Thomas More SOCIETY

September 27, 2023

Re: *Open Letter in Response to Attorney General Bonta's "Guidance Regarding Forced Disclosure Policies Concerning Gender Identity."*

This open letter is written in response to California Attorney General Rob Bonta's September 26, 2023, letter titled "Guidance Regarding Forced Disclosure Policies Concerning Gender Identity,"[1] which discusses the relationship between apparently conflicting orders in *People v. Chino Valley Unified Sch. Dist.* (Cal. Super. Ct. San Bernardino County, No. CIV SB 2317301), and *Mirabelli & West v. Olson* (S.D. Cal. No. 3:23-cv-768). Undersigned counsel of LiMandri & Jonna LLP serves as counsel of record in *Mirabelli & West v. Olson* (S.D. Cal. No. 3:23-cv-768) and as Special Counsel to the Thomas More Society. As counsel for the Plaintiffs in *Mirabelli*, this open letter provides a necessary response.

Attorney General Rob Bonta's September 26, 2023 letter is incorrect in myriad ways. The Temporary Restraining Order ("TRO") issued against the Chino Valley Unified School District's Board of Education ("Chino Valley") is temporary in nature—only in place until the October 13 Preliminary Injunction hearing—and was issued on an emergency, *ex parte* basis without the benefit of robust argument and briefing. In fact, the trial court judge in *Chino* commented on the record that he had not even had the opportunity to read all of Chino's briefing before the hearing. In California, it is black letter law that "[t]he issuance of a TRO is not a determination of the merits of the controversy. All that is determined is whether the TRO is necessary to maintain the status quo pending the noticed hearing on the application for preliminary injunction." *Landmark Holding Grp., Inc. v. Superior Ct.*, 193 Cal. App. 3d 525, 528 (1987) (cleaned up).

The order in *Mirabelli v. Olson*,[2] on the other hand, was issued by Judge Roger Benitez, a Federal District Court Judge in the Southern District of California. Judge Benitez, who was aware of the ruling in *Chino*, had the benefit of three rounds of briefing and four months to consider the issues. Then, after over four hours of oral argument and the benefit of several binders' worth of legal briefing and evidentiary submissions, he issued a 36-page order granting a Preliminary Injunction, not a TRO, and denying both the local school district's and the state's motions to dismiss. As stated by Judge Benitez:

- "[T]he plaintiffs also correctly understand that EUSD's policies are in direct tension with the federal constitutional rights of parents to direct the upbringing and education of their children." (Order at p.15.)
- "EUSD's policy of elevating a child's gender-related choices to that of paramount importance, while excluding a parent from knowing of, or participating in, that kind of choice, is as foreign to federal constitutional and statutory law as it is medically unwise." (Order at p.18.)

[1] https://oag.ca.gov/system/files/attachments/press-docs/9-26-23%20Mirabelli-CV%20Guidance%20Letter.pdf.
[2] https://uploads-ssl.webflow.com/63d954d4e4ad424df7819d46/65034f906c8a3969f9bd31d1_Dkt.%2042_Order%20on%20Cross%20Motions.pdf.

- Policies requiring "that these teachers communicate misrepresentations to parents about the names and pronouns adopted by their students … would likely be unlawful and in derogation of the constitutional rights of parents." (Order at p.23.)

More importantly, the *Mirabelli* order is grounded in federal law. The Federal District Court rejected the California Department of Education and Escondido Union School District's ("EUSD") arguments, which were based in large part on the privacy protections of the California Constitution. The Federal Court in *Mirabelli* expressly commented on the record that the U.S. Constitution controls over the California Constitution if there is a conflict between the two—an elementary principle of constitutional law. *See* U.S. Const., art. VI, ¶ 2. As Judge Benitez aptly observed in *Mirabelli*, even "California appellate courts recognize that parents have [federal] constitutional rights and legal responsibilities and that generally a parent's rights are superior to a right of privacy belonging to their child." (Order at p.20.)

Attorney General Bonta's assertion that the *Mirabelli* order has "no effect" on the TRO in *Chino* is willfully turning a blind eye to an inevitable reality that the State will be forced to confront in due course, either voluntarily or involuntarily. While it is true that the *Mirabelli* Preliminary Injunction order—on its face—enjoins the State of California and the Escondido Union School District from enforcing their Parental Exclusion Policies only as to Elizabeth Mirabelli and Lori Ann West, this is not the end of the analysis.

First, Federal Courts have supremacy over state courts, and can enjoin state court orders to protect or effectuate Federal Court orders. Thus, to protect its own preliminary injunction order, a Federal District Court can enjoin a state court temporary restraining order. *See NBA v. Minnesota Pro. Basketball, Ltd. P'ship*, 56P F.3d 866 (8th Cir. 1995). If California continues to openly defy Judge Benitez's preliminary injunction, and undermine its holding and reasoning, an injunction against the *Chino Valley* litigation may be necessary.

Second, the reasoning of the opinion makes two points abundantly clear: (1) any teacher in California who objects on religious grounds to these dangerous and unconstitutional policies could file their own lawsuit in Federal Court and obtain similar relief; and (2) any parent who has standing to sue and challenges these dangerous policies could obtain relief against the State and any school district—asserting their fundamental rights as parents under the Fourteenth Amendment Due Process Clause.

It is deeply concerning, but unfortunately unsurprising, that the State Attorney General issued a press release and "guidance" in defiance of a Federal Court order—directing school districts and state officials to act in a manner that a Federal Court determined likely violates the U.S. Constitution. The State's newly issued guidance exposes the State, School Districts, and public school employees to massive liability in the form of attorneys' fees and damages.[3]

[3] Paul M. Jonna (@PaulJonna), TWITTER (Sep. 17, 2023), https://twitter.com/PaulJonna/status/1703422517753565646 (noting judicially awarded hourly rate of over $1,200).

Instead of doubling down on this dangerous course of conduct, the State of California should carefully review the Federal Court order in *Mirabelli*, and follow the guidance of seasoned experts in this field, like Dr. Erica Anderson, who provided written testimony in *Mirabelli v. Olson*. Dr. Anderson's declaration was unrebutted by the State—it had no expert of its own to contradict Dr. Anderson, and the State did not even bother to object to the declaration. As Judge Benitez's Preliminary Injunction order noted, Dr. Anderson's declaration explained that there is not "any professional body that would endorse EUSD's [or the State's] policies which envision adult personnel socially transitioning a child or adolescent without evaluation of mental health professionals and without the consent of parents or over their objection." (Order at p.13.) There are many dangers associated with allowing young children to "socially transition" without the knowledge or involvement of their parents.

Californians should be deeply troubled by the fact that this issue—hiding young children's gender identity and social transition at school—is such a high priority for the State. There is no justification for Attorney General Bonta burning millions of taxpayer dollars in litigation and other resources enforcing "guidance" that he now knows, and should have always known, is both unconstitutional and harmful to children. As Judge Benitez noted on page 35 of his 36-page ruling:

> The school's policy is a trifecta of harm: it harms the child who needs parental guidance and possibly mental health intervention to determine if the incongruence is organic or whether it is the result of bullying, peer pressure, or a fleeting impulse. It harms the parents by depriving them of the long recognized Fourteenth Amendment right to care, guide, and make health care decisions for their children. And finally, it harms plaintiffs who are compelled to violate the parent's rights by forcing plaintiffs to conceal information they feel is critical for the welfare of their students—violating plaintiffs' religious beliefs.

Parents, teachers, and students deserve leaders that respect and follow the law—especially fundamental Constitutional rights. Thomas More Society is committed to fighting this battle in Court—up to and including the U.S. Supreme Court—until every official in the State of California and across the nation is forced to conform to the law. Unfortunately, that process will cost taxpayers millions of dollars, but it's a battle that is necessary and must be won.

Sincerely,

LiMANDRI & JONNA LLP

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