the superintendent. Nevertheless, *if* a curriculum for human sexuality or sexually transmitted diseases has been adopted for a school, instruction in those courses and programs implementing the curriculum should include the following:

- "Abstinence from sexual activity is the desirable goal for all school-age children;
- Abstinence from sexual activity is the only certain way to avoid unintended pregnancy, sexually transmitted diseases, and other associated health problems;
- The best way to avoid sexually transmitted diseases and other associated health problems is to establish a permanent mutually faithful monogamous relationship;
- *A policy to respect parental rights by ensuring that:*
    - *Children in grade five (5) and below do not receive any instruction through curriculum or programs on human sexuality or sexually transmitted diseases; or*
    - *Any child, regardless of grade level, enrolled in the district does not receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual*

orientation; and

- *A policy to notify a parent in advance and obtain the parent's written consent before the parent's child in grade six (6) or above receives any instruction through curriculum or programs on human sexuality or sexually transmitted diseases authorized in this section."*

The requirements in italicized font are *new* requirements of SB 150. The first three bullet point requirements above appeared in KRS 158.1415 prior to SB 150 and should not require any new action by school districts. The two new policy requirements do not specify whether these policies are to be adopted by the local board of education, the superintendent or the school council. In any event, they are only required *if* a curriculum for human sexuality or sexually transmitted diseases has been adopted for the school. If no such curriculum has been adopted, then the policies are not necessary. If a curriculum for human sexuality or sexually transmitted diseases *has* been adopted, SB 150 requires that districts adopt a parental notice and consent policy if a, "child in grade six (6) or above receives any instruction through curriculum or programs on human sexuality or sexually transmitted diseases." SB 150 also presents districts with a choice. That is, if a curriculum for human sexuality or sexually transmitted diseases has been adopted for a school, the school district must determine whether its policy will require that: (1) "Children in grade five (5) and below do not receive any instruction through curriculum or programs on human sexuality or sexually transmitted diseases; ***or*** [2] Any child, regardless of grade level, enrolled in the district does not receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation."[1]

For example, if a K-8 school has a curriculum for human sexuality or sexually transmitted diseases, and the school district chose a policy pursuant to SB 150 that, "children in grade five (5) and below do not receive any instruction through curriculum or programs on human sexuality or sexually transmitted diseases," then only students in grades 6-8 within the school should receive instruction on the curriculum for human sexuality or sexually transmitted diseases. Furthermore, the school district should provide notice to parents and guardians, "in advance and obtain the parent's written consent before the parent's child in grade six (6) or above receives any instruction through curriculum or programs on human sexuality or sexually transmitted diseases." Under this scenario, instruction on curriculum for human sexuality or sexually transmitted diseases at the high school level would not be impacted. However, the school district would have to meet the parental notice and consent requirements prior to high school students receiving any instruction on the curriculum for human sexuality or sexually transmitted diseases.

If school districts choose a policy pursuant to SB 150 that, "children in grade five (5) and below do not receive any instruction through curriculum or programs on human sexuality or sexually transmitted diseases," they should be aware that
the following grade 5 health standard does not align with such a policy and should not be included in curriculum or instruction at grade 5 or below:

[1] By utilizing the conjunction "or" SB 150 requires one of these two policies, but not both.

- *5.1.6. Describe basic male and female reproductive body parts and their functions as well as the physical, social and emotional changes that occur during puberty.*

KDE will begin standards review for Health and Physical Education, but until revised standards are approved and effective in law, the grade 5 health standard above should be omitted from local curriculum and instruction at grade 5 and below if a school district chooses a policy pursuant to SB 150 that, "children in grade five (5) and below do not receive any instruction through curriculum or programs on human sexuality or sexually transmitted diseases."

If school districts choose a policy pursuant to SB 150 that, "[a]ny child, regardless of grade level, enrolled in the district does not receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation," instruction through curriculum or programs on human sexuality or sexually transmitted diseases at all grade levels will be impacted. Furthermore, this policy impacts not only instruction, but also "presentations." If this policy is selected by districts, they should review current courses, programming, instructional resources and learning experiences to ensure compliance including, but not limited to, health education curriculum, Advanced Placement coursework, dual credit courses and extracurricular activities. Some of these learning experiences may need to be altered or discontinued to comply with the district's selected policy.

For example, if the school district chose a policy pursuant to SB 150 that, "[a]ny child, regardless of grade level, enrolled in the district does not receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation," then schools at any grade level can implement instruction for a curriculum on human sexuality or sexually transmitted diseases. However, the instruction on this curriculum should not include any instruction or presentation on gender identity, gender expression, or sexual orientation, regardless of grade level. Of course, it is difficult to understand how high schools would provide instruction on human sexuality or sexually transmitted diseases, without some presentation on sexual orientation, which includes heterosexual individuals. Furthermore, the school district would have to provide notice to parents and guardians, "in advance and obtain the parent's written consent before the parent's child in grade six (6) or above receives any instruction through curriculum or programs on human sexuality or sexually transmitted diseases."

Regardless of the policies a district selects, SB 150 does not prohibit school personnel from, "discussing human sexuality, including the sexuality of any historic person, group, or public figure, where the discussion provides necessary context in relation to a topic of instruction from [an approved curriculum.]" Furthermore, school district personnel are not prohibited from, "responding to a question from a student during class regarding human sexuality as it relates to topics of instruction from [an approved curriculum.]"

School districts should work closely with instructional leaders and their board counsel when determining whether its policy will require that: (1) "Children in grade five (5) and below do not receive any instruction through curriculum or programs on human sexuality or sexually

transmitted diseases; ***or*** [2] Any child, regardless of grade level, enrolled in the district does not receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation."

Finally, Section 2 of SB 150 provides details regarding the notice that parents and guardians must receive. For any course, curriculum or program on the subject of human sexuality provided by school personnel or by third parties, the school district must, "provide an alternative course curriculum, or program without any penalty to the student's grade or standing," for those students in grade 6 or above whose parents do not consent to instruction through curriculum or programs on human sexuality or sexually transmitted diseases. Notice that this alternative course need only be offered if parents refuse consent for courses, curriculum or programs on the subject of human sexuality. No similar requirement exists for students whose parents or guardians object to instruction on sexually transmitted diseases.
Furthermore, for courses, curricula or programs on the subject of human sexuality provided by school personnel or by third parties, parents must be permitted to inspect curriculum, instructional materials, lesson plans, assessments or tests, surveys or questionnaires, assignments and instructional activities. Written notice shall be provided to parents/guardians at least two (2) weeks prior to the student's participation in the course, curriculum or program on the subject of human sexuality and notify parents of the following: (1) the availability of an alternative course curriculum or program without any penalty to grade or standing for students grade 6 and above; (2) the materials that are available to parents for inspection as well as the process on how to review the materials; (3) that the course, curriculum or program must be developmentally appropriate; (4) that the course, curriculum or program is limited to curriculum approved pursuant to KRS 160.345(2); (5) the date of the course, curriculum or program; (6) the process for a parent to provide written consent for participation; and (6) the contact information for the teacher of the course, curriculum or program, as well as the supervising school administrator. School districts should consider a standardized form that can be utilized to ensure these notice requirements are satisfied.

For questions regarding Section 2 of SB 150 (2023), please contact Office of Teaching and Learning Chief Academic Officer Micki Ray.

Section Three

This section requires local boards of education to adopt policies to "not allow students to use restrooms, locker rooms, or shower rooms that are reserved for students of a different biological sex" after allowing public comment on the issue at an open meeting. School districts are required to provide "the best available accommodation" to students who assert that their gender is different from their biological sex and whose parent or guardian provides written consent. This section provides that the "accommodation shall not include the use of school restrooms, locker rooms, or shower rooms designated for use by students of the opposite biological sex while students of the opposite biological sex are present or could be present."

Again, school districts should remain aware of the legal landscape applicable to transgender students, including current and proposed Title IX regulations. The United States Court of Appeals for the Sixth Circuit previously held: "Under settled law in this Circuit [which includes Kentucky], gender nonconformity as defined in *Smith v. City of Salem,* is an individual's 'fail[ure] to act and/or identify with his or her gender … . Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination." *Dodds v. United States Department of Education*, 845 F.3d 217, 221 (2016). Districts should consult with board counsel for legal advice regarding the policies required by SB 150 and potential liability concerns.

EXHIBIT C

Human Sexuality

Per KRS 158.1415, if a school council or, if none exists, the Principal adopts a curriculum for human sexuality or sexually transmitted diseases, instruction shall include but not be limited to the following content:

a) Abstinence from sexual activity is the desirable goal for all school-age children;

b) Abstinence from sexual activity is the only certain way to avoid unintended pregnancy, sexually transmitted diseases, and other associated health problems;

c) The best way to avoid sexually transmitted diseases and other associated health problems is to establish a permanent mutually faithful monogamous relationship;

d) A school policy to respect parental rights by ensuring that: children in grade five (5) and below do not receive any instruction through curriculum or programs on human sexuality or sexually transmitted diseases;

e) A school policy to notify a parent in advance and obtain the parent's written consent before the parent's child in grade six (6) or above receives any instruction through curriculum or programs on human sexuality or sexually transmitted diseases.

CURRICULUM REQUIREMENTS

Any course, curriculum, or program offered by a public school on the subject of human sexuality provided by school personnel or by third parties authorized by the school shall:

a) Provide an alternative course, curriculum, or program without any penalty to the student's grade or standing for students whose parents have not provided written consent as required by law;

b) Be subject to an inspection by parents of participating students that allows parents to review the following materials:

1) Curriculum;

2) Instructional materials;

3) Lesson plans;

4) Assessments or tests;

5) Surveys or questionnaires;

6) Assignments; and

7) Instructional activities;

c) Be developmentally appropriate; and

d) Be limited to a curriculum that has been subject to the reasonable review and response by stakeholders in conformity with KRS 160.345.

Human Sexuality

CURRICULUM REQUIREMENTS (CONTINUED)

A public school offering any course, curriculum, or program on the subject of human sexuality shall provide written notification to the parents of a student at least two (2) weeks prior to the student's planned participation in the course, curriculum, or program. The written notification shall:

a) Inform the parents of the provisions of the course or curriculum;

b) Provide the date the course, curriculum, or program is scheduled to begin;

c) Detail the process for a parent to review the materials;

d) Explain the process for a parent to provide written consent for the student's participation in the course, curriculum, or program; and

e) Provide the contact information for the teacher or instructor of the course, curriculum, or program and a school administrator designated with oversight.

This shall not prohibit school personnel from:

a) Discussing human sexuality, including the sexuality of any historic person, group, or public figure, where the discussion provides necessary context in relation to a topic of instruction from a curriculum approved pursuant to KRS 160.345; or

b) Responding to a question from a student during class regarding human sexuality as it relates to a topic of instruction from a curriculum approved pursuant to KRS 160.345.

REFERENCES:

KRS 158.1415; KRS 160.345

RELATED POLICIES:

08.1; 08.23; 08.2322

Adopted/Amended: 6/26/2023
Order #:

EXHIBIT D

Student Privacy Rights

PUBLIC COMMENT REQUIRED

KRS 158.189 requires the Board, after allowing public comment at an open meeting, to adopt this Policy (09.141), that at a minimum, does not allow students to use restrooms, locker rooms, or shower rooms that are reserved for students of a different biological sex.

A student who asserts to school officials that his or her gender is different from his or her biological sex and whose parent or legal guardian provides written consent to school officials shall be provided with the best available accommodation, but that accommodation shall not include the use of school restrooms, locker rooms, or shower rooms designated for use by students of the opposite biological sex while students of the opposite biological sex are present or could be present.

Acceptable accommodations may include but are not limited to access to single-stall restrooms or controlled use of faculty bathrooms, locker rooms, or shower rooms.

REFERENCE:

KRS 158.189

Adopted/Amended: 6/26/2023
Order #:

EXHIBIT E

FCPS Guidance on Implementing Senate Bill 150

Fayette County Public Schools is committed to providing a safe and welcoming environment for all students, working in partnership with families, and following the requirements of state law. These high-level guidelines have been developed to help FCPS staff with enacting the new legislation. Specific questions should be directed to the district's legal office.

Resources: FCPS Notification of Content & Permission Form and Kentucky Senate Bill 150 and FCPS Policy 08.13531 and Potential FCPS Courses Impacted by SB 150

Pronouns:

SB 150 states: "The school district shall not require school personnel or students to use pronouns that do not conform to that particular student's biological sex as indicated on the student's original, unedited birth certificate issued at the time of birth."

- Staff should not ask or survey students about their pronouns.
- Staff can share their preferred pronouns with students.
- Staff can acknowledge and discuss pronouns with a student when a student freely discusses their own pronouns without being prompted.
- Staff cannot be required to use pronouns that do not conform to a student's biological sex.
- Staff should encourage students to discuss their mental, physical health, or life issues with their parents.

Restroom/Locker Rooms/Shower Rooms

SB 150 states: "A student who asserts to school officials that his or her gender is different from his or her biological sex and whose parent or legal guardian provides written consent to school officials shall be provided with the best available accommodation, but that accommodation shall not include the use of school restroom, locker rooms, or shower rooms designated for use by students of the opposite biological sex while students of the opposite biological sex are present or could be present."

- Students can only enter and use gender-specific restrooms that coincide with their biological sex.
- A student whose gender is different from their biological sex can be granted access to a single-stall (or gender-neutral) restroom or controlled use of faculty bathrooms, locker rooms, or shower rooms.
- Staff should not assume the biological sex of a student based on appearance and/or name.

Surveys/Forms/Questionnaires/Assessments/Health Screening

SB 150 states: "Prior to a well-being questionnaire or assessment, or a health screening form being given to a child for research purposes, a school district shall provide the student's parent with access to review the material and shall obtain parental consent ... and shall be required for each assessment or form.

- Parent/guardian permission must be granted before any and all well-being surveys, forms, questionnaires, or health screenings can be given to any FCPS student. This includes written permission for counseling and mental health services that are repeated for the same referral.

FCPS Guidance on Implementing Senate Bill 150

- This does not keep school personnel from seeking or providing emergency medical or mental health services for a student following district policies.
- This does not remove the duty to report child abuse or neglect.

Curriculum & Instruction

FCPS Policy 08.13531, in response to SB 150 states:

- *Children in grade five (5) and below do not receive any instruction through curriculum or programs on human sexuality or sexually transmitted diseases.*
- *A public school offering any course, curriculum, or program on the subject of human sexuality shall provide written notification to the parents of a student at least two (2) weeks prior to the student's planned participation in the course, curriculum or program. If written consent is not obtained for the student to participate in the course, curriculum, or program, schools will provide an alternative course, curriculum, or program without penalty to the student's grade or standing.*

    - Students in fifth grade and below should not receive any instruction on human sexuality or sexually transmitted diseases.
    - Since the law does not define human sexuality, any curriculum and/or instruction that will explore, show images of, or discuss human sexuality will require prior parent consent.
    - Teachers and administrators should proactively plan instructional accommodations for students whose families do not provide consent.
    - This law does not impact the existence of clubs related to topics of identity, gender expression, or sexual orientation (i.e. GSA), if offered as an extracurricular activity before and/or after school. If such club meetings are held during the school day (and therefore qualify as curricular time), parent consent must be obtained.
    - Staff can display a pride flag and have discussions with colleagues or parents that do not violate board policy.
    - Teachers and administrators should proactively plan for how to share curriculum, instructional materials, lesson plans, assessments, surveys, questionnaires, assignments and instructional activities with parents who request such access.
    - Teachers may discuss human sexuality, including the sexuality of any historical person, group, or public figure, when the discussion provides necessary context in relation to a topic of instruction from approved curriculum.
    - Teachers may respond to student questions during class regarding human sexuality as it relates to a topic of instruction from an approved curriculum.

FCPS has identified courses that MAY have content or instructional activities that could be impacted by Senate Bill 150 and the regulations provided within the bill. This list is subject to change and relies on the professional judgment and content knowledge of teachers, district instructional specialists, and the professional learning communities (PLC's) that review content, curriculum, assessments, and instructional resources that will be presented to students during instruction.

EXHIBIT F

Commonwealth of Kentucky
Office of the Attorney General

Daniel Cameron
Attorney General

Capitol Building, Suite 118
700 Capital Avenue
Frankfort, Kentucky 40601
(502) 696-5300
Fax: (502) 564-2894

July 6, 2023

OAG 23 - 04

Subjects:

1. Whether Senate Bill 150 allows school districts to choose whether to offer curriculum that either (1) prohibits children in grades five and below to receive instruction on human sexuality or sexually transmitted diseases; or (2) prohibits any child regardless of age to receive instruction with the goal of exploring gender identity, gender expression, or sexual orientation.

2. Whether a school district would violate Title IX of the Education Amendments of 1972 by implementing the provisions of Senate Bill 150 concerning preferred pronoun policies and policies concerning the use of facilities including restrooms, locker rooms and shower rooms in public schools.

Written by:

Jeremy J. Sylvester, Assistant Attorney General

Syllabus:

1. Senate Bill 150 does not permit school districts to choose one of its two restrictions on curricula content. The law prohibits not only instruction on human sexuality or sexually transmitted diseases for children in grades 5 or below, but also instruction, for any grade level, on gender identity, gender expression, or sexual orientation.

2. Neither existing binding legal precedent nor statutory or regulatory law holds or declares that a school district would violate Title IX by implementing Senate Bill 150's provisions concerning preferred pronoun policies and policies concerning the

> use of facilities including restrooms, locker rooms and shower rooms in public schools.

Opinion of the Attorney General

During the 2023 regular session, the Kentucky General Assembly enacted Senate Bill 150, overriding a veto from the Governor. *See* 2023 Ky. Acts, Ch. 132. The law addresses multiple topics governing the operation of public schools, including limiting instruction on gender identity and sexual orientation, establishing parental notification rights, prohibiting required or recommended preferred pronoun usage policies, and restricting a person of one biological sex from using the restrooms, locker rooms, or shower rooms designated for the opposite biological sex.[1] This opinion addresses concerns arising from a guidance document issued by the Kentucky Department of Education (KDE) on April 17, 2023, which the KDE later updated on June 5, 2023. The update to the guidance document offers the KDE's heavily revised interpretation of Section 2 of the law suggesting that school districts have the choice to obey only one of two legislative prohibitions relating to public school curricula for human sexuality or sexually transmitted diseases. The guidance document also suggests that school districts risk violating Title IX if they implement the provisions of the law addressing restrooms, locker rooms, showers rooms, and preferred pronoun usage.

Both versions of the KDE guidance document discussed Section 2 of Senate Bill 150. Section 2 amended KRS §158.1415 to place restrictions on public-school instruction regarding human sexuality or sexually transmitted diseases. At issue here is the following statutory text:

> (1) If a school council, or, if none exists, the principal adopts a curriculum for human sexuality or sexually transmitted diseases, instruction shall include but not be limited to the following content: [. . .]
>
> (d) A policy to respect parental rights by ensuring that:
>
> 1. Children in grade five (5) and below do not receive any instruction through curriculum or program on human sexuality or sexually transmitted diseases; or
>
> 2. Any child, regardless of grade level, enrolled in the district does not receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation; and

[1] The bill also prohibited puberty blockers, cross-sex hormones, and surgeries for the treatment of gender dysphoria in minors.

> (e) A policy to notify a parent in advance and obtain the parent's written consent before the parent's child in grade six (6) or above receives any instruction through curriculum or programs on human sexuality or sexually transmitted diseases authorized in this section.

KRS §158.1415(1).

The April 2023 KDE guidance document only briefly discusses Section 2 of Senate Bill 150 but refers the reader to another document entitled "Senate Bill 150 (2023) Section Two Supplemental Guidance."[2] This supplement delineated the bill's requirements for Kindergarten through Grade 5 compared to Grades 6 through 12. This supplement clearly stated that no children in Grades 5 and below should "receive any instruction through curriculum or programs on human sexuality or sexually transmitted diseases." Moreover, children in this group (Grades 5 and below) were also prohibited from receiving "any instruction or presentation on gender identity, gender expression or sexual orientation." The supplemental guidance states that the curriculum for Grades 6 through 12 may include instruction on human sexuality and sexually transmitted disease subject to advance parental notice and consent. However, the supplement again emphasized that these students may not "receive any instruction or presentation that has a goal or purpose of students studying or exploring gender identity, gender expression or sexual orientation."

Less than two months after issuing its supplement discussing Section 2 of Senate Bill 150, the KDE inexplicably issued a revised guidance document radically altering its prior guidance to school districts.[3] The KDE claimed that the "or" between KRS 158.1415(1)(d)(1) and (d)(2) allows a school district to choose which one of those two prohibitions apply to its curriculum on human sexuality or sexually transmitted diseases.[4] As an example, the guidance document posits that a school district choosing to prohibit instruction with the goal or purpose of studying gender identity, gender expression, or sexual orientation can still instruct children of any age on other topics of human sexuality and sexually transmitted diseases.[5]

The updated KDE guidance document also suggests that Section 5(b) of Senate Bill 150 would violate Title IX, if implemented. Section 5(b) prohibits the KDE or Kentucky Board of Education from recommending or requiring "policies and procedures for the use of pronouns that do not conform to a student's biological sex." 2023 Ky. Acts, Ch. 132, § 5(b). Similarly, "[a] local school district shall not require

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[2] A copy of this supplemental guidance document is available at: https://perma.cc/WHD8-RBT7.
[3] A copy of this revised guidance documents entitled 2023 Legislative Guidance-Emergency Bills is available at: https://perma.cc/47W5-QH5X.
[4] *Id.*, at pp. 9 – 10.
[5] *Id.*, at p. 10.

school personnel or students to use pronouns for students that do not conform to that particular student's biological sex." *Id*. at § 5(b).

Last, the updated KDE guidance document implies that Section 3 of Senate Bill 150 would violate Title IX, if implemented. Section 3 requires local school and charter school boards to adopt policies that "shall, at a minimum, not allow students to use restrooms, locker rooms, or shower rooms that are reserved for students of a different biological sex." *Id*. at § 3. A student who asserts that his or her gender does not conform with his or her biological sex and whose parents or legal guardian provides consent, "shall be provided with the best available accommodation." *Id*. at § 4(a). Acceptable accommodations may include "access to single-stall restrooms or controlled use of faculty bathrooms, lockers rooms, or shower rooms." *Id*. at § 4(a).

Following its summary of Senate Bill 150's provisions governing policies on preferred pronouns, restrooms, locker rooms and shower rooms, the KDE strongly suggested these provisions violated Title IX by stating:

> School districts should remain aware of the legal landscape applicable to transgender students, including current and proposed Title IX regulations. The United States Court of Appeals for the Sixth Circuit previously held: "Under settled law in this Circuit [which includes Kentucky], gender nonconformity as defined in *Smith v. City of Salem*, is an individual's 'fail[ure] to act and/or identify with his or her gender…. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination." *Dodds v. United States Department of Education*, 845 F.3d 217, 221 (2016).

After making this statement, KDE concluded that school districts should consult with board counsel for legal advice for potential liability concerns. The implication of this statement is that school districts risk financial harm, either in the form of legal liability to pay monetary damages in private Title IX actions or in the loss of federal funding, if they comply Senate Bill 150.[6]

I. KDE's most recent interpretation of Section 2 of Senate Bill 150 is incorrect.

The KDE correctly interpreted Section 2 of Senate Bill 150 the first time. The KDE's revised interpretation of Section 2 of Senate Bill 150 is incorrect. First, it fails to account for the use of the disjunctive "or" in the context of prohibitions. And second,

[6] At least one news reporter drew this conclusion as well. Krista Johnson, *Why Kentucky schools that follow state anti-trans law may run afoul of federal laws*, Courier Journal (Apr. 24, 2023).

the KDE's interpretation would render part of the statute meaningless, creating an absurd result that is clearly contrary to what the legislature intended.

The intent of the legislature is clear from the text of Section 2. *See Chilton v. Gividen*, 246 S.W.2d 133, 135 ("[A] statute will be construed so as to accomplish the purpose for which it was enacted."). When read in proper context, KRS §158.1415(1)(d) seeks to ensure school districts respect parental rights by prohibiting two things: either (1) instruction on human sexuality or sexually transmitted diseases to students in grades 5 or below; or (2) instruction or presentations to students of any age that have the goal or purpose of students studying or exploring gender identity, gender expression, or sexual orientation. Because the legislature was stating basic prohibitions, its use of the disjunctive "or" in this section of the statute means that both things connected by the disjunctive are prohibited. Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation Legal Texts, 119 (West 2012). KDE seemed to have applied basic canon of construction in its April guidance documents.

Even if the intent of the legislature in using "or" were not clear[7], "courts have the ultimate responsibility" in matters of statutory construction, not agencies. *Gilbert v. Commonwealth*, 291 S.W.3d 712, 716 (Ky. App. 2008) (citing *Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet,* 689 S.W.2d 14, 20 (Ky. 1985)). Kentucky "courts have said '[n]ot the literal language but the true intention or will of the Legislature is the law.'" *Hardwick v. Boyd Cnty. Fiscal Ct.*, 219 S.W.3d 198, 201 (Ky. App. 2007) (quoting *Asher v. Stacy*, 185 S.W.2d 958, 959 (Ky. 1945)); *see also Cosby v.*

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[7] Commissioner Glass (or his lawyers) must know the legislative intent behind Section 2, because he stated repeatedly (at least 8 times) during a recent interview on Kentucky Tonight that the "or" was a "mistake." See "SB 150 and LGBTQ Issues", available at https://ket.org/program/kentucky-tonight/sb-150-and-lgbtq-issues/ (last viewed July 5, 2023).

1:39 – "That's the language in the bill, so it wasn't our determination to use the word 'or,' that is the de facto language that is in the statute."

1:53 – "We started hearing from attorneys that represent school districts and they really pointed out that error… We now know it's an error based on the reaction that we are seeing from the Senate GOP and the Kentucky GOP… But it's been brought to us from those attorneys in pointing out that error."

2:45 – "Its clear the legislators made an error here and the right thing for them to do… When I make an error I accept responsibility for it and straighten it out. They have the opportunity to do that in the next session. I'm sure they will correct this error."

3:09 – "It's almost surprising there aren't more errors with the speed and undercover darkness that this moved through."

4:07 – "It doesn't seem like they are owning up to it…. It seems like based on their reaction their intent was for it to be 'and' and the right thing for them to do in the next session is to go ahead and correct the error."

Commonwealth, 147 S.W.3d 56, 59 (Ky. 2004) ("The legislature's intention shall be effectuated, even at the expense of the letter of the law." (citation omitted)); KRS 446.080(1) ("All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. . .."). In carrying out their duty to construe statutes, courts may revise "or" to "and" and vice versa, "whenever such conversion is required, inter alia, to effectuate the obvious intention of the Legislature and to accomplish the purpose or object of the statute." *Duncan v. Wiseman Baking Co.*, 357 S.W.2d 694, 698 (Ky. 1961) (observing that the "popular use of the words 'or' and 'and' is loose and frequently inaccurate); *see also*, *Boron Oil Co. v. Cathedral Found., Inc.*, 434 S.W.2d 640, 641 (Ky. 1968) (noting that this practices is permissible when it is "obvious that the intent of the legislature would be thwarted if the change were not made."). In doing so, "an interpretation which will lead to an absurd result will be avoided." *Chilton*, 246 S.W.2d at 135.

Such an interpretative conversion of "or" to "and" would be appropriate here to avoid the absurd interpretation KDE has now proffered. Under the KDE's reckoning, if a school district chooses to forgo instruction on gender identity, gender expression, and sexual orientation, it is free to teach about all other aspects of human sexuality and sexually transmitted diseases to children of any age. Moreover, KDE's flawed interpretation cannot be harmonized with several other provisions of Senate Bill 150. *See Jefferson Cnty. Bd. of Ed. v. Fell*, 391 S.W.3d 713, 719 (Ky. 2012) ("The particular work, sentence or subsection under review must also be viewed in context rather than in a vacuum; other relevant parts of the legislative act must be considered in determining the legislative intent."); *Lewis v. Jackson Energy Co-op. Corp.*, 189 S.W.3d 87, 92 (Ky. 2005) ("The statute must be read as a whole and in context with other parts of the law."). KRS §158.1415(1)(e) provides for advance parental notification and consent before any child in **grade six or above** receives any instruction through curriculum or programs about human sexuality or sexually transmitted diseases.

This provision clearly contemplates that KRS §158.1415(1)(d)(1) prohibits all such instruction to grades 5 and below rather than leaving it to the school districts to decide whether they will do so. If this were not the case, explicit or graphic instruction could be presented to kindergartners as a part of curriculum on prevention of sexually transmitted diseases without prior parental notification or consent, while parental consent would be required to present the same material to high schoolers. That is both perverse and non-sensical. It is also obvious the General Assembly intended to prohibit all instruction that has as its goal or purpose students studying or exploring gender identity, gender expression, or sexual orientation because there is no reference to these topics in other provisions concerning parental notice and consent (*see* KRS §158.1415(1)(e)) or the requirement to offer alternative instruction on human sexuality (*see* KRS §158.1415(3)). This omission is entirely consistent with

the purpose of the Act to completely prohibit instruction on these topics under KRS §158.1415(1)(d)(2).

Based on the foregoing, it is the opinion of the Attorney General that Section 2 of Senate Bill 150 prohibits school districts from offering any instruction to children in grades 5 and below on the topics of human sexuality or sexually transmitted diseases. Moreover, school districts are prohibited from providing instruction exploring gender identity, gender expression, or sexual orientation to students in any grade. School districts are not given the option as to which of these prohibitions they are required to implement.

II. No binding precedent, statutory or regulatory law establishes that implementation of Senate Bill 150 would violate Title IX.

Because the KDE guidance (both the April guidance and the revised June guidance) is overly simplistic and fails to provide any guidance at all, this Office must advise on Title IX's requirements and how they may relate to Senate Bill 150. In the opinion of the Attorney General, a school district's implementation of Senate Bill 150 does not constitute a Title IX violation under any existing, binding legal precedent or statutory or regulatory law.

A. Title IX prohibits discrimination "on the basis of sex."

Title IX was enacted in 1972 to ensure women and girls are provided equal access to educational opportunities. The operative provision of Title IX 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 subject to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). Although "sex" is not defined by statute, the term refers to the biological differences between male and female. *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812–814 (11th Cir. 2022); Notice of Final Rule, 85 Fed. Reg. 30026, 30178 (May 19, 2020) ("Title IX and its implementing regulations include provisions that presuppose sex as a binary classification."). *See also*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020)(Niemeyer, J. dissenting) (noting that "sex" refers to the "physiological distinctions between males and females").

Not all differential treatment on the basis of sex constitutes prohibited discrimination under Title IX. *Meriwether v. Hartop*, 992 F.3d 492, 510, n.4 (6th Cir. 2021). For example, Congress declared that nothing in Title IX "shall be construed to prohibit [schools] from maintaining separate living facilities for the different sexes." 20 U.S.C §1686. The implementing regulations also state that schools "may provide

separate toilets, locker room, and shower facilities on the basis of sex," so long as the "facilities provided for students of one sex [are] comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. Moreover, schools may "operate or sponsor teams for members of each sex where selection for such teams is based on competitive skill or the activity involved is a contact sport." *Id* at § 106.41(b). Title IX thus underscores that "[p]hysical differences between men and women … are enduring" and the "two sexes are not fungible" but rather have "inherent differences." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsberg, J.) (cleaned up) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

Although not explicitly stated in the statute, Title IX also prohibits sexual harassment and abuse of students. Title IX's implementing regulations require schools to investigate complaints of harassment and abuse and take appropriate steps to prevent it. 34 C.F.R. §§ 106.44, 106.45. A student subject to sex abuse or harassment by an employee or another student at a school may also bring a private cause of action against the school to collect damages. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998) (dealing with misconduct by teacher); *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629 (1999) (dealing with student-on-student harassment). To prevail in a suit against the school, a plaintiff must prove that "1) [the plaintiff] was subjected to a quid pro quo sexual harassment or a sexually hostile work environment; [2)] [the plaintiff] provided actual notice of the situation to an 'appropriate person,' who was, at a minimum, an official of the educational entity with authority to take corrective action and to end discrimination; and [3] the institution's response to the harassment amounted to 'deliberate indifference.'" *Klemencic v. Ohio St. Univ.*, 263 F.3d 504, 510 (6th Cir. 2001) (citation omitted). For hostile work environment claims, the plaintiff must also demonstrate the sexual harassment was "so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities and benefits provided by the school." *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999) (citing to *Davis*, 119 S. Ct. at 1666–71).

B. No binding precedent holds that unlawful discrimination "on the basis of sex" under Title IX includes disparate treatment of those asserting a gender identity that does not conform with their sex.

In the past decade, courts began tackling the issue of whether discrimination against employees whose gender identity does not conform to their biological sex constitutes unlawful sex discrimination under Title VII, which prohibits adverse employment actions against the employee "because of" the employee's "sex." 42 U.S.C. § 2000e-2(a). Both the United States Supreme Court and the Sixth Circuit Court of Appeals have held that taking adverse employment actions against an employee for not conforming to certain stereotypes associated with the employee's biological sex constitutes unlawful sex discrimination under Title VII. *See e.g.*, *Bostock v. Clayton*

County, 140 S. Ct. 1731 (2020) (holding that Title VII prohibits an employer from firing an employee for being homosexual or gender non-conforming); S*mith v. City of Salem*, 378 F.3d 729 (6th Cir. 2005) (holding that termination of employee based on gender transition constitutes sex-based discrimination); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d. 560 (6th Cir. 2018) (same). These cases interpreting Title VII are binding in Kentucky.

These Title VII cases, however, have not been extended to the Title IX context. The KDE guidance elides this point. The *Bostock* majority expressly noted that "other federal or state laws that prohibit sex discrimination" were not "before" the Court; and refused to "prejudge" any such question about what those statutes require. *Bostock*, 140 S. Ct. at 1753. Even more specifically, the Court stated, "we do not purport to address bathrooms, locker rooms, or anything else of the kind." *Id.* The Sixth Circuit Court of Appeals issued similar warnings. *See Meriwether*, 992 F.3d at 510, n. 4 ("[I]t does not follow that principles announced in the Title VII context automatically apply in the Title IX context."); *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he rule in *Bostock* extends no further than Title VII.").

There is currently a split of authority among the federal circuit courts regarding whether Title IX prohibits discrimination based on gender nonconformity in all contexts. Ruling *en banc*, the Eleventh Circuit Court of Appeals recently held that the term "sex" in Title IX means biological sex and therefore segregation of restroom facilities based on biological sex is specifically allowed under existing regulations. *Adams*, 57 F.4th at 812–814. The Fourth and Seventh Circuit Courts of Appeal, however, have interpreted Title IX under the same sex-stereotyping framework used in Title VII cases. *See Grimm*, 972 F.3d at 617–18 (finding a violation of Title IX to deny a biological male student who identified as female access to the girl's restroom); [8] *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1047–1050 (7th Cir. 2017) (concluding the same regarding a biological male student who had been denied access to the girl's restroom).[9]

The United States Department of Education also recently sought to amend Title IX regulations to address gender incongruent persons. Notice of Proposed Rule

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[8] The first Fourth Circuit Court of Appeals decision in this case gave deference to a Department of Education letter opining that Title IX requires school to allow students to use the sex-segregated bathroom consistent with their asserted gender identity. *Grim v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016). The United States Supreme Court then issued of a stay of the injunction entered in favor of the plaintiff based, in part, on this letter, *see Gloucester Cnty. Sch. Bd. v. Grimm*, 136 S. Ct. 2442 (2016), and then vacated judgment and remanded the case back to the Fourth Circuit for further consideration of a Title IX guidance document issued by the Department of Education under a new administration, *see Gloucester*, 137 S. Ct. 1239 (2017). After the Fourth Circuit Court of Appeals found in favor of the plaintiff again, the United States Supreme Court denied writ of certiorari on June 28, 2021. *Gloucester Cnty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878 (2021).

[9] The United States Supreme Court dismissed a petition for writ of certiorari upon agreement of the parties. *Whitaker v. Kenosha Unified Sch. Dist.*, 138 S. Ct. 1260 (2018).

Making, 87 Fed. Reg. 41390 (July 12, 2022). These proposed regulations reflect a shift in policy and ideology regarding what it means to discriminate "on the basis of sex" in the context of Title IX. However, proposed regulations are not binding law. Moreover, the views on how Title IX's ban on sex discrimination should apply to gender incongruent students change from administration to administration.[10] At the very least, this back-and-forth interpretation of Title IX on the issue of gender identity indicates how unsettled the law is.

C. Neither existing binding legal precedent nor statutory or regulatory law holds or declares that a school district would violate Title IX by implementing Senate Bill 150's provisions concerning the use of facilities including restrooms, locker rooms and shower rooms in public schools.

Students who claim their gender does not conform with their biological sex have mounted legal challenges against policies requiring them to use the sex-segregated restroom aligning with their biological sex. The Fourth and Seventh Circuit Courts of Appeal have held that enforcement of these polices against these individuals violates Title IX's prohibition on sex-based discrimination under the sex-stereotyping theory advanced by *Bostock*. *See Grimm*, 972 F.3d at 616–19; *Whitaker,* 858 F.3d at 1047–1050. But the Eleventh Circuit Court of Appeals has held that restricting restroom use by biological sex rather than the asserted gender identity of a student did not amount to illegal sex discrimination under Title IX. *Adams*, 57 F.4th at 811–14. The United States Supreme Court explicitly stated that it has yet to weigh in on this specific issue. *Bostock*, 140 S. Ct. at 1753.

The Sixth Circuit Court of Appeals has also not issued a definitive ruling suggesting that a school district implementing Senate Bill 150's provisions governing restrooms, locker rooms, and shower rooms would constitute a violation of Title IX. The *Dodds* case, which is cited in the KDE guidance, addressed a school district's motion to stay an injunction entered in a district court in Ohio on behalf of an eleven-year-old special needs student who was suicidal. That injunction allowed the student

[10] *See e.g.,* February 22, 2017 Dear Colleague Letter (withdrawing Obama administration letters opining that Title IX required access to sex-segregated facilities based on gender identity), available at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.; Memorandum for Kimberly M. Richey Re: *Bostock v. Clayton Cty*., 140 S. Ct. 1731 (2020) (concluding that Title IX does not prohibit certain practices such as referring to students by pronouns matching their biological sex or restricting access to sex-segregated restrooms based on biological sex), available at https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf; President Biden's Exec. Order No. 13, 988, 86 Fed. Reg. 7,023 (Jan. 20, 2021) ("Under *Bostock's* reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 et seq.), the Fair Housing Act, as amended (42 U.S.C. 3601 et seq.), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.")

to use the restroom aligning with the student's self-identified gender. *Dodds*, 845 F.3d. at 220–21. A panel of the Sixth Circuit Court of Appeals, after weighing the equities of the case, allowed the injunction to remain in place. Believing that the unique procedural posture and facts of the *Dodds* case did not make it binding precedent, the United Stated District Court for the Middle District of Tennessee ruled that a Tennessee law restricting use of sex-separated restrooms and changing rooms according to biological sex did not violate Title IX. *D.H. v. Williamson Cnty. Bd. of Ed.*, 2022 W.L. 16639994 (M.D. Tenn. Nov. 2, 2022). The Sixth Circuit Court of Appeals has yet to rule on that appeal.

The Office also believes that a challenge to Senate Bill 150's restrictions on the use of locker rooms and shower rooms to students of the same biological sex requires a different analysis than has been employed by cases addressing restrooms only. Some of the cases involving restrooms discounted the privacy interests of students because the restrooms had stalls with doors. *Whitaker*, 858 F.3d at 1052 ("[restroom policy] ignores the practical reality of how [the student] … uses the bathroom: by entering a stall and closing the door"); *Grimm*,972 F.3d at 613–14 (agreeing with *Whitaker* on the issue of privacy). But locker rooms and shower rooms typically involve groups of students gathered in a complete state of undress where the anatomical and physiological differences between the biological sexes is patent. In this Office's opinion, courts within the Sixth Circuit may be hesitant to find that Title IX requires middle and high school girls to undress and shower in the presence the boys they will sit next to in English class later that same day. *See Williamson Cnty. Bd. of Ed.*, 2022 W.L. 16639994 at *9 (acknowledging privacy interests of other students in restroom).

As stated above, the Department of Education has recently proposed Title IX regulation amendments. 87 Fed. Reg. 41390. These proposed amendments include a revision to 34 CFR §106.31(a):

> (2) In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, unless otherwise permitted by Title IX or this part. Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

87 Fed. Reg. 41571. The Department notes that its regulations have "recognized limited contexts in which recipients are permitted … to separate student on the basis of sex because the Department has determined that in those contexts such treatment

does not generally impose harm on students. *See e.g.*, 34 CFR 106.33 (toilet, locker room, and shower facilities); *id*. at 105.34(a)(3)." 87 Fed. Reg., 41534. But the Department cites to *Grimm*, *Whitaker*, and other restroom cases, and states that "courts have recognized that a [school] subjects students to such harm when it bars them from accessing otherwise permissible sex-separate facilities or activities consistent with their gender identity." *Id*. at 41535. Thus, the Department's proposed regulations reflect its view that facilities separated based on biological sex are generally legal, but that students should be allowed to use the sex-separated facility that aligns with the gender, when the student's sex and gender identity do not align.

Again, it is important to note that these proposed regulations are not final and are not currently binding on recipients of federal funding. Moreover, these proposed regulations addressing gender identity are based on the Department's expansive interpretation of *Bostock*, which it disclosed in a published interpretation entitled, "Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender in Light of *Bostock v. Clayton County*." Interpretation, 86 Fed. Reg. 32,637 (June 22, 2021). That flawed published interpretation is the subject of a legal challenge currently on appeal before the Sixth Circuit Court of Appeals. *See Tenn., et. al. v. Dep. of Ed., et. al*, No. 22-5807.

In sum, Title IX's text and existing implementing regulations allow disparate treatment based on biological sex in some contexts. Moreover, the United States Supreme Court and Sixth Circuit Court of Appeals have warned that Title VII case law concerning gender identity discrimination in the workplace do not apply to Title IX. For these reasons, it is the Attorney General's opinion that a school district's implementation of Senate Bill 150's provision concerning restrooms, locker rooms, and shower rooms would not violate Title IX.

D. A school district does not violate Title IX simply because it does not have a required preferred pronoun usage policy.

KDE's implication that a school district may violate Title IX by not having a preferred pronoun policy wholly lacks merit.[11] In fact, the recent Sixth Circuit Court of Appeal's holding in *Meriwether v. Hartop* suggests just the opposite. *Meriwether*, 992 F.3d at 511. In that case, a professor, Nicholas Meriwether, was disciplined by his employer for failing to comply with the university's policy mandating he refer to the plaintiff by preferred pronouns during class. Meriwether sued stating that the university violated his rights under the Free Speech and Free Exercise Clauses of the First Amendment. The court held that the university's policy forcing Meriwether under the threat of discipline to use a student's preferred pronouns stated a claim for violation of Meriwether's First Amendment rights. *Id*. at 511–12, 517. The court also

[11] *Dodds*, the only Sixth Circuit case cited in KDE's guidance, has nothing to do with preferred pronoun polices.

rejected the university's argument that Title IX compelled a different result. *Id.* at 511. The court noted that the failure of Meriwether to use preferred pronouns, absent more, was not sufficient to support a Title IX hostile-environment claim because Meriwether's actions were not "serious enough to have the systematic effect of denying the victim equal access to an educational program or activity." *Id.* (quoting *Davis*, 526 U.S. at 652).[12]

Senate Bill 150 simply prevents schools from implementing a policy concerning preferred pronouns that teachers and students must follow under the threat of discipline. Senate Bill 150 does not prevent teachers and students from voluntarily referring to students by their preferred pronouns if they choose to do so. By giving students and teachers the freedom to act in accordance with their beliefs, however, Senate Bill 150 preserves the First Amendment rights of students and teachers consistent with the *Meriwether* holding. And in doing so, it alleviates potential liability for school districts for First Amendment claims. For these reasons, it is the Office's opinion that implementation of Senate Bill 150's prohibition on preferred pronoun usage polices does not violate Title IX.

Daniel Cameron
ATTORNEY GENERAL

Jeremy J. Sylvester
Assistant Attorney General

[12] This is consistent with letter from Assistant Secretary Kenneth Marcus to Representative Mark Green dated March 9, 2020, which is available at https://www2.ed.gov/about/offices/list/ocr/correspondence/congress/20200309-title-ix-and-use-of-preferred-pronouns.pdf. That letter states, 'By itself, refusing to use transgender students' preferred pronouns is not a violation of Title IX and would not trigger a loss of funding or other sanctions."

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CASE NO. _____
DIVISION ____

Filed Electronically

JOHN DOE and SPOUSE DOE for themselves and as Next Friends and Parents of CHILD DOE, and as representatives on behalf of individuals similarly situated,

ANN ROE and SPOUSE ROE for themselves and as Next
Friends and Parents of CHILD ROE, and as representatives on behalf of individuals similarly situated,

MARY POE for herself and as Next Friend and Parent of
CHILD POE 1 and CHILD POE 2, and as representatives on behalf of individuals similarly situated,

And

JANE NOE and former SPOUSE NOE for themselves and
as Next Friends and Parents of CHILD NOE, and as representatives on behalf of individuals similarly situated,

v.

FAYETTE COUNTY BOARD OF EDUCATION and KENTUCKY ATTORNEY GENERAL DANIEL J. CAMERON

PLAINTIFFS

DEFENDANTS

ORDER OF PROTECTION AND ALLOWING PLAINTIFFS TO PROCEED PSEUDONYMOUSLY

This matter having come before the Court upon Plaintiffs' Motion for Leave to Proceed Pseudonymously and for Order of Protection, it is hereby **ORDERED:**

1. That Plaintiffs' Motion for Leave to Proceed Pseudonymously is **GRANTED**;
2. Plaintiffs are permitted to bring this action under pseudonyms to protect their identities from public disclosure;
3. In all publicly-filed documents, Plaintiffs shall only be identified by their pseudonyms;
4. All documents filed with this Court that contain the full or partial names of the Plaintiffs or contain information that might otherwise identify them, directly or indirectly, shall be filed under seal;
5. Upon request, Plaintiffs will disclose their identities to counsel for Defendants. In that event, Plaintiffs need only disclose the minimum information necessary for Defendants to present their defense;
6. Counsel for Defendants may disclose Plaintiffs' identities to the Defendants' agents, legal counsel representing them in these proceedings, and to any experts retained in this case, but only to the minimum extent necessary for Defendants to litigate this action;
7. Every individual to whom disclosure of Plaintiffs' identities is made shall read and be bound by this Order. Counsel for each of the Defendants shall ensure that persons to whom disclosure is made under Paragraphs 5 and 6 above are aware of this Order; and
8. Under no circumstances shall any party or any other person intentionally disclose Plaintiffs' identities without their legal counsel's written consent.

IT IS THEREFORE ORDERED.

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CASE NO. _____
DIVISION ____

Filed Electronically

JOHN DOE and SPOUSE DOE for themselves and as Next Friends and Parents of CHILD DOE, and as representatives on behalf of individuals similarly situated

ANN ROE and SPOUSE ROE for themselves and as Next Friends and Parents of CHILD ROE, and as representatives on behalf of individuals similarly situated

MARY POE for herself and as Next Friend and Parent of CHILD POE 1 and CHILD POE 2, and as representatives on behalf of individuals similarly situated

And

JANE NOE and former SPOUSE NOE for themselves and as Next Friends and Parents of CHILD NOE, and as representatives on behalf of individuals similarly situated

PLAINTIFFS

v.

FAYETTE COUNTY BOARD OF EDUCATION and KENTUCKY ATTORNEY GENERAL DANIEL J. CAMERON

DEFENDANTS

PLAINTIFFS' MOTION FOR LEAVE TO PROCEED PSEUDONYMOUSLY
AND INCORPORATED MEMORANDUM OF LAW

The Plaintiffs, John Doe and Spouse Doe, for themselves and as Next Friends and Parents of Child Doe, Ann Roe and Spouse Roe for themselves and as Next Friends and Parents of Child Roe, Mary Poe, for herself and as Next Friend and Parent of Child Poe 1 and Child Poe 2, and Jane

Noe and Former Spouse Noe, for themselves and as Next Friends and Parents of Child Noe, by counsel, respectfully move this Court for an order protecting their identities from public disclosure and request leave to permit the Plaintiffs to proceed in this matter pseudonymously.[1] The Plaintiffs submit the following memorandum in support of their motion.

Plaintiffs are adolescents students and parents of those adolescent students who are challenging the implementation of Kentucky's recently passed Senate Bill 150, which, among other things, permits the intentional "misgendering" of students, deprives students of their fundamental right to a public education in violation of *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), and limits access to school restrooms for transgender students.

The student Plaintiffs are transgender or non-binary. They are members of a stigmatized group that frequently encounters discrimination and harassment. They are especially vulnerable because of their status as young people under the age of eighteen. To mitigate the serious risk of harm, the student Plaintiffs would face from discrimination and harassment if their transgender identity was disclosed in public court filings and any media attention that could result, they seek leave to proceed pseudonymously in this litigation. Their parents also seek to proceed pseudonymously to protect the identity of their minor children because identification of the parent Plaintiffs would effectively identify their children.

Considering the private subject matter of this lawsuit and because student Plaintiffs are minors challenging a government action, Kentucky's standard for allowing a plaintiff to proceed pseudonymously is satisfied and the motion should be granted.

[1] All names used herein are pseudonyms to protect the identity of the movants.

STANDARD OF REVIEW

Kentucky Rule of Civil Procedure 10.01 requires that "[i]n the complaint the style of the action shall include the names of all the parties…" Under exceptional circumstances, however, courts have allowed parties to proceed under a pseudonym like "John Doe" or "Jane Doe" to preserve their anonymity. *Doe 1 v. Flores*, 661 S.W.3d 1, 6 (Ky. App. 2022).

Several factors guide the analysis of whether a plaintiff's privacy interest substantially outweighs the presumption of open judicial proceedings. *Id.* citing *Doe v. Harlan Cnty. School Dist.*, 96 F.Supp.2d 667, 670 (E.D. Ky. 2000). These factors include: (a) whether the plaintiffs seeking anonymity are suing to challenge governmental activity, (b) whether prosecution of the suit will compel the plaintiffs to disclose information "of the utmost intimacy," and (c) whether a child plaintiff is involved. *Id.*, citing *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981).

Further, a Court may "issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense" upon a Plaintiff's motion and for good cause shown. *Richmond Health Facilities-Madison, LP v. Clouse*, 473 S.W.3d 79, 83 (Ky. 2015).

ARGUMENT

In the present case, there are exceptional circumstances which require the Plaintiffs to proceed pseudonymously. All three factors mentioned above weigh in the Plaintiffs' favor in the present case. Furthermore, a protective order is necessary to protect the Plaintiffs from oppression and undue burden.

A. Plaintiffs Should Be Permitted to Proceed Pseudonymously Because the Student Plaintiffs Are Children

The student Plaintiffs are minor children, aged from 10 to 17. Minor litigants have a "special status and vulnerability" that entitles them to "heightened privacy protections." *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981). For instance, Federal Rule of Civil Procedure 5.2(a)(3)

protects minor children involved in litigation by requiring redaction from any court filing of "the name of an individual known to be a minor" and the use instead of only "the minor's initials."

Though there is a lack of Kentucky case law on the subject, federal courts have consistently granted permission to proceed using pseudonyms in cases involving claims by transgender youth. *See, e.g., DOE et al. v. Ladapo et al.*, No. 23-cv-00114, ECF No. 51 (N.D. Fla. May 3, 2023); *Doe v. Volusia Cnty. Sch. Bd.*, No, 18-102, ECF No. 8 (M.D. Fla. Jan. 30, 2018); *Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 16-524, 2016 WL 4269080, at *5 (S.D. Ohio Aug. 15, 2016); *Doe v. U.S.*, No. 16-0640, 2016 WL 3476313, ay *1 (S.D. Ill. June 27, 2016). For all the same reasons cited in the above cases, the same relief is appropriate here.

B. Plaintiffs Should Be Permitted to Proceed Pseudonymously Because They Are Challenging Government Activity.

Plaintiffs here are challenging a government activity, which further weighs in favor of permitting Plaintiffs to proceed pseudonymously. Specifically, Plaintiffs are challenging the enforcement of Senate Bill 150 in public schools, which among other things, permits the intentional misgendering of students, deprives students of a fundamental right to a public education in violation of *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989), and limits access to school restrooms for transgender students. "[W]hether a defendant is a governmental entity or a private defendant is significant because governmental bodies do not share the concerns about 'reputation' that private individuals have when they are charged with wrongdoing." *Doe v. Webster County*, 2022 WL 124678, at *2 (W.D. Ky. January 15, 2022), citing *Doe v. Shakur*, 164 F.R.D. 359, 361 n.1 (S.D. N.Y. 1996). The Plaintiffs have sued a public local Board of Education, which is an agency of the Kentucky state government. *Yanero v. Davis*, 65 S.W.3d 510, 527 (Ky. 2001). As such, the strong interests in proceeding pseudonymously are present here.

C. Plaintiffs Should Be Permitted to Proceed Pseudonymously Because this Lawsuit Involves Information "of the Utmost Intimacy."

This lawsuit requires the student Plaintiffs to disclose their transgender identity. No Kentucky case law has considered how "of the utmost intimacy" is to be analyzed and considered, however several federal courts have dealt with this issue. A plaintiff's transgender identity is "of the utmost intimacy" and exposes the plaintiff to risk of injury. *Meriwether v. Trs. of Shawnee State Univ.*, 2019 WL 2392958, at *3 (S.D. Ohio Jan. 30, 2019). Because this case concerns details "of the utmost intimacy," including, for example, genitalia, pubertal development, medical history, mental health, and gender identity, proceeding pseudonymously is essential. *Id*.

Furthermore, there is an actual risk of discrimination and harassment if the Plaintiffs are not permitted to proceed pseudonymously. Federal courts have taken "judicial notice of the increased threat of violence to which transgender individuals are exposed." *Doe v. City of Detroit,* 2018 WL 3434345, at *2 (E.D. Mich. July 17, 2018) (citing "A Time to Act: Fatal Violence Against Transgender People in America in 2017," at 33). Courts have also observed "that transgender individuals face discrimination, harassment, and violence because of their gender identity." *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *see also Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (finding that forcing individuals "to disclose their transgender status … exposes" them "to a substantial risk of stigma, discrimination, intimidation, violence, and danger."). Several courts, including courts within the region of the Sixth Circuit Court of Appeals, accordingly "have held that an individual's transgender identity can carry enough of a social stigma" to warrant anonymity. *City of Detroit*, 2018 WL 3434345, at *2 (citing *Doe v. Blue Cross & Blue Shield of Rhode Island*, 794 F. Supp. 72, 72 (D.R.I. 1992).

The same "considerations also support allowing the parent Plaintiffs to proceed anonymously, because public disclosure of their identities would nullify any privacy protections given to their children alone." *D.L. ex rel. Phan L. Bateman*, No. 12-208, 2012 WL 1565419, at *2 (M.D. Fla. May 2, 2012) (citing *Doe v. Banos*, 713 F. Supp. 2d 404, 407 n.1 (D.N.J. 2010)). Therefore, the student Plaintiffs and the parent Plaintiffs should be permitted to proceed pseudonymously.

D. A Protective Order is Necessary to Protect the Plaintiffs from Embarrassment, Oppression and Undue Burden.

As detailed above, the disclosure of the Plaintiffs' identities would expose the student Plaintiffs to an elevated risk of discrimination, intimidation, violence, and educational disruption. The requested protective order would protect and safeguard not only the student Plaintiffs' identities, but also their physical and emotional safety.

Generally, when considering whether to enter a protective order, courts will consider whether the opposing party will have sufficient information to fully defend the case if the requested protective order is issued. If knowledge of the party's identifying information may be necessary to the opposing party's ability to present their defense, the trial court may order that the moving party's identity be disclosed to the opposing party, but limit the disclosure of the moving party's personal information to the public. *See Doe v. Porter*, 370 F.3d 558, 560-61 (6th Cir. 2004).

Here, the Plaintiffs are seeking an order that would limit the disclosure of their personal information to the public, but will not oppose disclosure of their identities to the Defendants if necessary so long as they are protected by the proposed protective order. Thus, the proposed protective order will not hamper the Defendants' ability to present a defense in any way.

CONCLUSION

For all the foregoing reasons, Plaintiffs' right to privacy outweighs the presumption of openness in court proceedings. Plaintiffs, therefore, respectfully request the Court grant this motion to proceed pseudonymously and enter a protective order protecting the Plaintiffs identities from public disclosure.

Respectfully submitted,

/s/ Douglas L. McSwain
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CERTIFICATE OF SERVICE

The undersigned cerifies that the foregoing was filed with the Court using the CM/ECF system on September 28, 2023, which will generate an electronic notice of filing to all counsel registered with that service.

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