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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

MONTANA SCHOOL COUNSELORS
ASSOCIATION; BRETT
THACKERAY; SARAH SMITH, on
behalf of her minor child IZZY SMITH;
and LIBBY THREADGOODE,

Plaintiffs,

v.

STATE OF MONTANA; GREGORY
GIANFORTE, in his official capacity as
the Governor of the State of Montana;
MONTANA OFFICE OF PUBLIC
INSTRUCTION; SUSIE HEDALEN, in
her official capacity as Superintendent of
Public Instruction; and MONTANA
BOARD OF EDUCATION,

Defendants.

Cause No.: DDV-2024-230

**ORDER ON MOTION TO
DISMISS**

1 Defendants State of Montana, Governor Greg Gianforte,
2 Superintendent of Public Instruction Susie Hedalen, Montana Office of Public
3 Instruction (“OPI”), and Montana Board of Education (collectively, “the State”),
4 represented by numerous attorneys¹, have moved to dismiss the Second Amended
5 Complaint for Declaratory and Injunctive Relief [“SAC”](Dkt. 54) pursuant to
6 Rule 12(b)(6) of the Montana Rules of Civil Procedure. Plaintiffs Montana
7 School Counselors Association, Brett Thackeray, Libby Threadgoode, and Sarah
8 Smith (on behalf of minor Izzy Smith), likewise represented by many attorneys²,
9 oppose the motion.

10 The motion is fully briefed and oral argument was held January 15,
11 2026. George Clark argued for the State and Ashlee Rossler argued for Plaintiffs.
12 For the reasons that follow, the motion to dismiss will be granted in part and
13 denied in part.

14 BACKGROUND

15 A. Section 20-7-120

16 In 2021, the legislature enacted Senate Bill 99 (SB 99), a bill to
17 regulate human sexuality education in primary and secondary public schools.
18 2021 Mont. Laws 316. Senate Bill 99, codified at Mont. Code Ann. § 20-7-120,
19 established an “opt-out” regime for sexuality education, allowing a child’s parent
20 or guardian to excuse their child’s participation in any “course of instruction, a
21 class period, an assembly, an organized school function, or instruction provided
22 by the district through its staff or guests” regarding “human sexuality education.”
23

24 ¹ The State is represented by Michael D. Russell, Thane Johnson, Alwyn Lansing, Michael Noonan, and George
Carlo L. Clark.

25 ² Plaintiffs are represented by Ashlee Rossler, Alex Rate, Akilah Deernose, Lilia N. Tyrrell, Jordan P. Helvie,
Matthew W. Costello, and Scott M. Dinner.

1 Mont. Code Ann. § 20-7-120(1) (2021). Senate Bill 99 defined “human sexuality
2 instruction” as “teaching or otherwise providing information about human
3 sexuality,” and listed the topics the statute considers to constitute “human
4 sexuality instruction,” including “intimate relationships, human sexual anatomy,
5 sexual reproduction, sexually transmitted infections, sexual acts, sexual
6 orientation, gender identity, abstinence, contraception, or reproductive rights and
7 responsibilities.” *Id.* § 20-7-120(6).

8 To enable parents to exercise this authority, Senate Bill 99
9 imposed on schools several notice requirements: (1) the school or district must
10 provide annual notice of the “basic content” of their planned human sexuality
11 instruction and inform parents of their right to withdraw the student; (2) 48 hours
12 before “holding an event or assembly or introducing materials for instructional
13 use” regarding human sexuality, the school must give specific notice of the
14 planned instruction; and (3) the school must make publicly available in advance
15 all human sexuality instruction curricular materials. *Id.* § 20-7-120(2)–(3).

16 In 2025, the legislature substantially revamped § 20-7-120 with
17 House Bill 471 (HB 471), 2025 Mont. Laws 300, which took effect July 1, 2025.
18 Now, § 20-7-120 regulates two distinct forms of instruction: “human sexuality
19 instruction” and “identity instruction.” The rules for each are different: “human
20 sexuality instruction” is subject to an opt-out procedure like it was under SB 99.
21 “Identity instruction,” however, is established as an opt-in regime: “A school
22 may not allow a child to attend identity instruction unless the child’s parent or
23 guardian agrees in writing to allow the child to attend.” Mont. Code Ann.
24 § 20-7-120(1)(b) (2025). Parents, however, may execute written approval for
25 identity instruction on an annual basis.

1 House Bill 471 redid the definitions of the types of instruction
2 subject to § 20-7-120. Human sexuality instruction is no longer defined as
3 “teaching or otherwise providing information” about various sexuality-related
4 topics, but it instead applies to “instruction that has the goal or purpose of
5 *studying, exploring, or informing*” students about the enumerated topics. Mont.
6 Code Ann. § 20-7-120(8)(a)(i) (2025) (emphasis added). The new category,
7 identity instruction, is similarly defined as having the “goal or purpose of
8 studying, exploring, or informing students about gender identity or gender
9 expression, or sexual orientation.” *Id.* § 20-7-120(8)(a)(ii).

10 House Bill 471 changed what types of activities constitute
11 “instruction” under the statute. Under SB 99, “instruction” meant a “course of
12 instruction, a class period, an assembly, an organized school function, or
13 instruction provided by the district through its staff or guests.” Mont. Code Ann.
14 § 20-7-120(1) (2021). Under HB 471, by contrast, “instruction” means “the
15 conduct of organized learning activities, including the provision of materials, for
16 students in a public school, whether conducted by a teacher or other school staff
17 or guests invited at the request of the school or district and *regardless of the*
18 *duration, venue, or method of delivery.*” Mont. Code Ann. § 20-7-120(8)(a)(iii)
19 (2025) (emphasis added). House Bill 471 creates an exception, however, for “a
20 teacher's response to an unexpected student-initiated inquiry. . . to the extent
21 necessary to resolve the inquiry or to maintain civility and decorum in the
22 classroom.” *Id.* § 20-7-120(9).

23 House Bill 471 also changes the notification requirements. Schools
24 or districts must send out annual notices of the “basic content” of the proposed
25 instruction for the coming year, the right to review curricular materials, and the

1 parents’ opt-in and opt-out rights. Mont. Code Ann. § 20-7-120(3) (2025).
2 Districts must provide for online availability of course materials for the district’s
3 health enhancement curriculum, including sexuality or identity instruction lesson
4 plans. *Id.* § 20-7-120(4)(a). Districts must provide a “calendar or events or
5 assemblies at which human sexuality instruction or identity instruction will be
6 provided.” *Id.* § 20-7-120(4)(b).

7 In addition to the annual and ongoing notice requirements, districts
8 must provide notice to parents of any planned human sexual instruction five to
9 fourteen days in advance to allow parents to exercise their opt-out rights. Mont.
10 Code Ann. § 20-7-120(2) (2025). In the case of identity instruction, there is no
11 additional notice requirement because the parent must have affirmatively given
12 written permission either before the planned instruction or at the beginning of the
13 school year or semester. *Id.* § 20-7-120(1)(b).

14 Finally, unlike SB 99, House Bill 471 contains an express
15 enforcement provision. It provides: “If, after investigating a violation under this
16 section, the trustees of a district find that an individual has knowingly or
17 repeatedly violated this section, the trustees shall report the findings to the board
18 of public education pursuant to 20-4-110.” *Id.* § 20-7-120(6). The referenced
19 section sets forth the Board of Public Education’s authority to discipline teachers
20 and administrators.

21 **B. Allegations regarding effects of Section 20-7-120**

22 A prominent theme in Plaintiffs’ complaint is the chilling effect of
23 § 20-7-120 on educators, librarians, and administrators. Plaintiffs allege that the
24 statute applies so broadly and indefinitely that schools, districts, teachers, and
25 librarians will simply forego instruction that is even arguably “human sexuality

1 instruction” and “identity instruction” to avoid running afoul of the statute. (SAC
2 ¶¶ 10–11, 16, 18, 29–30.) They allege that application of the law may result in
3 children having no exposure to the wide range of literary, artistic, and historical
4 topics that involve LGBTQ figures, artists, authors, and musicians, essentially
5 erasing them from the common culture. (SAC ¶¶ 14, 16–17, 21–22, 29.)

6 Senate Bill 99 has been in effect since 2021. According to
7 plaintiffs, teachers and counselors report “avoiding or shutting down
8 conversations about gender identity or sexual orientation altogether to avoid
9 running afoul of SB 99 and risking professional discipline including probation,
10 termination, and the possible loss of teaching certificates.” (SAC ¶ 57.) School
11 counselors, concerned about the breadth of what it means to engage in
12 “instruction,” have struggled with how to maintain confidentiality with students
13 seeking help on gender and sexuality issues and complying with the requirements
14 of SB 99. (SAC ¶ 59.) Teachers and counselors contend that school boards and
15 administrators, fearful of violating SB 99, have directed school faculty and staff
16 to avoid discussion of sexuality and gender topics altogether. (SAC ¶ 61.) They
17 cite the example of a librarian who underwent a formal complaint to the school
18 board for teaching students about the meaning of “Pride Month,” resulting in
19 public accusations that she was a sexual predator who was “grooming” children,
20 and culminating in discipline and her resignation. (SAC ¶ 60.)

21 Plaintiffs also allege that comprehensive sex education is a vital
22 part of educating K-12 students, and § 20-7-120 suppresses access to this
23 information. (SAC ¶ 36.) They observe that national standards support sex
24 education to help adolescents navigate sexual development and healthy
25 relationships and to help prevent disease, sexual violence, dating and

1 interpersonal violence, and unplanned or underage pregnancies. (SAC ¶¶ 37–39.)
2 Plaintiffs observe that LGBTQ students face a disproportionately higher risk of
3 acquiring sexually transmitted infections and having an unplanned pregnancy.
4 (SAC ¶ 40.) They allege that sex education including gender identity and sexual
5 orientation topics increases acceptance of LGBTQ students and improves
6 outcomes for this cohort. (SAC ¶¶ 40–41.) Plaintiffs allege sex education is also
7 necessary to curb documented risky sexual practices by Montana youth. (SAC
8 ¶¶ 42–47.)

9 According to Plaintiffs, inclusion of sexual orientation and gender
10 identity instruction is necessary to protect LGBTQ students from harassment,
11 bullying, and violence. LGBTQ students are disproportionately bullied and are
12 more likely to miss school, drop out, suffer from depression, and attempt or
13 complete suicide. (SAC ¶¶ 48–52.) They allege that sexual orientation and gender
14 identity instruction and exposure to the contributions of LGBTQ thinkers,
15 creators, and figures to American society promotes better treatment of LGBTQ
16 students by their peers, improves their educational outcomes, and reduces
17 suicidality. (SAC ¶¶ 53–55.) Plaintiffs contend that in other states that have
18 enacted similar statutes, hate crimes targeting members of the LGBTQ
19 community have risen. (SAC ¶ 29.)

20 **C. Allegations regarding standing**

21 Plaintiffs, all of whom have some connection to the public school
22 system, represent parents, students, teachers, librarians, and counselors.

23 Libby Threadgoode is a teacher and librarian at Billings West High
24 School and the advisor for the Billings West Genders and Sexualities Alliances
25 student club, a “gay-straight alliance” (GSA), which is a common student-run

1 organization that promotes gender and sexuality inclusivity. She alleges
2 § 20-7-120 has chilled access to literature, limited her classroom presentations
3 about sexuality and gender issues, and required the GSA to post agendas 48
4 hours in advance of meetings. Threadgoode alleges various ways in which the
5 statute complicates her work as a teacher. Threadgoode is herself a member of
6 the LGBTQ community and has a child in schools who may not be able to share
7 her child’s family experiences freely and will not see her family’s experience
8 represented in literature in the curriculum in the same was as families without
9 LGBTQ members. (SAC ¶¶ 69–90.)

10 Brett Thackeray is a Spanish teacher at Fergus High School and
11 Lewistown Junior High School. He alleges that § 20-7-120 has affected his
12 ability to use materials to support language learning because some of those
13 materials explore various relationship types and has also been reluctant to teach
14 certain coming-of-age cultural practices (for example, *quinceañera* celebrations
15 in Latin American communities). His allegations express the chilling effect he
16 has experienced in once-common interactions and instruction about matters of
17 equity and inclusivity. It also inhibits the development of relationships with
18 LGBTQ students who look to teachers as trusted adult supports.

19 Sarah Smith brings claims for her daughter, Izzy Smith, who is
20 seventeen years old and a senior at Fergus High School. Izzy considers herself an
21 “ally” for LGBTQ classmates and has expressed concern for the effect of
22 § 20-7-120 on the wellbeing of her LGBTQ classmates. Izzy also alleges that
23 suppression of instruction that could arguably fall within § 20-7-120 is directly
24 harming her education.

25 /////

1 Supreme Court’s recent decision in *Mahmoud v. Taylor*, 606 U.S. 522 (2025).
2 Second, the State challenges Plaintiffs’ standing with respect to each of their
3 claims. Because a plaintiff’s legal standing to sue is a non-waivable, threshold
4 requirement that is essential to the Court’s power to decide the case, *Heffernan v.*
5 *Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80, the Court
6 will address the question of standing first.

7 **A. Standing**

8 The concept of standing derives from the Montana Constitution,
9 which empowers district courts to decide only “cases at law and in equity,” and it
10 concerns “whether a litigant has the right to seek judicial resolution of a dispute.”
11 *Noland v. State*, 2025 MT 294, ¶¶ 9–10, 425 Mont. 328, 581 P.3d 47; Mont.
12 Const. art. VII, § 4. To have standing to bring a claim, the plaintiff must have a
13 “a personal stake in the outcome” of the claim advanced. *Heffernan*, ¶ 30. Thus,
14 to establish standing, the plaintiff must show: “(1) the claim is based on an
15 alleged wrong or illegality that has caused, or is likely to cause, the plaintiff to
16 suffer a past, present, or threatened injury to person, property, or exercise of [a]
17 civil or constitutional right”; and “(2) the harm is of a type that legal relief can
18 effectively alleviate, remedy, or prevent.” *Held v. State*, 2024 MT 312, ¶ 32,
19 419 Mont. 403, 560 P.3d 1235. A “general or abstract interest in the
20 constitutionality of a statute” is not enough to confer standing. *Shreves v. Mont.*
21 *Dep’t of Labor & Indus.*, 2024 MT 256, ¶ 17, 418 Mont. 514, 558 P.3d 784.

22 “Standing is determined as of the time the action is brought.”
23 *Heffernan*, ¶ 30. At the same time, procedural posture matters: there is a different
24 quantum of proof necessary to establish standing for each stage of the litigation.
25 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (standing must be “supported

1 in the same way as any other matter on which the plaintiff bears the burden of
2 proof, *i.e.*, with the manner and degree of evidence required at the successive
3 stages of the litigation”); *Accord, Barrett v. State*, 2024 MT 86, ¶ 18, 416 Mont.
4 226, 547 P.3d 630. This case is at the pleadings stage, and the Court is therefore
5 determining only whether Plaintiffs have stated a claim for which relief can be
6 granted. At this juncture, Plaintiffs need not prove their claims or produce
7 evidence; to the contrary, the Court must take Plaintiffs’ factual allegations as
8 true and view them in the light most favorable to Plaintiffs. *Obert v. State*,
9 2024 MT 270, ¶ 13, 419 Mont. 1, 558 P.3d 1110. The Court can only dismiss
10 Plaintiffs’ case at this stage if it “appears certain” they cannot prevail “under any
11 set of facts which could be proven in support” of their claims. *Obert*, ¶ 13.
12 Additionally, for claims (like the ones here) seeking only equitable relief, only
13 one named Plaintiff need have standing. *Held*, ¶ 32. Thus, this Court will not
14 dismiss a claim for lack of standing unless it appears certain from what has been
15 pleaded that no named Plaintiff could prove facts that would establish their
16 standing to assert the claim.

17 The State challenges Plaintiffs’ standing to assert any of their four
18 constitutional claims. Plaintiffs, unsurprisingly, oppose. Each of the State’s
19 arguments will be evaluated in light of the standard articulated above.

20 **1. Count I: Freedom of Speech and Expression**

21 Article II, Section 7 of the Montana Constitution provides, in
22 relevant part: “No law shall be passed impairing the freedom of speech or
23 expression. Every person shall be free to speak or publish whatever he will on
24 any subject, being responsible for all abuse of that liberty.”

25 /////

1 Plaintiffs Threadgoode, Thackeray, and Montana School
2 Counselors Association allege facts establishing they cannot speak as they wish
3 because of the allegedly onerous nature of the notice and opt-in or opt-out
4 requirements and the threat of negative consequences for non-compliance
5 flowing from § 20-7-120. The State responds that matters of curriculum and
6 instruction constitute government speech falling outside the right to free
7 expression. Whether the “government speech” doctrine will ultimately defeat
8 Plaintiffs’ claim, however, is beside the point. For standing purposes, the
9 question is not whether Plaintiffs will ultimately prevail, but whether they have
10 suffered an injury in fact that can be redressed by the courts. *See GLBT Youth in*
11 *Iowa Schools Task Force v. Reynolds*, 114 F.4th 660, 667 (8th Cir. 2024) (citing
12 *Braden v. Wal-Mart Stores*, 588 F.3d 585, 591 (8th Cir. 2009)). The Court will
13 undoubtedly tackle at a later stage in this litigation the question whether, to what
14 degree, and under what circumstances the State may properly regulate the
15 provision of information about sexuality and gender in public schools as part of
16 the government’s prerogative to “say what it wishes.” *Rosenberger v. Rector &*
17 *Visitors of the Univ. of Va.*, 515 U.S. 819, 832 (1995). For *standing* purposes,
18 however, the Court is simply looking to see whether the dispute here is “definite
19 and concrete, not hypothetical and abstract.” *Reichert v. State ex rel. McCulloch*,
20 2012 MT 111, ¶ 56, 365 Mont. 92, 278 P.3d 455. Thus, for now it suffices to say
21 that Plaintiffs allege either that they cannot speak as they wish or cannot hear
22 what they want to hear. This is a concrete, definite injury, and if Plaintiffs prevail
23 on the merits, then it will be an injury the Court can remedy through equitable
24 means. Plaintiffs have accordingly established their standing to assert a freedom
25 of expression claim.

1 **2. Count II: Right to Privacy**

2 Article II, Section 10 of the Montana Constitution provides: “The
3 right of individual privacy is essential to the well-being of a free society and shall
4 not be infringed without the showing of a compelling state interest.” Plaintiffs
5 allege that § 20-7-120’s notice requirements, combined with the breadth of what
6 it means to provide “instruction,” would at least arguably require counselors to
7 disclose information about students seeking counseling on intimate relationships,
8 sexual orientation, and struggles with gender identity to parents, breaching those
9 children’s expectations of privacy.

10 As an initial matter, the State’s argument here again largely barks
11 up the wrong tree. As with the freedom of expression claim, the State raises a
12 standing argument, but then wrongly argues the merits, not the degree to which at
13 least one Plaintiff has the requisite stake in the controversy to render the dispute a
14 case or controversy. But even then, the State’s take on the merits is not as clean-
15 cut as they suggest.

16 For instance, the State asserts that § 20-7-120 does not require “the
17 exchange of sensitive student information.” Actually, that is not at all clear under
18 the statute, particularly in its current form. Section 20-7-120 chose to define
19 “instruction” broadly to apply to “organized learning activities, including the
20 provision of materials” and to apply “regardless of the duration, venue, or
21 method of delivery,” meaning it is not limited to classroom discussion and formal
22 assemblies. Mont. Code Ann. § 20-7-120(8)(a)(iii). Counseling is inherently tied
23 to education, and it is therefore readily capable of being understood as an
24 “organized learning activit[y].” It often involves the “provision of materials.”
25 And particularly in secondary schools, it is hardly uncommon for adolescents to

1 seek out counseling on “intimate relationships,” “sexually transmitted
2 infections,” “contraception,” “sexual orientation,” and “gender identity or gender
3 expression.” *See id.* § 20-7-120(8)(a)(i),(ii). Thus, it is not unreasonable to fear—
4 as the counselors say they do—that they cannot have a counseling session on
5 these topics without providing particularized five-to-fourteen days’ advance
6 notice to parents or, in the case of matters of gender or sexual orientation, obtain
7 affirmative parental consent. Nor would counseling fall within the exception in
8 § 20-7-120(8)(b): a counseling session is not an “unexpected” student inquiry,
9 and counseling by its nature is not conducted only “to the extent necessary to
10 resolve the inquiry or to maintain civility and decorum in the classroom.”

11 Additionally, the State argues that “in four years of enforcement,
12 [Plaintiffs] cannot present a shred of evidence that someone, whether school
13 administrator, teacher, or parent, has disclosed sensitive student information.”
14 (Dkt. 56 at 16.) This misapprehends Plaintiffs’ burden at this stage. At the
15 pleadings stage, Plaintiffs do not have to produce a “shred of evidence” of
16 anything. The standard in Montana is instead whether the State is on notice of
17 Plaintiffs’ claim and theory of standard, and this Court can only dismiss if it is
18 “certain” or “beyond doubt” that they could not prove their claim. The Court
19 cannot say that is the case. Additionally, Plaintiffs do not argue just that private
20 information *has* been disclosed; rather their primary argument is that the specter
21 of having to do so has chilled their ability to counsel students who seek their
22 help.

23 The State also attempts to cast doubt on whether Plaintiffs have
24 suffered injury, disputing Plaintiff counselors’ characterization of their own
25 ethical standards. Again, whether Plaintiffs are injured is a distinct issue from

1 whether their cause of action is meritorious. Additionally, the injury does not
2 need to be the invasion of a constitutional right, provided it is sufficiently
3 individualized and concrete. *See Barrett v. State*, 2024 MT 86, ¶ 31, 416 Mont.
4 226, 547 P.3d 630. For example, in environmental cases, plaintiffs can have
5 standing if they suffer harm to their aesthetic or recreational interests, even
6 though neither aesthetics nor recreational opportunities are constitutionally
7 protected. *See Park County Env'tl. Council v. Mont. Dep't of Env'tl. Quality*,
8 2020 MT 303, ¶ 20. Here, Montana School Counselors Association's
9 membership consists of school counselors in Montana public schools. (SAC
10 ¶ 100.) They allege their members must adhere to ethical standards that include a
11 duty of confidentiality. (SAC ¶ 103.) They allege § 20-7-120 forces them to
12 breach that duty of confidentiality if they must provide notice to parents. (SAC
13 ¶ 103.) They allege this prevents them "from performing their professional
14 responsibilities" to their students. (SAC ¶ 104.) This sufficiently alleges a
15 concrete, non-hypothetical injury. Moreover, contrary to the State's argument,
16 Plaintiffs are not required at the pleadings stage to attach a copy of their ethical
17 standards to the complaint, or to explain those obligations in detail. The standard
18 is notice pleading, and Plaintiffs' allegations are sufficient.

19 Nevertheless, the Court has an independent duty to scrutinize
20 standing. *Heffernan*, ¶ 29. Thus, the Court must also consider whether Plaintiffs
21 have standing to assert the privacy rights of their students.

22 Even if a plaintiff has demonstrated they have satisfied the
23 constitutional minimum requirements for standing, there is also an important
24 prudential limitation on standing: "the plaintiff generally must assert her own
25 legal rights and interests." *Baxter v. Homeowners Ass'n v. Angel*, 2013 MT 83,

1 ¶ 15, 369 Mont 398, 298 P.3d 1145 (quoting *Heffernan*, ¶ 32.) The privacy rights
2 of school counselors are not directly implicated by § 20-7-120. To be protected
3 by the right to privacy, there must be a “subjective or actual expectation of
4 privacy” that “society is willing to recognize. . . as reasonable.” *Billings Gazette*
5 *v. City of Billings*, 2013 MT 334, ¶ 18, 372 Mont. 409, 313 P.3d 129. Montana
6 School Counselors Association’s members are all public employees performing
7 public duties. The notice provisions of § 20-7-120 do not require counselors to
8 provide personal or private information about themselves. Accordingly, the
9 privacy right being asserted by Montana School Counselor Association’s
10 members belongs to their students, not themselves.

11 There is an exception to the general rule that one must assert one’s
12 own rights, sometimes called “third party standing.” To demonstrate third party
13 standing, three criteria must be satisfied: (1) “the litigant must have suffered an
14 injury in fact, thus giving him or her a ‘sufficiently concrete interest’ in the
15 outcome of the issue in dispute”; (2) “the litigant must have a close relation to the
16 third party”; and (3) “there must exist some hindrance to the third party’s ability
17 to protect his or her own interests.” *Baxter*, ¶ 15 (quoting *Powers v. Ohio*,
18 499 U.S. 400, 410–411 (1991)).

19 The first and third criteria are easily established here. For the
20 reasons stated above, school counselors indeed allege an injury in fact personal to
21 them because of the alleged constraints on their ability to perform their job.
22 Moreover, the Court has little difficulty concluding that students seeking
23 counseling on sexuality, gender, and sexual orientation are hampered in their
24 ability to protect their own interests. The claim itself is predicated on an alleged
25 harm to these students’ right to privacy if forced to divulge facts about their

1 sexual orientation, gender identity, or other matters of gender and sexuality to
2 their parents or others. To participate in the lawsuit is to risk disclosure of the
3 very information they are seeking to keep private.

4 Finally, the relationship between counselor and student can fairly
5 be characterized as a “close” relationship. The rationale for requiring a “close”
6 relationship between the person whose rights are being asserted and the person
7 asserting those rights is two-fold: (1) “If the enjoyment of the right is inextricably
8 bound up with the activity the litigant wishes to pursue, the court at least can be
9 sure that its construction of the right is not unnecessary in the sense that the
10 right's enjoyment will be unaffected by the outcome of the suit”; and (2) “the
11 relationship between the litigant and the third party may be such that the former
12 is fully, or very nearly, as effective a proponent of the right as the latter.”

13 *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). The relationship is also typically a
14 confidential one. *Id.* These criteria are satisfied here. First, a student-counselor
15 relationship is inherently confidential, both as a matter of professional ethics (as
16 Plaintiffs allege) and as a matter of Montana law. *See* Mont. Code Ann.

17 § 26-1-809 (student-school counselor communications are privileged unless the
18 minor and their parent or guardian consents to disclosure). Second, the
19 relationship between a student and a school counselor is “inextricably bound up”
20 with the student’s expectation of privacy, which is the claim being advanced
21 here. Third, there is every reason to believe that school counselors have the same
22 motivation to be as effective an advocate for their students as the students would
23 be if bringing the action themselves.

24 Additionally, this is not a situation where the relationship is merely
25 hypothetical. This is not like *Baxter*, where a lawyer in a dispute over a locked

1 elevator in the building housing his law office could not assert the disability
2 rights of hypothetical future clients whose access might be hindered by the
3 elevator. *See Baxter*, ¶¶ 18–20. Here, members of the Montana School
4 Counselors Association can likely demonstrate they have members who *right*
5 *now* provided counsel to LGBTQ students or have regularly done so in the past.
6 Although the student-school counselor relationship is frequently a transitory one
7 because students grow up, change schools, graduate, or drop out over time, this is
8 akin to the physician-patient relationship in *Armstrong v. State*, 1999 MT 261,
9 ¶ 13, 296 Mont. 361, 989 P.2d 364, in which the court permitted third-party
10 standing for doctors asserting privacy claims on behalf of their patients, despite
11 the time-limited nature of that relationship.

12 Accordingly, at a minimum, Plaintiff Montana School Counselors
13 Association has standing to assert Plaintiffs’ privacy claim.

14 **3. Count III: Due Process (Vagueness)**

15 Count III of the SAC is a void-for-vagueness claim. “Vague laws
16 invite arbitrary power.” *Sessions v. Dimaya*, 854 U.S. 148, 175 (2018) (Gorsuch,
17 J., concurring). Thus, a statute that “fails to give a person of ordinary intelligence
18 fair notice that [the person’s] contemplated conduct is forbidden” violates due
19 process and is void on its face. *State v. Nye*, 283 Mont. 505, 513, 943 P.2d 96
20 (1997) (quoting *State v. Brogan*, 272 Mont. 156, 168, 900 P.2d 284, 291 (1995)).
21 The concern about vagueness is particularly acute when it implicates what
22 expression is and is not permissible. This is because “where a vague statute abuts
23 upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the
24 exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer
25 far wider of the unlawful zone than if the boundaries of the forbidden areas were

1 clearly marked.” *City of Whitefish v. O’Shaughnessy*, 216 Mont. 433, 440,
2 704 P.2d 1021, 1025–1026 (1985). This is what Plaintiffs argue: uncertainty in
3 the application of § 20-7-120, coupled with the consequences school staff face if
4 they run afoul of its provisions, will chill expression in schools.

5 Plaintiffs have alleged sufficient facts to establish their standing to
6 challenge § 20-7-120 on due process grounds. The statute provides that a school
7 employee or invitee might be engaged in “instruction” if the activity at issue has
8 “the goal or purpose” of “studying,” “informing” about, or even just “exploring”
9 the various topics covered by the statute. Mont. Code Ann. § 20-7-120(8)(a)
10 (2025). To be sure, the statute provides that “instruction” is confined to “the
11 conduct of organized learning activities,” which would seem to narrow its scope
12 considerably. In the next breath, however, the statute widens its scope again,
13 emphasizing that “instruction” can be found anywhere, “regardless of the
14 duration, venue, or method of delivery.” *Id.* § 20-7-120(8)(a)(iii). It is thus not
15 fanciful to question whether advising a student club, holding a counseling
16 session, running the school library, facilitating a study group, putting together a
17 school performance, or even having an “open door” policy for students might
18 comprise “instruction.”

19 Additionally, the subjects comprising “human sexuality topics,”
20 gender identity, gender expression, or sexual orientation are not as cabined as the
21 State imagines. Matters of gender, sex, and sexuality are deeply ingrained into
22 the human experience. From Herodotus’s *Histories* to Shakespeare’s *Romeo and*
23 *Juliet*, Freud’s *The Interpretation of Dreams*, and Mozart’s *The Marriage of*
24 *Figaro*, it is difficult to articulate many matters of the arts, the social sciences, or
25 the humanities where either some aspects of gender and “human sexuality,” as

1 defined in § 20-7-120, might not at least sometimes be “explored” or “studied.”
2 Even Oscar Wilde’s *The Picture of Dorian Gray*, cited by the State (Dkt. 56 at
3 6), addresses themes of hedonism and identity, and was famously authored by a
4 man prosecuted for homosexuality. Nor can one easily answer these questions
5 about the reach of the statute with some hand-waving appeals to “common
6 sense”: the sharp disagreements in public discourse about what is and is not
7 appropriate in music, film, schools, books, libraries, and classrooms suggest there
8 is not necessarily a common understanding of which mentions of gender or
9 sexuality are viewed as benign and which ones are not.

10 Plaintiffs allege educational activities potentially constituting
11 “human sexuality” or “identity” “instruction” are already being curtailed in
12 schools because they fear a broad application of § 20-7-120, and that they
13 themselves have altered their behavior out of fear of violation § 20-7-120. Right
14 now, Plaintiffs do not have to prove this claim; they must merely allege it.

15 It is not necessary at this stage to determine whether § 20-7-120 is
16 indeed vague in whole or part. There are formidable obstacles to finding a statute
17 vague, as outlined by the State. That, however, is a merits question. For today’s
18 purposes, it is enough to say that there is enough uncertainty in the meaning of
19 the statute that Plaintiffs’ chilled expression, and their fear of enforcement for the
20 activities addressed in the complaint, are “actual or imminent, not conjectural or
21 hypothetical.” *Heffernan*, ¶ 32. Maybe they can prove their fears are realistic,
22 maybe they cannot, but the Court cannot say “beyond doubt” that Plaintiffs
23 cannot prove any set of facts establishing their standing to sue on due process
24 grounds.

25 ////

1 **4. Count IV: Right to “Educational Opportunity”**

2 The Montana Constitution provides: “It is the goal of the people to
3 establish a system of education which will develop the full educational potential
4 of each person. Equality of educational opportunity is guaranteed to each person
5 of the state.” Mont. Const. art. X, §1(1). The Constitution also requires that the
6 legislature “provide a basic system of free quality public elementary and
7 secondary schools.” *Id.* art. X, § 1(3). Plaintiffs allege § 20-7-120 violates
8 Article X, Section 1 in several ways: (1) they argue § 20-7-120 allegedly targets
9 and disproportionately affects LGBTQ students (SAC ¶¶ 145–146); (2) they
10 argue § 20-7-120 leads to self-censorship by school employees, undermining the
11 guarantee of a “quality” public education (SAC ¶¶ 145–146; and (3) they contend
12 LGBTQ students’ ability to access counseling will be impeded (SAC ¶¶ 147–
13 150).

14 The only plaintiff bringing this claim is Sarah Smith on behalf of
15 her daughter, Izzy Smith, a senior at Fergus High School. Izzy does not contend
16 she herself is a member of the LGBTQ community. She alleges, however, that
17 she is “concerned about the quality of her education under these bills.” She
18 worries that “teachers will begin to self-censor during their lessons, which
19 impedes her ability to learn about varying perspectives and engage in stimulating
20 discussions about marginalized communities.” (SAC ¶ 99.)

21 Izzy has not alleged sufficient facts demonstrating she has standing
22 to assert denial of equal educational opportunity to LGBTQ students. To have
23 standing to bring a claim, a plaintiff may not be a “mere bystander” to the
24 litigation. *Food & Drug Admin. v. All. for Hippocratic Medicine*, 602 U.S. 367,
25 379 (2024). Concern about the impact of a policy on the welfare of others does

1 not confer standing, even if the impact on others implicates the plaintiff’s own
2 “sincere legal, moral, ideological, and policy objections.” *Id.* at 385–386. Thus,
3 in *Alliance of Hippocratic Medicine*, doctors who oppose abortion rights could
4 not object because of their belief that prescriptions for mifepristone (a drug that
5 can induce abortion) to others. *Id.* at 386. Accordingly, Izzy’s sincere care and
6 concern for fellow students whom she believes to be harmed by § 20-7-120
7 cannot confer standing.

8 At the same time, a portion of Izzy’s claim is the impact on *her*
9 education. Although she couches the self-censorship impacts on her own
10 education as a matter about which she is “concerned,” that does not render the
11 fear abstract or hypothetical. To the contrary, the SAC is replete with allegations
12 that SB 99—the weaker of the two bills—has already curtailed the provision of
13 education. Plaintiffs allege that a “widespread lack of clear guidance or training”
14 in Montana schools has led educators to fear inadvertent violations of § 20-7-120.
15 (SAC ¶ 58.) Plaintiffs allege some school boards and administrators “direct staff
16 to entirely avoid any potentially covered topics” under the statute. (SAC ¶ 61.)
17 Plaintiff Threadgoode alleges teachers have removed personal libraries from their
18 classrooms to avoid potential SB 99 claims. (SAC ¶ 74.) At Billings West High
19 School, the student-run GSA club posts agendas of meetings—potentially the
20 only student clubs required to do so—to ensure compliance with SB 99. (SAC
21 ¶ 79.) Plaintiff Thackeray, a Spanish teacher, additionally alleged the various
22 ways in which § 20-7-120 has complicated the teaching of Spanish, including
23 limited use of readers with high frequency words but that also include
24 discussions of cultural gender roles and relationships. (SAC ¶ 91.) He noted that
25 //

1 even matters like group projects are fraught out of concern of inadvertent
2 violation of § 20-7-120. (SAC ¶ 93.)

3 The SAC thus contains sufficient allegations to demonstrate that
4 Izzy’s alleged fear that her education will be harmed by § 20-7-120 is “actual or
5 imminent” not “conjectural or hypothetical.” *Heffernan*, ¶ 32. It is not “beyond
6 doubt” that Izzy could prove no set of facts demonstrating that § 20-7-120 will
7 personally impact her legally protected interest in a quality education.
8 Accordingly, the State is not entitled to dismissal of Count IV of the SAC except
9 to the limited extent Izzy purports to assert a denial of equal educational
10 opportunity to LGBTQ students, a group of which she is not a member.

11 **B. Conflict with *Mahmoud v. Taylor* and *Mirabelli v. Bonta***

12 Citing the United States Supreme Court’s recent decision in
13 *Mahmoud v. Taylor*, 606 U.S. 522 (2025), the State argues the complaint must be
14 dismissed because injunctive relief in the form requested by Plaintiffs would
15 necessarily violate the rights of parents under the United States Constitution to
16 direct the religious upbringing of their children. The Court (mostly) disagrees.

17 The Court begins its analysis by examining *Mahmoud*. In
18 *Mahmoud*, the Montgomery County (Maryland) Board of Education had
19 introduced “‘LGBTQ-inclusive’ storybooks” into the elementary school
20 curriculum. *Mahmoud*, 606 U.S. at 528. As the United States Supreme Court
21 characterized it, the storybooks did not merely present information about
22 sexuality or gender identity in a neutral fashion; instead, they were
23 “unmistakably normative” and “clearly designed to present certain values and
24 beliefs as things to be celebrated and certain contrary values and beliefs as things
25 to be rejected.” *Id.* at 550.

1 The Board in *Mahmoud* took a hard line on use of the storybooks.
2 Teachers were mandated to incorporate them into their instruction. *Id.* at 535.
3 The Board announced it would not notify parents when the storybooks would be
4 used. *Id.* at 538. Although parents could excuse their children from participation
5 in other curricular topics, including “family life and human sexuality,” *id.* at 540,
6 the Board specifically decided parents would not be allowed to opt out of
7 storybook-based instruction for any reason, including for religious objections. *Id.*
8 at 538–539. Board members, after being confronted with the petition of parents
9 of a variety of faiths, including many holding non-Christian beliefs, made
10 dismissive comments about their faiths. One Board member stated in a news
11 story that she felt “kind of sorry” for a student who testified in favor of opt outs
12 because the student “may have been ‘parroting dogma’ learned from her parents”
13 and suggested that objecting parents were “comparable to ‘white supremacists’
14 who want to prevent their children from learning about civil rights.” *Id.* at 539.

15 Against this backdrop, the Court held the district court should have
16 granted a preliminary injunction requiring the Board “to notify [parents] in
17 advance whenever one of the books in question or any other similar book is to be
18 used in any way and to allow them to have their children excused from that
19 instruction.” *Id.* at 569. It held the Board’s use of the story books, “along with its
20 decision to withhold opt outs, places an unconstitutional burden on the parents’
21 rights to the free exercise of their religion.” *Id.*

22 The Supreme Court has since elaborated on the sweep of its
23 holding in *Mahmoud*. In *Mirabelli v. Bonta*, 607 U.S. ___, 2026 WL 575049
24 (Mar. 2, 2026) (per curiam), the Court rejected the characterization that
25 *Mahmoud* is a “narrow decision focused on uniquely coercive curricular

1 requirements.” *Mirabelli*, slip op. at 4. Rather, the Court clarified *Mahmoud*
2 announced a rule that state action that “substantially interfere[s] with the right of
3 parents to guide the religious development of their children” is subject to strict
4 scrutiny. *Id.*, slip op. at 4–5. In *Mahmoud*, the mandatory use of “unmistakably
5 normative” LGBTQ+ storybooks without any opt-out permitted for parents with
6 religious objections infringed on this standard. In *Mirabelli*, the challenged
7 actions were California state policies that prohibited schools from disclosing to
8 parents a student’s gender identity, gender expression, or gender transitioning,
9 including a student’s use of names and pronouns inconsistent with their
10 biological sex at school. *Id.*, slip op. at 2–3. The Court observed that “the
11 intrusion on parents’ free exercise rights here—unconsented facilitation of a
12 child’s gender transition—is greater than the introduction of LGBTQ storybooks
13 we considered sufficient to trigger strict scrutiny in *Mahmoud*.” *Id.*, slip op. at 5.

14 This case proceeds on a different footing than either *Mahmoud* or
15 *Mirabelli*. Both *Mirabelli* and *Mahmoud* involved challenges by parents to
16 governmental policies that shut them out of important aspects of their children’s
17 development. In both cases, the exercise of state power was muscular indeed. In
18 *Mahmoud*, the district mandated the use of “normative” LGBTQ storybooks with
19 no opportunities for parents to opt out, even on religious grounds. In *Mirabelli*,
20 the State prevented parents from knowing anything about a child’s gender
21 transitioning, including where the parents had strong religious views on matters
22 of gender identity.

23 In one sense, *Mahmoud* and *Mirabelli* can be understood as
24 consistent with two basic precepts in the constitutional order. First, it is not the
25 place of government to prescribe—in schools or elsewhere—what “shall be

1 orthodox in politics, nationalism, religion, or other matters of opinion or force
2 citizens to confess by word or act their faith therein.” *W. Va. St. Bd. of Educ. v.*
3 *Barnette*, 319 U.S. 624, 642 (1943). Second, public spaces and public resources
4 should be open for all. *See, e.g., Trinity Lutheran Church of Columbia, Inc. v.*
5 *Comer*, 582 U.S. 449, 458–459 (2017). In short, all students should be able to
6 take advantage of the school system without being forced to surrender their
7 values or be placed in conflict with the values of their parents.

8 Plaintiffs’ action, however, can be understood as being brought in
9 the same spirit. While the policies in *Mahmoud* and *Mirabelli* can be thought of
10 as rejecting governmental efforts to put a thumb on the scales in favor of certain
11 viewpoints on matters of sexuality and gender, Plaintiffs argue that § 20-7-120
12 also puts a thumb on the scale, just in the opposite direction. Plaintiffs’ theory of
13 the case is that § 20-7-120 makes even arguably touching on sexuality and gender
14 so onerous and fraught that teachers, librarians, counselors, and principals will
15 err on the side of exclusion. In Plaintiffs’ telling, fear that stocking the library
16 with a particular book, counseling an LGBTQ student in crisis, or studying some
17 works of literature, theater, or art will prompt someone in the community to
18 claim it was un-noticed “human sexuality” or “identity” instruction, triggering
19 public outrage, distraction, and possibly discipline. The easier it is, then, to
20 forego anything that could be controversial, no matter how that affects the
21 students.

22 If Plaintiffs are correct, the same core constitutional values
23 underscoring *Mahmoud* and *Mirabelli* are implicated here, just for different
24 groups of children and parents. Just as schools in Maryland and California
25 became a less welcoming place for families with certain religious beliefs,

1 Plaintiffs argue that § 20-7-120 will do the same here for LGBTQ families by
2 making the issues that matter to them effectively *verboten*.

3 Additionally, it must be remembered that parents with strongly
4 held religious beliefs on matters of sex and gender are not the only parents who
5 send children to public schools. Many parents *want* their children to be free to
6 approach school counselors about whatever is troubling them. They *want* their
7 children to have a wide range of literature available to them in the school library.
8 They *want* schools to expose their children to diverse and challenging ideas and
9 to be forced to engage in critical thinking, whether the subject is English, history,
10 social studies, theater, music, or art. Many (though certainly not all) *want* their
11 adolescent children to have access to information about sexuality, relationships,
12 and healthy practices for navigating the transition to adulthood. This lawsuit, if
13 successful, does not require the Court to hold that parents who have sincere
14 objections to certain topics should be forced to subject their children to them
15 anyway. Instead, the argument here is over whether § 20-7-120 goes too far in
16 the other direction, thereby stifling everyone else’s access to the benefits of a
17 public education. Plaintiffs’ view of § 20-7-120 is that it shuts children out of
18 many of the things taxpaying parents want their public schools to provide.

19 The State contends Plaintiffs’ requested relief—enjoining SB 99
20 and HB 471—would “strip[] parents of their federal rights, depriving them of the
21 right of notice and the right to an opt-out of instruction that violates their
22 religious beliefs.” (State’s Opening Br., Dkt. 56 at 9.) That, however, is not what
23 would happen. Even if the Court were to enjoin SB 99 and HB 471 in their
24 entirety, the effect would be to revert state law to what existed in 2020. In other
25 words, state law would again be silent on the subject. An injunction would leave

1 All of that said, the Court notes its agreement with the State on one
2 important point: the interplay of § 20-7-120, the Montana Constitution, and
3 religious liberty is indeed at issue in this case. Plaintiffs unconvincingly argue
4 that the State has not expressly raised the issue in its pleadings. The operative
5 pleading in this case is the Second Amended Complaint, however, and its filing
6 superseded the prior pleadings. *See Cass v. Composite Indus. of Am.*, 2002 MT
7 226, ¶ 15, 311 Mont. 406, 56 P.3d 322. Thus, the State will yet have an
8 opportunity to answer the Second Amended Complaint and assert any defenses.

9 Additionally, the Court does recognize that there is potentially
10 significant tension between the holding of *Mirabelli* and Plaintiffs' privacy claim.
11 The Court cannot interpret the Montana Constitution to provide fewer protections
12 than are provided by the United States Constitution. *State v. Stewart*, 2012 MT
13 317, ¶ 34, 367 Mont. 503, 291 P.3d 1187; *Espinoza v. Mont. Dep't of Revenue*,
14 591 U.S. 464, 476–479 (2020). At the same time, the only briefing before the
15 Court concerning *Mirabelli* is the State's notice of supplemental authority.
16 Accordingly, the prudent course is to order supplemental briefing on the effect of
17 *Mirabelli* on the viability of Plaintiff's privacy claim.

18 CONCLUSION

19 With one exception—Izzy Smith's standing to assert an equal
20 educational opportunity claim on behalf of LGBTQ students—at least one
21 Plaintiff has standing to assert each of Plaintiffs' claims. For the reasons stated
22 above, *Mahmoud v. Taylor* does not compel dismissal of the complaint in its
23 entirety, but the Court will require supplemental briefing on the effect of
24 *Mirabelli v. Bonta* on Plaintiffs' privacy claim.

25 Accordingly,

1 **IT IS ORDERED:**

2 1. The State’s Motion to Dismiss (Dkt. 55), filed November
3 12, 2025, is **GRANTED** in part and **DENIED** in part as follows:

4 a. Count IV is **DISMISSED in part without prejudice**
5 to the limited extent Plaintiff Smith contends that § 20-7-120 violates the
6 educational opportunity rights of any students other than Izzy Smith.

7 b. The Court **DEFERS** decision on whether Count II
8 (right to privacy) fails to state a claim for which a relief can be granted pending
9 receipt of supplemental briefing.

10 c. In all other respects, the State’s motion to dismiss is
11 **DENIED**.

12 2. Within **28 days** of the filing date of this Order, the parties
13 shall submit supplemental briefing on the following question: Whether the
14 United States Supreme Court’s holding in *Mirabelli* compels dismissal of
15 Count II of the Second Amended Complaint. The parties may file simultaneous
16 reply briefs **fourteen days** thereafter.

17 3. Within **28 days** of the filing date of this Order, Defendants
18 shall file an answer to the Second Amended Complaint.

19 4. Pursuant to Mont. R. Civ. P. 16(b), the parties shall confer in
20 good faith on a proposed schedule within **21 days** of the filing date of this Order.
21 Within **28 days** of the filing date of this Order, Plaintiffs shall file with the Court
22 an agreed proposed schedule consisting of the following dates:

23 a. Deadline for joinder of parties and amendment of
24 pleadings.

25 b. Deadline for exchange of lay witnesses.

1 c. Deadlines for disclosure of expert witnesses and rebuttal
2 experts. Note: “Rebuttal” expert testimony is testimony intended solely to
3 contradict or rebut evidence on the same subject matter identified by another
4 party.

5 d. Discovery completion deadline (which must be set after
6 the joinder/amended pleadings and expert disclosure deadlines).

7 e. Pretrial Motions deadline (which must be set after the
8 discovery completion deadline).

9 f. Mediation Deadline (mediation is mandatory and may not
10 be waived).

11 DATED this 17th day of March 2026.

12
13 /s/ Christopher D. Abbott
14 CHRISTOPHER D. ABBOTT
15 District Court Judge

16 cc: Ashlee Rossler, via email
17 Alex Rate, via email
18 Akilah Deernose, via email
19 Lilia N. Tyrrell, via email
20 Jordan P. Helvie, via email
21 Matthew W. Costello, via email
22 Scott M. Dinner, via email
23 Austin Knudsen, Montana Attorney General, via email
24 Michael D. Russell, via email
25 Thane Johnson, via email
Alwyn Lansing, via email
Michael Noonan, via email

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