**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| EVERETT DE'ANDRE ARNOLD, et al.,<br>Plaintiffs,<br>v.<br>BARBERS HILL INDEPENDENT SCHOOL DISTRICT,<br>Defendant. | CIVIL ACTION NO. 4:20-CV-01802<br>JURY TRIAL REQUESTED |

**PLAINTIFFS' RESPONSE TO**
**DEFENDANT'S MOTION FOR PARTIAL DISMISSAL**

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1. Plaintiffs Everett De'Andre Arnold ("De'Andre"), Cindy Bradford, on behalf of her minor son K.B., and Sandy Arnold (together, "Plaintiffs") submit this Response to Defendant Barbers Hill Independent School District's ("Defendant" or "BHISD") Motion for Partial Dismissal [Dkt. No. 144] (the "Motion").

## I.
## INTRODUCTION

2. BHISD's Hair Policy[1]—which prohibits only male students from growing hair below their earlobes, eyebrows, or shirt collar—was discriminatorily implemented and enforced against De'Andre and K.B. on account of their sex and race. The Hair Policy also impermissibly regulates how De'Andre and K.B. wear their hair both inside *and outside* of school in a manner that suppresses the outward expression of their identity and culture. De'Andre and K.B. were excluded from classroom instruction as punishment under the discriminatory Hair Policy and deprived of their property right in education without due process of law. BHISD's promulgation of the December 2019 revision of the Hair Policy[2] and the imposition of consequences on De'Andre and K.B. pursuant to its enforcement of the policy were, at least in part, to retaliate against Mrs. Arnold—De'Andre's mother and

[1] The "Hair Policy" refers to the portions of BHISD's grooming policy that expressly regulate only male students' hair and subject male students who violate such restrictions to punishment. Though the policy has been in place since at least the 1970s (as periodically amended), the current iteration of BHISD's Hair Policy is the result of the December 2019 revision, which became effective as of January 2020. *See* Plaintiffs' Second Amended Complaint [Dkt. No. 141] (the "Complaint"), ¶¶ 41-55.

[2] The December 2019 revision of the Hair Policy became effective in January 2020.

K.B.'s aunt—in response to her constitutionally protected speech against the discriminatory nature of BHISD's hair and disciplinary policies.

3. Plaintiffs' Complaint adequately alleges causes of action for race discrimination,[3] sex discrimination,[4] infringement of rights to free speech and free expression,[5] retaliation,[6] and violation of the Due Process Clause.[7] BHISD's motion does not seek dismissal of any of Plaintiffs' claims for race discrimination. Moreover, BHISD's Motion does not challenge the sufficiency of the allegations underlying Plaintiffs' claims. Instead, BHISD incorrectly argues that Plaintiffs' claims for sex discrimination, retaliation, and violations of the First Amendment and Due Process Clause are legally barred for one dubious reason or another. The Court should reject each of BHISD's arguments for the following reasons:

- *First*, the Court has already rightly rejected BHISD's arguments that De'Andre's and K.B.'s sex discrimination and free speech claims are *per se* invalid under *Karr v. Schmidt*—a 1972 decision that is wholly inapplicable to any claim asserted by Plaintiffs.

- *Second,* BHISD's argument regarding the due process claim is based on the faulty premise that De'Andre and K.B. were merely transferred to an alternative learning placement; instead, the due process claim adequately alleges that De'Andre and K.B. were denied access to instruction and an

[3] **The first cause of action** is for race discrimination in violation of the Equal Protection Clause; **the second cause of action** is for race discrimination in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* ("Title VI"); and **the ninth cause of action** is for race discrimination in violation of Texas Civil Practice and Remedies Code § 106.001.

[4] **The third cause of action** is for sex discrimination in violation of the Equal Protection Clause; **the fourth cause of action** is for sex discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"); and **the tenth cause of action** is for sex discrimination in violation of Texas Civil Practice and Remedies Code § 106.001.

[5] **The fifth cause of action** is for violation of the First Amendment right to free speech and free expression.

[6] **The sixth cause of action** is for retaliation in violation of the First Amendment; and **the seventh cause of action** is for retaliation in violation of Title IX.

[7] **The eighth cause of action** is for violation of the Due Process Clause.

opportunity to learn, effectively depriving them of their property right in education without due process of law.

- *Third,* De'Andre and K.B. allege that BHISD denied them access to facilities and participation in programs and other benefits because of their sex, as required to allege a viable claim under Section 106.001 of the Texas Civil Practice and Remedies Code.

- *Fourth*, BHISD's attempts to defeat Mrs. Arnold's First Amendment retaliation claim fail because BHISD's discrimination against De'Andre and K.B. was severe enough to chill Mrs. Arnold's speech and resulted in independent injury to Mrs. Arnold, thus conferring standing to assert a First Amendment retaliation claim. And Mrs. Arnold's allegations of adverse actions against her are sufficient—independently and combined—to maintain a cause of action for First Amendment retaliation.

- *Fifth*, Mrs. Arnold has standing to bring a Title IX retaliation claim because she was victim to BHISD's reprimand, surveillance, and stalking after she publicly complained to BHISD about its Hair Policy during a Board meeting. Mrs. Arnold's Title IX retaliation claim should not be dismissed because she meets the standard articulated by the Supreme Court in *Jackson v. Birmingham Board of Education*.

- *Finally*, BHISD's argument that Plaintiffs are not entitled to declaratory relief fails because Plaintiffs have established an actual controversy exists between the parties, which this Court has the authority to address by granting the requested relief.

## II.
## PLAINTIFFS HAVE ADEQUATELY PLED THEIR CLAIMS

### A. De'Andre and K.B. Allege Valid Claims for Violation of the Equal Protection Clause and Title IX Because the Hair Policy Constitutes Facial Sex-Based Discrimination.

4. To state a claim under the Equal Protection Clause and Title IX for sex discrimination, a plaintiff is required to allege that a state actor intentionally discriminated against the plaintiff because of their sex. *Ruvalcaba v. Angleton Indep. Sch. Dist.*, No. 3:18-cv-00243, 2019 U.S. Dist. LEXIS 114602, at *5–6 (S.D. Tex. June 6, 2019). The Complaint includes detailed allegations that the Hair Policy enacted by BHISD (a Texas

public school district) intentionally discriminates against male students (including De'Andre and K.B.) on its face by expressly prohibiting *only* male students from having hair that extends below the eyebrows, earlobes, and shirt collar. *See, e.g.*, Compl. [Dkt. No. 141], ¶¶ 28, 41–51, 53–54, 80–83, 88–89, 95, 99–102, 104, 109–113, 119–126, 144, 147–148, 152–158, 162–168, 171–184, 329–360. Indeed, this Court previously found that K.B. demonstrated a substantial likelihood of success on the merits of his claim for sex discrimination under the Equal Protection Clause. *See* Mem. Op. and Order granting K.B. a preliminary injunction [Dkt. No. 98] (the "Opinion") at 8.

5. BHISD's Motion does not argue that De'Andre and K.B. fail to meet their burden to assert a claim under the Equal Protection Clause or Title IX. Instead, BHISD incorrectly contends—as it did unsuccessfully in its Response to K.B.'s Motion for a Preliminary Injunction [Dkt. No. 57]—that hair regulations that apply only to males are entirely above judicial review and not subject to any scrutiny under the Equal Protection Clause or Title IX. Mot. [Dkt. No. 144] at 5–7, 9. BHISD once again principally relies on *Karr v. Schmidt* for this argument. 460 F.2d 609 (5th Cir. 1972). In doing so, however, BHISD ignores that the Court has already correctly held that "*Karr* simply does not bar" the asserted claims for sex discrimination. *See* Op. [Dkt. No. 98] at 11. The Court should again reject BHISD's argument. *Id.*

6. As the Court previously recognized in its Opinion, "*Karr* does not address sex discrimination . . . ."[8] Op. [Dkt. No. 98] at 11 (noting that "*Karr* did not discuss the

[8] Plaintiffs previously briefed why *Karr* is inapplicable to bar Plaintiffs' claims. *See* Pl. K.B.'s Mot. for Prelim. Inj. [Dkt. No. 44], ¶ 35 n.7; Pl. K.B.'s Reply in Supp. of Mot. for a Prelim. Inj. [Dkt. No. 62], ¶ 6. For purposes

questions presented by K.B.—let alone resolve them adversely to K.B.—because the *Karr* Court was not presented with those questions."). Moreover, the 1972 *Karr* decision predates binding Supreme Court precedent holding that intermediate scrutiny applies to all sex-based classifications. *Id.* at 11 (citing *United States v. Virginia*, 518 U.S. 558 (1996) for the proposition "that the Supreme Court has applied the intermediate-scrutiny standard to classifications by sex since 1976, when it issued *Craig v. Boren*, 429 U.S. 190, 197 (1976)"). As this Court noted, since *Karr* was decided, the Supreme Court has repeatedly held that "heightened scrutiny . . . attends all gender-based classifications." *Id.* at 10 (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017)). Any policy that facially discriminates on the basis of sex—such as the Hair Policy challenged in the Complaint—is thus subject to heightened scrutiny under the Equal Protection Clause. *Id.* at 11–12. The Hair Policy cannot withstand such heightened scrutiny. *Id.*

7. BHISD also again improperly relies upon *Barber* and *Toungate* to argue that hair regulations that apply only to male students cannot violate constitutional rights, but neither case is applicable to the claims involved in this dispute. *See* Mot. [Dkt. No. 144] at 6–7 (citing *Barber v. Colo. Indep. Sch. Dist.*, 901 S.W.2d 447 (Tex. 1995); *Bastrop Indep. Sch. Dist. v. Toungate*, 958 S.W.2d 365 (Tex. 1997)). In addition to being nonbinding state court decisions, neither *Barber* nor *Toungate* involved any Fourteenth Amendment Equal Protection or Title IX claims. Instead, *Barber* and *Toungate* each only involved state constitution and state statutory claims that are distinct from the Equal Protection Clause

of judicial economy, Plaintiffs do not repeat such briefing here, but incorporate it by reference as if fully set forth herein.

and Title IX claims asserted in the Complaint. *See Barber*, 901 S.W.2d 447; *Toungate*, 958 S.W.2d 365.

8. BHISD has done nothing to dislodge binding Supreme Court precedent imposing intermediate scrutiny "for cases of official classification based on gender." *United States v. Virginia*, 518 U.S. 515, 532–33 (1996). The Complaint adequately alleges that BHISD's Hair Policy improperly classifies and punishes students—including De'Andre and K.B.—based on gender, which means that "BHISD has the 'demanding' burden of presenting an 'exceedingly persuasive' justification for the hair-length policy." Op. [Dkt. No. 98] at 12. De'Andre and K.B. have met their pleading burden and the Motion should accordingly be denied.

**B. De'Andre and K.B. Allege Valid Claims for Violation of the First Amendment Because the Hair Policy Infringes Upon Their Right to Freedom of Speech and Expression.**

9. A plaintiff stating a viable claim under the First Amendment based upon expressive conduct is required to allege that their conduct was intended to convey a particularized message with a likelihood that the message would be understood by those who viewed it. *Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437, 441 (5th Cir. 2001). In meeting this burden, the Complaint includes detailed allegations that De'Andre and K.B. wear their natural hair in locs as an expression of their heritage, identity, and ethnicity, and others (including BHISD) understood such message. *See, e.g.*, Compl. [Dkt. No. 141], ¶¶ 4–5, 25–26, 68–73, 78, 81, 96, 107, 111, 115, 129, 141–142, 149, 160, 193, 208, 240–241, 361–371.

10. Similar to the sex discrimination claims discussed above, BHISD does not contend that De'Andre and K.B. fail to meet any of these pleading requirements. Instead, BHISD once again attempts to rely entirely upon *Karr* to argue that hair length and hair formations are never protected by the First Amendment. *See* Mot. [Dkt. No. 144] at 8–9. BHISD's contention is yet again misplaced.

11. BHISD's continued reliance on *Karr* to argue that a student's hair can never convey a constitutionally protected message is incorrect. The plaintiff in *Karr* brought suit "not because his hair conveys a message but 'because I like my hair long.'" *Karr,* 460 F.2d at 614. De'Andre and K.B., to the contrary, have adequately alleged that their locs are an outward expression of their identity and culture. As the Court previously noted when it found that K.B. established a substantial likelihood of success on the merits of his First Amendment claim, "[v]isibly wearing one's hair in a particular manner is capable of communicating one's religion or heritage."[9] Op. [Dkt. No. 98] at 25 (quoting *Gonzales v. Mathis Indep. Sch. Dist*., No. 2:18-cv-43, 2018 U.S. Dist. LEXIS 21657, at *20 (S.D. Tex. Dec. 27, 2018)). This is consistent with the well-established rule that one's hair worn in a particular formation can effectively convey a person's racial identity and cultural heritage. *See, e.g.*, *Gonzales*, 2018 U.S. Dist. LEXIS 216577 at *20; *Alabama & Coushatta Tribes v. Trustees of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1333–34 (E.D. Tex. 1993) (the wearing of long hair by male Native American students was an expressive or

[9] BHISD is certainly aware that individuals may wear their hair in a particular manner as an expression of their heritage as evidenced by the fact that BHISD has previously granted an exemption to the Hair Policy to a male student because he is Native American. *See, e.g*., Compl. [Dkt. No. 141], ¶¶ 53, 238–239 and 338.

communicative activity signifying their racial heritage as well as their religion); *Braxton v. Bd. of Pub. Instruction,* 303 F. Supp. 958, 959 (M.D. Fla. 1969) (where a goatee "is worn as 'an appropriate expression of his heritage, culture and racial pride as a black man' its wearer also enjoys the protection of first amendment rights.").

12. The defendant in *A.A. v. Needville Independent School District* similarly cited *Karr* to argue "that a public school student's freedom to choose a hair style is, as a matter of law, not protected by the First Amendment." 701 F. Supp. 2d 863, 881 (S.D. Tex. 2009). The court in *A.A.* cited the same language from *Karr* that BHISD relies on in its Motion, but noted that the "Fifth Circuit later changed its position" in *Canady v. Bossier Parish School Board*. *Id*. (citing *Canady*, 240 F.3d 437). The court expressly declined to apply the *per se* rule announced in *Karr* and instead acknowledged that "[t]he Supreme Court has long recognized that the First Amendment protects more than just the written or spoken word; conduct might be sufficiently communicative to fall within the scope of the First Amendment." *Id.* at 881 (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

13. Furthermore, BHISD's Hair Policy unconstitutionally bars De'Andre and K.B. from expressing their racial identity and cultural heritage through expressive conduct both inside *and outside* of school. In *Mahanoy Area School District v. B.L.*, the Supreme Court held that a student's off-campus speech was protected under the First Amendment as it did not create the sort of "substantial disruption" necessary to justify the school's regulation. 141 S. Ct. 2038, 2047 (2021). The Court recognized that a school's regulation of off-campus speech coupled with its regulations of on-campus speech would practically entail a twenty-four-hour regulation period. *See id*. at 2046. The Court stated that "courts

must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all." *Id.*; *Compare Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 287 (5th Cir. 2001) (school policy did not restrict First Amendment rights more than necessary where it only regulated students' expression during school hours and students were free to wear expressive clothing outside of school hours).

14. BHISD's Hair Policy practically enforces a twenty-four-hour regulation on De'Andre and K.B., and unconstitutionally bars them from expressing their racial and cultural heritage through expressive conduct even when off-campus. *See* Compl. [Dkt. No. 141], ¶ 51 (noting that BHISD administrators have conceded that the Hair Policy regulates male students' hair both inside and outside of school). Under BHISD's Hair Policy, De'Andre and K.B. can effectively *never* engage in their right to freedom of expression through their hair. This sort of twenty-four-hour regulation is exactly the sort of curtailment the Supreme Court warned lower courts to be "skeptical" of. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2047. De'Andre and K.B. have adequately pled claims for violation of their First Amendment rights to freedom of speech and expression, and BHISD's Motion should accordingly be denied.

**C. De'Andre and K.B. Allege Valid Due Process Claims.**

15. Well-settled, controlling authority makes clear that De'Andre's and K.B.'s due process claims should not be dismissed. As BHISD acknowledges, students in Texas have a property right in education because Texas state law provides free public school education and compels all children between six and 18 years of age to attend school. *See*

*Goss v. Lopez*, 419 U.S. 565, 573–74 (1975) (recognizing a property right in education where an Ohio statute provided a free education to children and compelled attendance); Tex. Educ. Code §§ 4.001, 25.001, 25.085 (promising equal access to a quality education for those between five and 21 years of age and compelling school attendance for those between six and 18 years of age).[10]

16. Moreover, Section 37.005 of the Texas Education Code expressly prohibits suspensions that last more than three school days.[11] *See* TEX. EDUC. CODE § 37.005(b) ("A suspension under this section may not exceed three school days."). The Complaint alleges that BHISD suspended K.B. for longer than three school days in violation of the Texas Education Code. *See, e.g.*, Compl. [Dkt. No. 141], ¶¶ 177–183, 397–400.

17. As the Supreme Court explained, students may not be deprived of their property interest in education without fundamentally fair procedures—at the very least, notice and a hearing. *See Goss*, 419 U.S. at 574, 576, 579–82.[12] "[T]he case law reinforces the basic idea that protected property interests are affected and due process protections are

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[10] *See also Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647, 654 (W.D. Tex. 2000) ("Under *Goss*, these State laws entitle Texas schoolchildren to a public education, and therefore students have a property interest in that education that cannot be taken away through disciplinary suspension or expulsions without due process of law.").

[11] The prohibition in subsection (b) states that any "suspension under this section" may not exceed three school days without differentiating between in-school and out-of-school suspensions. TEX. EDUC. CODE § 37.005(b). However, the Texas legislature clearly knew how to specify whether a subsection only applied to a particular type of suspension. *See id*. at § 37.005(c)–(e) (Subsections (c), (d), and (e) specifically delineate different requirements for in-school and out-of-school suspensions). The absence of language limiting subsection (b) to a particular type of suspension makes clear that the prohibition against "a suspension" lasting longer than three school days applies equally to all suspensions, including both in-school and out-of-school suspensions.

[12] As the Supreme Court recognized, "[l]onger suspensions [exceeding 10 days] or expulsions for the remainder of the school term, or permanently, may require more formal procedures." *Id*. at 584. Indeed, it has long been clear that the Due Process clause applies where—as is the case here—the students allege constructive expulsion. "Since the landmark decision in the Court of Appeals for the Fifth Circuit in *Dixon v. Alabama State Board of Education*, 294 F.2d 150, *cert denied*. 368 U.S. 930, the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion." *Goss*, 419 U.S. at 576 n.8 (collecting cases).

required when the discipline imposed amounts to a deprivation of access to education." *Riggan*, 86 F. Supp. 2d at 655. Importantly, a student can be deprived of access to education without being wholly ousted from all educational settings.[13] "'The primary thrust of the educational process is classroom instruction;' therefore minimum due process procedures may be required if an exclusion from the classroom would effectively deprive the student of instruction or the opportunity to learn." *Id*. (citing *Cole v. Newton Special Mun. Separate Sch. Dist*., 676 F. Supp. 749, 752 (S.D. Miss. 1987), *aff'd* 853 F.2d 924 (5th Cir. 1988)).

18. BHISD attempts to sidestep De'Andre's and K.B.'s due process claims by disingenuously minimizing De'Andre's and K.B.'s allegations as nothing more than a dispute about ISS, which BHISD characterizes as a mere "transfer to an alternative learning placement." *See* Mot. [Dkt. No. 144] at 9–10. BHISD argues that De'Andre's and K.B.'s due process claims should be dismissed because a mere "transfer to an alternative learning placement" does not deprive a student of any property or liberty interest. *Id.* However, De'Andre and K.B. plausibly allege that they were deprived of access to public education when they were excluded from the high school facility (and hence, classroom instruction) for weeks, warehoused in ISS indefinitely in conditions that denied them instruction and an opportunity to learn, and constructively expelled. *See* Compl. [Dkt. No. 141], ¶¶ 403–409 (alleging that Principal Kana instructed De'Andre and K.B. to leave school, thereby excluding De'Andre from school for nine days and excluding K.B. from school for 19 days,

[13] *See, e.g*., *Alabama & Coushatta Tribes*, 817 F. Supp. at 1335 (holding that students were denied procedural due process when they were confined to in-school suspension ("ISS") for a month and not provided much help with schoolwork); *Riggan*, 86 F. Supp. 2d at 654–56 (finding that "three days suspension, five days of [alternative school], exclusion from graduation ceremonies, and two letters of apology" deprived the student of his property right in education such that due process was required).

before K.B. served six days of ISS, and both students were forced to withdraw; further alleging that ISS, as manifested at Barbers Hill High School, was substandard and did not actually constitute an educational program). Because De'Andre's and K.B.'s allegations involve far more than a mere "transfer to an alternative learning placement," BHISD's argument is unavailing.

19. BHISD claims to cite "well-settled, controlling authority" to support its argument. However, not only does BHISD only cite to one published in-Circuit case, but because De'Andre's and K.B.'s allegations concern far more than a mere "transfer to an alternative learning placement," that lone Fifth Circuit case—like all of the persuasive authority cited—is distinguishable. *See Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25 (5th Cir. 1997) (no allegations of exclusion from school, a substandard ISS program that falls short of actual education, or actual constructive expulsion); *Esparza v. Bd. of Trustees*, 182 F.3d 915, 1999 WL 423109 (5th Cir. 1999) (unpublished, non-precedential opinion) (same);[14] *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981) (same); *Doe v. Humble Indep. Sch. Dist*., 2019 WL 3288385 (S.D. Tex. July 22, 2019) (same); *Stafford Mun. Sch. Dist. v. L.P*., 64 S.W.3d 559 (Tex. App.—Hou. [14th Dist.] 2001, no pet.) (same); *see also Riggan*, 86 F. Supp. at 655 (distinguishing *Nevares* and *Zamora* as cases that involved challenges to assignment to alternative school that did not – on the facts presented – involve the denial of access to education).

[14] Indeed, the *Esparza* opinion itself notes that neither the students in *Nevares* nor the students in *Esparza* were excluded from attending classes. *Esparza*, 1999 WL 423109 at *4. In contrast, De'Andre and K.B. allege that they were physically excluded from school altogether—and thus precluded from attending class—for weeks, warehoused in ISS without the benefit of instruction or an opportunity to learn, and were ultimately constructively expelled.

20. Contrary to BHISD's erroneous assertions, De'Andre and K.B. plausibly allege a denial of access to education that amounts to a deprivation of their property interest in education without due process. *Compare Alabama & Coushatta Tribes*, 817 F. Supp. at 1335 (holding that students were denied procedural due process by being confined to ISS for a month where students in ISS had little opportunity to ask their teachers questions and minimal tutorial help or assistance with schoolwork and where the students weren't given notice and an opportunity to be heard) *with* Compl. [Dkt. No. 141], ¶ 407 (alleging, "In ISS, K.B. was not provided with certified teachers, instruction, or educational opportunities.") and K.B. Decl. in Supp. of Pl.'s Mot. for a Prelim. Inj. [Dkt. No. 44-4], ¶ 24 ("In ISS, we had to figure out our schoolwork and homework on our own. Our ISS teachers were not certified and could not explain our work assignments"); *compare Sagehorn v. Indep. Sch. Dist. No. 728*, 122 F. Supp. 3d 842, 864 (D. Minn. 2015) (noting that the question was "whether the [defendants] interfered with [plaintiff's] right to public education without providing him adequate process" and holding that the plaintiff had plausibly alleged a due process claim where he was forced to withdraw from school, even though he was not formally expelled) *with* Compl. [Dkt. No. 141], ¶¶ 405, 409 (alleging that De'Andre and K.B. were forced to withdraw from school). Accordingly, De'Andre and K.B. have plausibly alleged due process claims and this Court should deny BHISD's Motion.

**D. De'Andre and K.B. Allege Valid Sex Discrimination Claims under Section 106.001 of the Texas Civil Practice and Remedies Code.**

21. To state a cause of action under Section 106.001 of the Texas Civil Practice and Remedies Code for sex discrimination, De'Andre and K.B. must show that an "officer or employee of the state, or a political subdivision of the state" committed one or more "prohibited acts" enumerated in Section 106.001 against De'Andre and K.B. because of their sex. TEX. CIV. PRAC. & REM. CODE §§ 106.001(a). De'Andre and K.B. have fully satisfied this standard by alleging that BHISD committed the "prohibited acts" of refusing to permit De'Andre and K.B. to use its facilities, refusing to permit De'Andre and K.B. to participate in its programs, refusing to grant De'Andre and K.B. certain benefits at BHISD, and imposing unreasonable burdens on De'Andre and K.B at BHISD because of their sex. Compl. [Dkt. No. 141], ¶¶ 431–438; TEX. CIV. PRAC. & REM. CODE §§ 106.001(a)(3)–(6).

22. BHISD's Motion makes no effort to dispute that De'Andre and K.B. properly alleged a Section 106 sex discrimination claim; rather, BHISD wholly relies on *Toungate* for the supposed proposition that a claim based on the enforcement of grooming standards in schools cannot give rise to a Section 106 discrimination claim. Mot. [Dkt. No. 144], § F. BHISD's blind reliance on *Toungate* is fundamentally flawed because *Toungate* is inconsistent with the present facts. The *Toungate* holding heavily relied upon the finding that "[t]he requirement that males wear their hair no longer than a certain length may be out of step with the social norms of the moment, *but it does not deprive male students of an equal opportunity to receive an education or to participate in school functions*." *Toungate*, 958 S.W.3d at 371 (emphasis added). Indeed, in *Toungate*, the plaintiff-student

was not simply warehoused in ISS without the benefit of instruction. To the contrary, Toungate's teacher prepared lesson plans, which a substitute teacher taught him while he was in ISS. *Toungate*, 958 S.W.3d at 366 (noting that Toungate's academic performance actually improved while he was in ISS). Here, the enforcement of the Hair Policy indisputably deprived De'Andre and K.B. of classroom instruction as well as the same opportunity in access to BHISD facilities, school functions, programs, and other benefits as female students. Because they are Black males, De'Andre and K.B. were forced to endure the prohibited acts of BHISD described above. Female students were not confined to ISS and excluded from extracurricular activities and graduation on account of their long hair.

**E. Mrs. Arnold Alleges a Valid Retaliation Claim under § 1983 and the First Amendment.**

23. To prevail on a First Amendment retaliation claim, Mrs. Arnold must establish that: (1) she was engaged in constitutionally protected activity, (2) BHISD's actions caused her to suffer an injury that would "chill a person of ordinary firmness" from engaging in that activity, and (3) BHISD's adverse actions were substantially motivated by Mrs. Arnold's exercise of constitutionally protected conduct. *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). BHISD does not dispute that Mrs. Arnold engaged in constitutionally protected speech when she opposed BHISD's arbitrary and discriminatory Hair Policy at public school Board meetings. *See* Mot. [Dkt. No. 144] at 12; *see also* Compl. [Dkt. No. 141], ¶¶ 191–193, 205–209, 225–226, 375. As alleged in the Complaint, BHISD's actions—including its discriminatory, selective enforcement of the policy against

De'Andre and K.B., Superintendent Poole's public intimidation of Mrs. Arnold immediately following the December 2019 Board meeting, and Chief Widner's stalking and harassment of Mrs. Arnold in the months following Mrs. Arnold's public comments at the District's Board meetings—would have chilled a person of ordinary firmness. *See* Compl. [Dkt. No. 141], ¶¶ 376–378. The Complaint also alleges that BHISD's adverse actions were motivated by Mrs. Arnold's constitutionally protected speech and Mrs. Arnold suffered compensable harm from such actions, including humiliation and emotional distress. *See id.* at ¶¶ 379–381, 390.

24. BHISD makes three arguments against Mrs. Arnold's First Amendment retaliation claim. *First*, BHISD argues that Mrs. Arnold lacks standing to raise a First Amendment retaliation claim based on discriminatory enforcement of the Hair Policy because those acts were directed toward De'Andre and K.B. However, BHISD ignores Fifth Circuit precedent that establishes that both "[s]tudents *and parents* may challenge unconstitutional actions in the public schools that directly affect the students." *Littlefield*, 268 F.3d at 284 n.7 (emphasis added). BHISD also ignores that Mrs. Arnold has plausibly alleged facts to confer Article III standing: She has alleged that BHISD's discriminatory enforcement of the Hair Policy against De'Andre and K.B. was *a direct consequence* of her exercise of her First Amendment rights to oppose the discriminatory Hair Policy, and she personally experienced humiliation and emotional distress (an injury in fact); that the harm was caused by BHISD's actions (causation); and that the harm can be remedied by an order enjoining BHISD from retaliating against persons who express concerns about race and sex discrimination (redressability). *See* Compl. [Dkt. 141] at ¶ 381. Mrs. Arnold

thus has standing to bring a claim for First Amendment retaliation even where the alleged retaliation was directed towards another individual. *Cf. Littlefield*, 268 F.3d at 284 n.7; *Montone v. City of Jersey City*, 709 F.3d 181, 196–98 (3d Cir. 2013) (discussing Supreme Court precedent that supports the proposition that a plaintiff can bring a First Amendment political participation retaliation claim based on retaliation against other individuals).

25. Further, BHISD's argument misunderstands the inquiry in a First Amendment retaliation claim, which asks broadly whether the complained-of actions caused injury that "would chill a person of ordinary firmness," and does not limit the direction or subject of the defendant's actions. *Keenan*, 290 F.3d at 258; s*ee also Warner v. St. Bernard Par. Sch. Bd.*, 99 F. Supp. 2d 748, 751 (E.D. La. 2000) (observing that "[l]egal analysis of retaliation cases under the First Amendment is distinct" and "the required element of a concrete adverse action is not a universal element for all constitutional or statutory violations actionable under § 1983"). Indeed, courts have found no standing problem where a parent has based a First Amendment retaliation claim on actions toward the student. *See McCook v. Spriner Sch. Dist.,* 44 F. App'x. 896 (10th Cir. 2002) (evaluating parent-plaintiff's First Amendment retaliation claim based on school's expulsion of student following parent's protected speech and finding school's expulsion of student would chill a person of ordinary firmness); *see also Pollack v. Reg'l Sch. Unit* 75, 12 F. Supp. 3d 173 (D. Me. 2014) (considering whether a school's actions against a student supported a parent's First Amendment retaliation claim). Given the distinct inquiry in a First Amendment relation claim, and Mrs. Arnold's allegations establishing independent Article III standing, BHISD's reliance on *Coon v. Ledbetter*, 780 F.2d 1158 (5th Cir. 1986)

and *Landry v. Cypress Fairbanks Indep. Sch. Dist.*, 2018 WL 3436971 (S.D. Tex. July 17, 2018)—neither of which involved First Amendment retaliation claims—is misguided and inapposite.

26. *Second*, BHISD argues that Superintendent Poole's conduct toward Mrs. Arnold following the December 16, 2019, Board meeting was, at most, a *de minimis* constitutional injury and is therefore not actionable under *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999). But BHISD's argument isolates and then minimizes Superintendent Poole's conduct as alleged in the Complaint. Superintendent Poole did not just "approach[]" Mrs. Arnold, talk to her in a "raised tone" and "point[] his finger at her." Mot. [Dkt. No. 144] at 13. Superintendent Poole accosted Mrs. Arnold in the middle of a crowd and, just inches from her face and in an intentionally intimidating manner, yelled at her for exercising her First Amendment right to speak out against BHISD's discriminatory policy. *See* Compl. [Dkt. No. 141], ¶¶ 212, 215. This is precisely the type of action the First Amendment retaliation doctrine is intended to protect against. Furthermore, the cases BHISD relies on to argue that Superintendent Poole's "reprimand" of Mrs. Arnold was *de minimis* arose in contexts where, by virtue of the plaintiff's position, a mere reprimand or other minor disciplinary action was insufficient to sustain a First Amendment retaliation claim. *See Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999) (plaintiff, an elected official, brought a First Amendment retaliation claim based on a recall petition and other similar adverse actions that arose by virtue of her position); *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267 (2d Cir. 2011) (concluding that principal's decision to place plaintiff-student in ISS for student's essay expressing suicidal ideations was precautionary and not adverse

treatment); *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075 (5th Cir. 1995) (similar). Here, Mrs. Arnold, a private citizen, was chastised and intimidated by a public official for exercising her First Amendment rights. This context makes Superintendent Poole's treatment of Mrs. Arnold actionable. *Cf. Colson*, 174 F.3d at 500 (cautioning that "the precise nature of the harms suffered by a plaintiff claiming First Amendment retaliation is crucial to our determination of whether she has alleged a constitutional deprivation").

27. *Third*, BHISD argues that Mrs. Arnold's allegations regarding Officer Widner do not state an injury that would chill a person of ordinary firmness. In the Complaint, Mrs. Arnold alleges that, on multiple (at least six or seven) occasions over several months, Officer Widner, "a uniformed police officer fully outfitted with a firearm, taser, and handcuffs," closely monitored, stalked, and intimidated her every time she stepped onto any BHISD campus. *See* Compl. [Dkt. No. 141], ¶¶ 230–232. Based on these allegations, Officer Widner's actions exceeded the nature and frequency of actions in the cases BHISD cites. Further, BHISD's argument does not address how a Black person of ordinary firmness would perceive being stalked and harassed by a large, white, armed police officer. Many articulations of the objective "ordinary person" standard look to whether a defendant's actions were adverse, and thus actionable, from the perspective of a *similarly situated* ordinary person. *See Washington v. Cty. of Rockland*, 373 F.3d 310, 320 (2d Cir. 2004) ("In the context of a First Amendment retaliation claim, we have held that '[o]nly retaliatory conduct that would deter a *similarly situated* individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action.'") (emphasis added); *McCrea v. District of Columbia*, 2021 WL 1216522, at *6 (D.D.C. Mar.

31, 2021) (explaining that to state a First Amendment retaliation claim, plaintiff must show, *inter alia*, "the defendant took some retaliatory action to deter a person of ordinary firmness *in plaintiff's position* from speaking again") (emphasis added). Indeed, the Fifth Circuit has considered the specific characteristics of the plaintiff in determining whether an ordinary person would be chilled by a defendant's actions. *See Keenan*, 290 F.3d at 258–59 (in describing *Colson*, outlining adverse actions of the defendants against the plaintiff-politician and characterizing the court's holding as that "an *ordinary politician* would not be deterred from continuing to criticize police") (emphasis added). The "ordinary person" standard necessarily observes and analyzes a defendant's action from the perspective of a person with the same relevant characteristics as the plaintiff and after considering the relevant racial social context. Thus, in assessing Mrs. Arnold's claims that Officer Widner's actions would have chilled the speech of an ordinary person, this Court should consider whether BHISD's conduct would deter a Black woman of ordinary firmness. This perception is important: Black Americans are 3.23 times more likely than white Americans to be killed by police.[15] Therefore, it would not be unreasonable to believe that a Black person of ordinary firmness would have their speech chilled under the circumstances Mrs. Arnold confronted.

28. Even assuming *arguendo* that Superintendent Poole's and Officer Widner's independent actions are insufficient to support a retaliation claim—though they are not—

[15] Harvard T.H. Chan School of Public Health, *Black People More than Three Times More Likely As White People to Be Killed During a Police Encounter* (2020), https://www.hsph.harvard.edu/news/hsph-in-the-news/blacks-whites-police-deaths-disparity/.

such actions combined constitute a "campaign of retaliatory harassment."[16] *Colson*, 174 F.3d 513-14. The Fifth Circuit has recognized that a campaign of harassment and adverse, retaliatory action, "though trivial in detail, can be substantial in gross." *Id*. at 514. Superintendent Poole's and Officer Widner's independent conduct standing alone are each actionable, but together—and when combined with other acts of retaliation by BHISD—constitute a campaign of retaliatory acts taken against Mrs. Arnold. *See* Compl. [Dkt. No. 141], ¶¶ 376–379.

**F. Mrs. Arnold Alleges a Valid Title IX Retaliation Claim.**

29. Mrs. Arnold has standing to bring a Title IX retaliation claim against BHISD as well. "[T]he Supreme Court has clarified [in *Jackson v. Birmingham Board of Education*] that Title IX provides a private right of action for 'retaliation against a person because that person has complained of sex discrimination.'" *Alice L. v. Eanes Indep. Sch. Dist*., No. A-06-CA-944-SS, 2007 WL 9710281, at *6 (W.D. Tex. Dec. 18, 2007) (quoting *Jackson v. Birmingham Bd. of Educ*., 544 U.S. 167, 175 (2005)). Additionally, "Title IX does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint." *Id.*

30. BHISD argues that Mrs. Arnold, as a parent, lacks standing to bring a Title IX retaliation claim under *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th. Cir. 1996) and *A.W. v. Humble Independent School District*, 25 F. Supp. 3d 973 (S.D.

[16] In *Colson*, the Fifth Circuit recognized that circuit precedent had only considered whether adverse actions amounted to a "campaign of harassment" for First Amendment retaliation purposes in the employment context, and thus requires that the campaign of retaliatory conduct "rise to such a level as to constitute a constructive adverse employment action." *Colson*, 174 F.3d at 514. That high burden would be inappropriate in this context, where there is no employment or other contractual relationship between Mrs. Arnold and BHISD.

Tex. 2014). In each case, a parent brought Title IX sexual harassment claims against a school district, not Title IX retaliation claims. BHISD fails to incorporate the clarification from the Supreme Court in *Jackson* regarding the requirements for standing to bring a Title IX retaliation claim, and instead relies on inapplicable case law that does not address Mrs. Arnold's circumstance. *See, e.g.*, *Rowinksy*, F.3d at 1008; *A.W.*, F. Supp. 3d at 980.

31. Here, Mrs. Arnold made a public complaint about the discriminatory effect of BHISD's modified Hair Policy on Black and male students during their Board meeting, and in turn, BHISD reprimanded her for her comments, selectively enforced the Hair Policy against her son, De'Andre, and nephew, K.B, subjecting them to indefinite suspension and constructively expelling them (at least in part as a way to punish Mrs. Arnold for her protected speech), and had Officer Widner surveil, stalk, and intimidate her whenever she entered BHISD property. *See* Compl. [Dkt. No. 141], ¶¶ 383-390. Thus, BHISD retaliated against Mrs. Arnold after she made the public complaint about the discriminatory effect of the Hair Policy. *Id.* Under the *Jackson* standard, Mrs. Arnold has standing to bring a Title IX retaliation claim against BHISD and the Court should not dismiss this claim.

**G. Plaintiffs Assert a Valid Request for Declaratory Relief.**

32. The Court should reject Defendant's further attempt to escape responsibility as Plaintiffs have met the standard for declaratory judgment for their claims under the First Amendment, Title IX, Equal Protection Clause, Due Process Clause, and state law for sex discrimination. "The Declaratory Judgment Act provides that, '[i]n a case of actual controversy within its jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not

further relief is or could be sought.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007) (quoting 28 U.S.C. § 2201(a)). To show an actual controversy, the dispute at issue "must be definite and concrete, real and substantial, and admit of specific relief through a decree of a conclusive character." *Frye v. Anadarko Petroleum Corp.*, 953 F.3d 285, 294 (5th Cir. 2019) (internal citation omitted). Additionally, claims must be justiciable and "not hypothetical, conjectural, conditional, or based upon the possibility of a factual situation that may never develop." *Rowan Cos. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989) (internal citation omitted) (adding that a declaratory judgment "also is intended to provide a means for settling an actual controversy before it ripens into a violation of the civil or criminal law"). Finally, a court must determine "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127 (internal citation omitted).

33. BHISD's assertion that the Court lacks authority to enter declaratory judgment relies entirely upon the arguments discussed above. *See* Mot. [Dkt. No. 144] at 16–17. As shown above, Plaintiffs' Complaint establishes an "actual controversy" under the Equal Protection Clause, First Amendment, Title IX, Due Process Clause, and state law. *See supra* Sections A–F. Indeed, the Court's Opinion demonstrates the existence of an actual controversy at the very least as related to the claims asserted by K.B. *See generally*

Op. [Dkt. No. 98]. BHISD's argument that the Court lacks authority to enter declaratory judgment is spurious and should be rejected.[17]

## III.
## CONCLUSION

34. For the above stated reasons, Plaintiffs respectfully request that BHISD's Motion be denied in full.

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Respectfully Submitted,

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[17] BHISD also contends punitive damages are not recoverable from governmental entities, such as the District, as a matter of law. *See* Mot. [Dkt. No. 144] at 17. In light of the removal of individually named defendants from the litigation, Plaintiffs recognize the unavailability of punitive damages where a municipality, such as BHISD, is the sole defendant.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served on all counsel of record via electronic filing in compliance with the Federal Rules of Civil Procedure on this 23rd day of July 2021.

*/s/ Nicholas E. Petree*
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