Case Number: PC-2025-01610
Filed in Providence/Bristol County Superior Court
Submitted: 7/18/2025 2:47 PM
Envelope: 5224914
Reviewer: Alexandra R.

STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

JANE DOE,	:	
Plaintiff;	:	
vs.	:	C.A. No. PC2025-01610
ANGÉLICA INFANTE-GREEN, in her capacity as the Commissioner of Elementary and Secondary Education, Rhode Island Department of Education	:	
Defendant.	:	

PLAINTIFF'S REPLY BRIEF TO
DEFENDANT'S OBJECTION TO DECLARATORY JUDGMENT

In her objection to Plaintiff's declaratory judgment action, the Commissioner through her attorneys succeed in adding insult to injury, when they accuse the mother in this case of trying to "disappear" her daughter. The rabid language used in the objection is not just confined to some visceral hatred of all things President Donald Trump, but includes one of the most shocking defamations counsel has ever seen contained in a legal filing, made worse by the fact that it is by the head of the State's Department of Education:

> Although the Plaintiff (and evidently the President) are of the opinion that the very existence of 1.6 million Americans can magically be swept away by the mere issuance of an executive order, the 3.3% of high school students who identify as transgender (the additional 2.2% who have at some point questioned if they were), have not disappeared.

(Comm Obj. p. 10-11). To accuse the mother in this case - who has witnessed the pain her daughter experienced after having been subject to sexual abuse at age 5 and then only to learn that her daughter was being secretly allowed to transition to a boy while at school when she attempted suicide - of wanting to "disappear" her daughter is heartless, demeaning and demanding of an apology and/or sanction.

The Commissioner could have and should have confined herself to the legal issue in this

case namely, by what statutory grant does the Commissioner have the power to redefine sex to include gender. Because there is no such power given to the Commissioner, the objection instead focuses on irrelevant citations to other statutes to justify the unprecedented action of the Commissioner in redefining the term "sex". One simple fact belies all of these arguments, what if R.I. Gen. Laws § 16-38-1.1 did not exist. There is nothing remotely included in the general powers and duties section of R.I. Gen. Laws § 16-60-6 that gives the power to the Commissioner to issue a regulation. If the commissioner had the power to issue a regulation prohibiting discrimination on the basis of sex under her general § 16-60-6 powers, there would have been no need for § 16-38-1.1.

Turning now to the Commissioner's legal argument:

1. <u>The Commissioner has no inherent power to issue a regulation.</u>

The Commissioner claims some she has authority to promulgate a regulation not based on R.I. Gen. Laws § 16-38-1.1(a)(5).

The Commissioner in her brief states:

> Thus, the Commissioner's authority to adopt the LBGTQ+ Regs. is a function not only of the specific directive from the General Assembly under § 16-38-1.1(a)(5), but also pursuant to a more general delegation of authority by the General Assembly under § 16-60-6 and her role as the Chief Executive Officer of the Council.

(Comm Obj. at p. 10). That is not an accurate statement of the law. The Commissioner has no general statutory authority to enact any regulation; her authority is: "To be responsible for the **administration** of policies, rules, and regulations of the board of education and the council on elementary and secondary education with relation to the entire field of elementary and secondary education . . ." R.I. Gen. Laws § 16-60-6(11) (*emphasis added*) What is unique about § 16-38-1.1(a)(5) is that it is the only statutory grant of authority to the Commissioner to enact a

regulation. All other regulations involving education must be promulgated by the Board of Education, albeit the statute as cited by the Commissioner, R.I. Gen. Laws § 16-60-4, doesn't actually use the word "regulation". One only need look at the Department of Education website to discover that the only regulations issued are by the Board of Education. https://ride.ri.gov/board-education/board-regulations

Take for example the issue of bullying. The Commissioner references the Right to Safe School Act, R.I. Gen. Laws § 16-2-17, as a basis for promulgating the Regulation. What she fails to mention to this Court is that there is another statute, R.I. Gen. Laws § 16-21-34, entitled "Statewide bullying policy implemented". That statute has been the basis for the "Rhode Island Statewide Bullying Policy" (see attached, Reply Exh. F), which prevents bullying on the basis of: "Race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression or mental, physical, or sensory disability, intellectual ability or by any other distinguishing characteristic." That statewide policy was issued, not by the Commissioner, but by the Department of Education. There is no need, and no legal basis, to claim that the Commissioner has to the power to issue the Regulation at issue here to prevent bullying of transgender students; a statute and policy already exists.

The Commissioner cites to *Clarke v. Morsilli*, 714 A.2d 597, 600 (R.I. 1998), for the proposition that: "an administrative agency is bound by the acts of the General Assembly that empower it. In the course of performing its discrete functions, [an] administrative agency, is called upon both to interpret certain acts of the Legislature and to promulgate applicable regulations not inconsistent with its delegated authority." The Commissioner omits the remainder of that paragraph cited, which concludes: "The Judiciary, however, sits as 'final arbiter

of the validity or interpretation of statutory law' as well as of any agency regulations promulgated to administer that law."

This full citation is important as the Commissioner should know. In *E. Providence Sch. Dep't v. R.I. Bd. of Educ.*, C.A. No. PC-2013-1556 (R.I. Super. Apr 13, 2018), (See attached Reply Exh. G) Judge Rodgers found that a 1990 vocational school regulation of the Board of Education could not abrogate a state law dealing with the same subject. In this case, there is a specific state law dealing with the prohibition on the discrimination on the basis of sex in education; the Commissioner has no general power under a different statute to override that state law.

The Commissioner then suggests that R.I. Gen. Laws § 16-38-1.1 is somehow ambiguous enough to allow her to redefine sex to include gender. The statue is not ambiguous; it is clear as day. It was enacted in 1985 when the General Assembly had never considered the issue of gender discrimination. It references only sex, and as pointed out previously, in its last amendment in 2013, the General Assembly specifically referenced "one sex" and "the other sex".

The Commissioner references the United States Supreme Court decision in *US v. Skrmetti*, but ignores its central holding. The statute at issue in that case classified on the basis of age and medical use. As the Court found: "Classifications that turn on age or medical use are subject to only rational basis review." p. 14. The Court then addressed the arguments of the plaintiffs that the statute creates facial sex-based classifications by defining the prohibited medical care based on the patient's sex. The Court shot this argument down: "This Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny." p. 15.

What relevance that case has to this is simple; the Court was unwilling to find that a prohibition on medical treatment based upon transgender identification was not a classification based on sex, i.e. gender does not equal sex.

2. <u>There is no basis to read R.I. Gen. Laws § 16-38-1.1 *in pari materia* with any other statute.</u>

The Commissioner cites the "principle of statutory construction that when two laws are *in pari materia*, the Court will harmonize them whenever possible." *Purcell v. Johnson*, 297 A.3d 464 (R.I. 2023) However, that concept only applies if there are two statutes either in conflict (as was the case in *Purcell*), or where one statute is silent on a topic, and the Court looks to similar statutes to discern a statute's meaning. *See e.g*. *Horn v. Southern Union Co*., 927 A.2d 292 (R.I. 2007), where the Court looked to the R.I. Fair Employment Practices Act to determine the statute of limitations for the R.I. Civil Rights Act.

In this case, there is nothing inherently inconsistent with R.I. Gen. Laws § 16-38-1.1 and any other statute cited by the Commissioner. Nor is there anything vague about the fact that R.I. Gen. Laws § 16-38-1.1, references sex as binary, as the Commissioner agrees: "Plaintiff is correct that R.I. Gen. Laws § 16-38-1.1 refers to "sex" in a binary fashion in certain contexts." (Comm. Obj. at 14)

The only relevant rule of statutory construction in this case is *expressio unius est exclusio alterius*, as we referenced in our brief.

3. <u>Title IX prohibits discrimination based on sex, not gender, and none of the cases cited by the Commissioner changes that.</u>

The Commissioner attempts to refute the fact that her reliance on Title IX was the basis of the Regulation by suggesting that Title IX really does prohibit discrimination on the basis of

gender. She cites *Bostock v. Clayton County*, 590 U.S. 644 (2020), which involved Title VII, and a District Court case from New Hampshire, *Tirrell v. Edelblut*, which granted a preliminary injunction against the enforcement of a State law prohibiting boys from participating in girls' sports.

First, the reliance on *Bostock* in the Title IX context is over; *United States Dep't of Educ. v. Louisiana*, 603 U.S. 866 (2024) put an end to any such analogy, and *Skrmetti* put a nail in the coffin.

As for citing *Tirrell*, a case granting a preliminary injunction which has not reached a final decision, it is quite ironic that the Commissioner would dismiss cases which have enjoined the enforcement of the 2024 Title IX regulations. Or that the Commissioner would dismiss *United States Dep't of Educ. v. Louisiana* as having "merely denied a motion for a stay pending appeal", when the Supreme Court's made clear that all nine justices of the Supreme Court of the United States, "accept[ed] that the plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity". Moreover, the Court in *Tirrell* found that heightened scrutiny under the Federal Equal Protection Clause applied to the New Hampshire law as discrimination based on sex. That ruling is in serious jeopardy given the *Skrmetti* decision that only rational basis standard of review applies.

The Commissioner places an inordinate amount of emphasis in citing to lawsuits wherein Federal District Court judges have enjoined President Trump's executive orders. Beside the fact that not one case is cited which is relevant to the issue here, i.e. that Title IX prohibits discrimination based on sex not gender, the Commissioner ignores that most of these injunctions

have been stayed or reversed on appeal, including a Court injunction barring President Trump from dismantling the US Department of Education. See https://bsky.app/profile/stevevladeck.bsky.social/post/3ltx5bf74hs2q, wherein the author notes the Supreme Court's latest ruling:

> Since April 4, #SCOTUS has issued 15 rulings on 17 emergency applications filed by Trump (three birthright citizenship apps were consolidated). It has granted relief to Trump ... in all 15 rulings.

One would have to be living under a rock to not see the litigation efforts by anti-Trump forces to stymie his election mandate. But as Justice Amy Coney Barrett noted in her decision for the Supreme Court striking down universal nationwide injunctions:

> We will not dwell on JUSTICE JACKSON's argument, which is at odds with more than two centuries' worth of precedent, not to mention the Constitution itself. We observe only this: JUSTICE JACKSON decries an imperial Executive while embracing an imperial Judiciary.

Trump v. Casa, Inc., (Jun 27, 2025) slip op. at 23 (See attached Reply Exh. H)

At one point in her brief (p. 21), the Commissioner accuses the Presidential Executive Order to be "belied by basic science." In support of this statement, she cites a brief in a case in the State of Washington. The Commissioner fails to mention that the statements of the Attorney General of the State of Washington cite to one opinion by a Dr. Daniel Shuman. The full quote, without redactions, is as follows:

> But zygotes do not produce reproductive cells "at conception." Shumer Supp. ¶8; see also Dkt. #18 ¶¶18-23; Dkt. #19 ¶¶27-37, 103-105. The labels "male" and "female" "cannot be assigned at conception prior to the process of sex differentiation." Shumer Supp. ¶8. These "inaccurate definitions" "make the Order nonsensical." Id. ¶22. The Denial-of-Care Order requires determination of an individual's sex. See Dkt. #161 pp.18-19. But the Orders define these terms in pure gobbledygook and are unconstitutionally vague.

The problem with this citation is to make it appear that there is no scientific dispute over the issue of biological sex and that sex and gender are in fact "fluid". But there most certainly is a dispute over that issue. Recently, in an article published by Colin Wright, an evolutionary biologist, academic advisor for the Society for Evidence-based Gender Medicine, and a fellow at the Manhattan Institute, the author addressed the recent defunding of the Trevor Project by the Trump administration:

> The Trevor Project was once widely considered a lifeline for gay teens facing bullying, family rejection, or isolation. But like many well-meaning groups, it has drifted from its original purpose and transformed into a vehicle for advancing radical and harmful ideologies under the banner of suicide prevention. On its website, the Trevor Project urges children to "unlearn" the idea that humans are male or female and adopt the false view that "gender and sex exist on a spectrum." It suggests that children who do not fit rigid gender stereotypes—like a boy who prefers ballet or a girl who prefers sports—may actually be transgender, with an internal "gender identity" misaligned with their bodies. This message is dangerous. Instead of reassuring children that there is nothing wrong with failing to conform to stereotypes, the Trevor Project suggests that children's discomfort may indicate that they are transgender and were "assigned" the wrong sex or gender at birth. This is the first step in a pipeline that can lead to puberty blockers, cross-sex hormones, and disfiguring surgeries.
>
> Later, on the same webpage, the Trevor Project states:
>
> If you decide that your current gender or sex just isn't right for you, you may want to make your gender identity fit with your ideal gender expression and presentation. This is called transitioning, and can include social (like telling other people about which pronouns you like), legal (like changing your name), or medical (like taking hormones or having surgery).
>
> "Transitioning" is not an evidence-based method of suicide prevention. The organization's promotion of such medical interventions is based on pseudoscientific claims: that "sex exist[s] on a spectrum," and that children have a fixed, internal "gender identity" that must be aligned with their bodies to resolve distress. In reality, biological sex is binary and immutable in humans.

https://www.city-journal.org/article/trevor-project-suicide-prevention-lgbt-youth-trump

That experts disagree on the issue of whether sex is binary or fluid is why courts should act with caution before blindly accepting one expert's view as gospel. As Justice Clarence Thomas so aptly put it in his concurrence in *US v. Skrmetti*, slip op. at 5:

> There are several problems with appealing and deferring to the authority of the expert class. *First*, so-called experts have no license to countermand the "wisdom, fairness, or logic of legislative choices." FCC v. Beach Communications, Inc., 508 U. S. 307, 313 (1993). *Second*, contrary to the representations of the United States and the private plaintiffs, there is no medical consensus on how best to treat gender dysphoria in children. *Third*, notwithstanding the alleged experts' view that young children can provide informed consent to irreversible sex-transition treatments, whether such consent is possible is a question of medical ethics that States must decide for themselves. *Fourth*, there are particularly good reasons to question the expert class here, as recent revelations suggest that leading voices in this area have relied on questionable evidence, and have allowed ideology to influence their medical guidance.

The Commissioner mocking and ridiculing the Trump Executive Order because it does not conform to her ideological beliefs regarding sex and gender has no place in the case– or in any case. It bears repeating: nothing in R.I. Gen. Laws § 16-38-1.1 gives the power to the Commissioner to impose her ideological view to redefine sex to include gender or gender identity.

4. <u>Plaintiff has a fundamental right to direct the care, custody, and upbringing of her children sufficient to have standing to bring this case.</u>

The Commissioner cites the case *Foote v. Ludlow School Committee,* 128 F.4th 336 (1st Cir. 2025), to assert that Plaintiff has no fundamental liberty interest in this case. But that is not what *Foote* holds; that case involved a federal due process challenge to a local school committee protocol. The only relevance the case has is affirming the fact that indeed, parents have a "fundamental right to direct the care, custody, and upbringing of one's children." *Id*. at 349. Ultimately, the Court held that the actions of the local school committee there did not violate the plaintiffs' substantive due process rights under the Fourteenth Amendment to the United States

Constitution. If Rhode Island were to pass a statute which mandated or permitted local school districts to hide from parents what gender pronouns are used with their children, and those parents were to bring a federal substantive due process claim, *Foote* may be controlling law for the time being. That is not what this case is about.

Finally, the Commissioner fails to mention that the case is before the U.S. Supreme Court on a petition for writ of certiorari and is therefore not a final decision. That the First Circuit may be overturned on this case is a fair bet, as the Court last term overturned the two cases from the First Circuit that it heard. https://reason.com/volokh/2025/06/30/scotus-puts-skrmetti-sdp-case-out-of-its-misery/ As that article also notes, "the Supreme Court "GVR'd" (granted cert, vacated the appellate decision, and remanded for consideration in light of a recent Supreme Court decision) three Circuit court cases: First, West Virginia excluded treatment for gender dysphoria from Medicaid. The Fourth Circuit held this exclusion violated the Equal Protection Clause. Second, North Carolina excluded treatment for gender dysphoria from the state employee health plan. The Fourth Circuit likewise ruled against the state. Third, Idaho denied Medicaid coverage for sex-reassignment surgery. After Skrmetti was argued, the Ninth Circuit found this exclusion was unlawful." This is more reason to be skeptical of the various cases the Commissioner relies upon.

CONCLUSION:

For all the reasons stated in this reply brief and Plaintiff's original brief, Plaintiff requests that this Court issue a declaratory judgment that the Commissioner of Elementary and Secondary Education Regulation 200-RICR-30-10-1, is in violation of state law and unenforceable.

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By her Attorney,

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CERTIFICATION

I hereby certify that on July 18, 2025, I electronically filed and served this document through the electronic filing system upon the following parties:

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