**IN THE UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEENASHVILLE DIVISION**

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| **L.E., *by his next friend and parents,* SHELLEY ESQUIVEL and MARIO ESQUIVEL,** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **No. 3:21-CV-00835** |
| **BILL LEE, in his official capacity as Governor of Tennessee, et al.** | ) | |
| **Defendants.** | ) | |

**KNOX COUNTY BOARD OF EDUCATION AND JON RYSEWYK'S JOINT MEMORANDUM OF LAW IN SUPPORT MOTION FOR SUMMARY JUDGMENT**

Defendants Knox County Board of Education ("KCBOE") and Superintendent Jon Rysewyk (the "Superintendent") (collectively "Knox County Defendants") submit this Memorandum of Law in Support of their Motion for Summary Judgment. Here, it is undisputed that the Defendants were required by state law to adopt the policy at issue and thus, were acting as an arm of the state precluding § 1983 liability against them. Further, Knox County Defendants did not violate Title IX for the reasons set forth below.[1] Thus, Defendants respectfully request the Court grant this Motion and dismiss any claims against them.

[1] Knox County Defendants presume that State Defendants will similarly file a Motion for Summary Judgment arguing that the State's law does not violate the rights of Plaintiff pursuant to any theory of recovery advanced by Plaintiff. After review of such arguments, Knox County Defendants may adopt some or all of the State's arguments on these issues.

## FACTS

### Structure and Function of KCBOE and Knox County Schools

Public school systems within the state of Tennessee were established by the Constitution of the State of Tennessee. *See* Art. 11, § 19, Tenn. Const. Thus, "[p]ublic education is, at core, a state rather than a county or municipal function and the general education statutes set forth a uniform statewide system of public education." *Rollins v. Wilson Cnty. Gov't*, 967 F. Supp. 990, 996 (M.D. Tenn. 1997). KCBOE is the elected body which manages and controls the Knox County, Tennessee school system. See Tenn. Code Ann. 49-2-203(a)(2) ("It is the duty of the local board of education to… [m]anage and control all public schools established… under its jurisdiction….") and Knox County Charter, Sec. 6.01.A: "The exclusive management and control of the school system of Knox County… is vested in the Knox County Board of Education…." KCBOE is a local education agency ("LEA") under Tennessee Code Annotated § 49-3-104. KCBOE's purpose is to implement the state's education system at the local level. [Deposition of 30(b)(6) witness Jennifer Hemmelgarn, p. 25, l. 4-13].

### Passage of Tennessee Code Annotated § 49-6-310

In March of 2021, the Tennessee General Assembly passed Senate Bill 228 which has subsequently been codified at Tennessee Code Annotated § 49-6-310. When it was passed in March of 2021, the statute read:

> **(a)** A student's gender for purposes of participation in a public middle school or high school interscholastic athletic activity or event must be determined by the student's sex at the time of the student's birth, as indicated on the student's original birth certificate. If a birth certificate provided by a student pursuant to this sub§(a) does not appear to be the student's original birth certificate or does not indicate the student's sex upon birth, then the student must provide other evidence indicating the student's sex at the time of birth. The student or the student's parent or guardian must pay any costs associated with providing the evidence required under this sub§(a).

> **(b)** The state board of education, each local board of education, and each governing body of a public charter school

Tenn. Code Ann. § 49-6-310(a)-(b) (West 2021).

The General Assembly further amended the statute in 2022 to create a private right of action for students and to specify that LEAs who failed to adopt policies pursuant to this will lose funding and could be liable for damages to the families of other students:

> **(c)** If a public school or public charter school violates a policy adopted under sub§(b) by the school's governing board or body, and the violation deprives a student of an athletic opportunity or causes direct or indirect harm to the student, then the student or the student's parent or legal guardian, if the student is a minor, has a private cause of action for injunctive relief, damages, and any other relief available under law. The student or the student's parent or legal guardian is also entitled to the student's or the student's parent's or legal guardian's reasonable costs and attorney fees. A student or a student's parent or legal guardian has one (1) year from the date of a violation of a policy adopted under sub§(b) to file an action.
>
> . . .
>
> **(f)** The commissioner of education shall withhold a portion of the state education finance funds that an LEA is otherwise eligible to receive if the LEA fails or refuses to comply with the requirements of this §. . . .

Tenn. Code Ann. § 49-6-310(c)(f) (West 2022).

In order to comply with the statute, KCBOE amended its interscholastic sports policy, I-171, to adopt the language set forth in sub§(a) of the statute. [Hemmelgarn Deposition, p. 97, l. 1-6]. KCBOE's purpose in amending the policy was to comply with state law. [*Id.*]. KCBOE had no role in drafting, advocating, or passing Tennessee Code Annotated § 49-6-310. [*Id.*, p. 86-87]. A copy of KCBOE policy 1-171 is attached to Defendants' Motion for Summary Judgment as Exhibit B and was introduced as Exhibit 1 to Ms. Hemmelgarn's deposition. [Motion for Summary Judgment, Ex. B].

**L.E.'s Time as a Student at Farragut High School**

Plaintiff L.E. is a high school student at Farragut High School, a school within the KCBOE school system. [Complaint, Doc. 1, ¶ 1]. Plaintiff alleges that he is a transgender boy[2] and desires to play golf on the Farragut High School boys' golf team. [*Id.*, ¶ 81]. L.E. alleges that Tennessee Code Annotated § 49-6-310 and KCBOE Policy 1-171 prevent him from playing on the golf team of his choice. [*Id.*, ¶ 83]. It is undisputed, however, that L.E. has never tried out for any golf team at Farragut High School. [Deposition of L.E., p. 18-19]. L.E. has never personally discussed playing golf with the Farragut golf coach, athletic director, or principal. [Deposition of L.E., p. 39-40].

## LEGAL STANDARD

The initial burden of establishing there is no genuine issue of material fact lies upon the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party's burden may be discharged by "showing-that is, pointing out to the district court-that there is an absence of evidence to support the nonmoving party's case." *Max Arnold & Sons, LLC v. W.L. Hailey & Co.*, Inc., 452 F.3d 494, 505-506 (6th Cir. 2006); *Celotex Corp.*, 477 U.S. at 325.

Once the moving party meets this initial burden, a motion for summary judgment requires the non-moving party to "put up or shut up" on a critical issue. *Ross v. City of Gatlinburg*, 327 F. Supp. 2d 834, 838-839 (E.D. Tenn. 2003), *quoting Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). To defeat summary judgment, the nonmoving party must present "concrete evidence from which a reasonable juror could return a verdict in his favor… ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "Bare allegations" by the non-moving party, as well as "conclusory allegations," are insufficient to defeat a well-founded summary judgment motion.

[2] As alleged in the Complaint, "transgender boy" means a person who was assigned the sex of female of birth, but identifies as a boy. [Complaint, ¶ 74-75]

*Mitchell v. Toledo Hospital*, 964 F.2d 577, 581-82 (6th Cir. 1992); *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888 (1990) ("the object of this provision [Rule 56(c)] is not to replace conclusory allegations of the complaint … with conclusory allegations of an affidavit").

The Court of Appeals has also warned that "the respondent must adduce more than a scintilla of evidence to overcome the motion [and] … must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)(quoting *Liberty Lobby*). Moreover, the Court of Appeals explained that:

> The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further, 'where the record taken as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is 'implausible.'

*Street*, 886 F.2d at 1480 (citations omitted). *See also Hutt v. Gibson Fiber Glass Products*, 914 F.2d 790 (6th Cir. 1990)("A court deciding a motion for summary judgment must determine whether the evidence presents a sufficient disagreement to require a submission to the jury or whether it is so one-sided that one party must prevail as a matter of law").

## ARGUMENT

### I. Defendants are entitled to judgment as a matter of law on Plaintiffs' §1983 claim.

#### A. The Claims Against Superintendent Rysewyk should be dismissed as duplicative.

Plaintiffs bring a § 1983 claim against KCBOE and Superintendent Rysewyk in his official capacity. Because Superintendent Rysewyk is sued only in his official capacity, this claim "generally represents only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell v. Dep't of Soc.*

*Sevs.*, 436 U.S. 658, 690, n. 5 (1978)). Thus, all claims against Superintendent Rysewyk should be dismissed as duplicative to the claims against KCBOE.

### B. KCBOE is Entitled to Judgment as a Matter of Law on Plaintiffs' § 1983 Claims Because It was Acting as an Arm of the State and Entitled to Sovereign Immunity.

Under *Monell*, an entity "may only be sued under § 1983 for unconstitutional or illegal municipal policies, and not for unconstitutional conduct of [its] employees." *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 819 (6th Cir. 2007) (quoting *Monell*, 436 U.S. at 691). The adoption or deliberate non-adoption of a "policy or custom" that violates a plaintiff's constitutional rights is the sole manner in which a [entity] can be held liable under § 1983. *Schroder v. City of Fort Thomas*, 412 F.3d 724, 727 (6th Cir. 2005). To plead a claim for municipal liability under § 1983, a plaintiff must plausibly allege that his constitutional rights were violated and that a policy or custom of the municipality was the "moving force" behind the deprivation of the plaintiff's rights. *Miller v. Sanilac Cnty.*, 606 F.3d 240, 254-55 (6th Cir. 2010) (citing *Monell*, 436 U.S. at 694 (internal citation omitted)).

Thus, local governing bodies—and the officers thereof, acting in their official capacities—do generally qualify as "persons" under §1983 and are amenable to suit. *Monell*, 436 U.S. at 690-95. This general rule, however, does not apply with a local governing body acts solely as an extension of the State because State governments and state officials are not "persons" within the ambit of §1983. *See e.g.*, *Kaimowitz v. Bd. of Trustees of Univ. of Ill.*, 951 F.2d 765, 767 (7th Cir. 1991) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989)). Thus, courts must focus on whether "there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton v. Harris*, 489 U.S. 3778, 385 (1989). As the Sixth Circuit has explained, "[w]here county officials are sued simply for complying with state

mandates that afford no discretion, they act as an arm of the State." *Brotherton v. Cleveland*, 173 F.3d 552, 566-67 (6th Cir. 1999); *see also Whitesel v. Sengenberger*, 222 F.3d 861, 872 (10th Cir. 2000) (county cannot be liable for "merely implementing" a policy created at the state level); *Bethesda Lutheran Homes and Servs., Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1988) ("When the municipality is acting under compulsion of state or federal law, it is the policy contained in that statute or federal law, rather than anything devised or adopted by the municipality, that is responsible for the injury."); *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) (local entity cannot be held liable for simply enforcing state law because the municipal policy in that instance "may more fairly be characterized as the effectuation of the policy of the State . . . embodied in that statute, for which the citizens of a particular county should not bear singular responsibility."). "[T]he essential question is the degree of discretion possessed by the official . . . implementing the contested policy." *Cady v. Arenac Cnty.*, 574 F.3d 334, 343 (6th Cir. 2009).

Here, it is undisputed that KCBOE is acting as an arm of the State in this particular matter. As an initial matter, courts in Tennessee have long noted that "[p]ublic education is, at core, a state rather than county or municipal function." *Rollins*, 967 F. Supp. at 996. Further, it is undisputed that Tennessee Code Annotated §49-6-310 required KCBOE to adopt the policy at issue. Sub§(b) of that statute states: "each local board of education and governing body of a public charter school shall adopt and enforce a policy to ensure compliance with sub§(a)." *Id.* Commissioner Penny Schwinn testified that this law is mandatory on local education agencies like KCBOE. [Deposition of Penny Schwinn, p. 207, l. 2-13]. Sara Morrison, Executive Director of the Tennessee State Board of Education, testified that the State Department of Education will review the polices adopted by the local education agency for compliance with this statute and that the statute requires

each local board of education to adopt and enforce a policy in compliance with the statute. [Morrison Depo., p. 108-109].

Further, Jennifer Hemmelgarn, KCBOE's 30(b)(6) deponent, testified that KCBOE's role is to implement the state education system at the local level. [Hemmelgarn Deposition, p. 25, l. 4-13]. She further testified that KCBOE understood that this state law required KCBOE to adopt a policy in compliance with it and that KCBOE had no role in drafting, advocating, or passing this law. [*Id.*, p. 86-87]. As she explained, the only basis for enacting the policy was to comply with state law. [*Id.*]. There is nothing in the record to show that KCBOE adopted this policy for any reason other than in order to comply with state law or exercised its own independent decision-making authority in implementing Policy I-171 which merely recites the language of Tennessee Code Annotated § 49-6-310. Indeed, KCBOE potentially faces a loss of funding if it failed to comply with the statute. *See* Tenn. Code Ann. 49-6-310(f) "The commissioner of education shall withhold a portion of the state education finance funds that an LEA is otherwise eligible to receive if the LEA fails or refuses to comply with the requirements of this section." In light of the potential consequences facing KCBOE, its policy enactment cannot be said to have been an independent action which lead to §1983 liability.

Here, the statue requires local education agencies to adopt a policy in compliance with state law and KCBOE implemented the exact language of the statute into its interscholastic sports policy. In such a situation, there can be no entity liability under *Monell*. As the Seventh Circuit has explained:

> When state law unequivocally instructs a municipal entity . . . we cannot say that the municipal entity's 'decision' to follow that directive involves the exercise of any meaningful independent discretion, let alone final policy-making authority. It is the statutory directive, not the follow-through, which causes the harm of which the plaintiff complains.

*Snyder v. King*, 745 F.3d 242, 249 (7th Cir. 2014).

Thus, this case differs from *Garner v. Memphis Police Department*, 8 F.3d 368 (6th Cir. 1993). In that case, Garner's father sued the Memphis Police Department after an officer shot and killed Garner's son, a fleeing burglary suspect. The officer followed city Police Department policy regarding deadly force in burglary cases. *Id.* at 361. The department argued that its fleeing felon rules did not constitute a "policy" under *Monell* because it crafted its policy in reliance on a state statute. *Id.* at 364. The Sixth Circuit rejected this argument because the statute only outlined the outer limits of the use of force and the Department deliberately chose to adopt a more restrictive deadly force policy. *Id.* Thus, the Sixth Circuit held that the department had crafted its own policy and thus, could be liable under *Monell*. *Ibid.*

The Plaintiffs may argue that KCBOE's policy will remain in effect even if Tennessee Code Annotated § 49-6-310 is repealed and that an affirmative action by KCBOE is required in order to change I-171 from its current form. However, future policy enactments by KCBOE are merely speculative at this point and also irrelevant to the question of whether KCBOE can be liable under §1983 and *Monell* for its revision of I-171 as required by Tennessee Code Annotated §49-6-310. Because KCBOE was acting in compliance with a state mandate, the answer is no. Therefore, KCBOE is entitled to judgment as a matter of law on Plaintiffs' §1983 claim.

## II. Defendants are entitled to judgment as a matter of law on Plaintiffs' Title IX claim.

Defendants are also entitled to judgment as a matter of law because KCBOE has not prevented L.E. from trying out or completing for a sports team. It is undisputed that L.E. has never tried out for any Farragut golf team. He has personally never spoken to the golf coach, athletic director, or principal about participating on or trying out for the golf team. [Deposition of L.E., p. 18-19, 39-40]. The only action taken by KCBOE in relation to L.E.'s ability to play athletics was

the adoption of Policy I-171 in compliance with state law. [Hemmelgarn Deposition, p. 97, l. 1-6].

These actions alone do not violate Title IX. It is likely that Plaintiffs will rely on *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738-39 (2020) and recent guidance documents from the Department of Education to argue that Tennessee Code Annotated § 49-6-310 and KCBOE policy 1-171 violates Title IX. However, *Bostock* resolved a discrete legal issue: whether Title VII of the Civil Rights Act of 9164 which prohibits employment discrimination "because of...sex," bars an employer from firing someone simply for being homosexual or transgender. 140 S. Ct. 1731, 1738-39, 207 L. Ed. 2d 218 (2020). The Court answered this question affirmatively. However, the Court explicitly narrowed the scope of its holding. As the United States District Court for the Eastern District of Tennessee recently explained, *Bostock's* holding did not:

> sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. *Id.* Nor did the Court's decision "purport to address bathrooms, locker rooms, [dress codes] or anything else of the kind." *Id.* The Court expressly declined to "prejudge" any laws or issues not before it, observing instead that "[w]hether policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases."

*Tennessee v. United States Dep't of Educ.*, -- F.4th --, 2022 U.S. Dist. LEXIS 125684 (E.D. Tenn. July 15, 2022).

Despite *Bostock's* narrow holding, the United States Department of Education recently issued new guidance documents which purported to adopt *Bostock's* holding into Title IX. As explained in *Tennessee v. United States*:

> On June 22, 2021, the Department published in the Federal Register an "Interpretation" of Title IX. ("Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County." 86 Fed. Reg. 32637 (June 22, 2021)). The Interpretation took effect upon publication. The Department recognized that the Interpretation represented a change in position, explaining the

> purpose of the Interpretation was "to make clear that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity" in light of the *Bostock* decision. The Interpretation states that the Department "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department" and that the Interpretation "will guide the Department in processing complaints and conducting investigations." The Interpretation "supersedes and replaces any prior inconsistent statements made by the Department regarding the scope of Title IX's jurisdiction over discrimination based on sexual orientation and gender identity."
>
> Subsequently, on June 23, 2021, the Department issued a "Dear Educator" letter to directly notify those subject to Title IX of the Department's Interpretation. [Doc. 1-4] ("Letter to Educators on Title IX's 49th Anniversary" (June 23, 2021)). The "Dear Educator" letter reiterates that "Title IX's protection against sex discrimination encompasses discrimination based on sexual orientation and gender identity" and explains that the Department "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity."
>
> The "Dear Educator" letter references an accompanying "Fact Sheet" that expounds on the Department's interpretation of Title IX. ("U.S. Dep't of Justice & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools" (June 2021)). The Fact Sheet explains that "discrimination against students based on their sexual orientation or gender identity is a form of discrimination prohibited by federal law." The Fact Sheet also notes that regulated entities "have a responsibility to investigate and address sex discrimination, including sexual harassment, against students because of their perceived or actual sexual orientation or gender identity." The Fact Sheet states that the Department "can [] provide information to assist schools in meeting their legal obligations," and offers examples of specific conduct related to sexual orientation and gender identity that the Department can investigate as incidents of discrimination under Title IX.

*Id.*

Several states, including Tennessee, sued to stop the implementation of these guidance documents. The District Court for the Eastern District granted Plaintiffs' motion for a preliminary injunction holding, in part, that the Department's interpretation of *Bostock* advanced a new interpretation of Title IX:

> Both the Department and EEOC maintain that their respective guidance documents are required by the *Bostock* decision. However, Defendants ignore the limited reach of *Bostock*. The *Bostock* decision only addressed sex discrimination under Title VII; the Supreme Court expressly declined to "prejudge" how its holding

> would apply to "other federal or state laws that prohibit sex discrimination" such as Title IX. *Bostock*, 140 S. Ct. at 1753. Similarly, the Supreme Court explicitly refused to decide whether "sex-segregated bathrooms, locker rooms, and dress codes" violate Title VII. *Id. Bostock* does not require Defendants' interpretations of Title VII and IX. **Instead, Defendants fail to cabin themselves to *Bostock*'s holding. Defendants' guidance documents advance *new* interpretations of Titles VII and IX and impose *new* legal obligations on regulated entities.** Thus, as further explained below, the challenged guidance documents are legislative rules; and "[l]egislative or substantive rules are, by definition, final agency action." *Doe v. U.S. Customs & Border Protection*, 2021 U.S. Dist. LEXIS 48817, 2021 WL 980888, at *9 (D.C. Cir. Mar. 16, 2021) (quoting *Broadgate Inc. v. U.S. Citizenship & Immigration Servs.*, 730 F.Supp.2d 240, 243 (D.C. Cir. 2010)).

*Id.* (emphasis added).

Thus, nothing in *Bostock* nor the new agency guidance from the United States Department of Education supports Plaintiffs' contention that KCBOE's actions in adopting Policy 1-171 pursuant to state law violates Title IX. Nor has any case in the Sixth Circuit held that KCBOE's adoption of Policy I-171 as required violates Title IX. For these reasons, the Defendants are entitled to judgment as a matter of law.

Respectfully submitted this the 7th day of October, 2022.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed electronically on the date recorded by the Court's electronic filing system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties who have filed an appearance in the case, by and through the following counsel:

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