UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS - AMARILLO DIVISION

SAMANTHA NELSON for herself and minor child L.N., *Plaintiff,*	§ § § §	
v.	§	**CAUSE NO. 2:24-CV-177-Z**
NAZARETH INDEPENDENT SCHOOL DISTRICT, et al. *Defendants.*	§ § § §	

PLAINTIFFS' FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE KACSMARYK:

Plaintiff Samantha Nelson files this amended complaint on behalf of herself and her minor daughter, L.N., against Nazareth Independent School District, NISD, Principal Robert O'Connor, and NISD Superintendent Kara Garlitz for their illegal retaliation for the exercise of Mrs. Nelson and L.N.'s constitutional rights. Mrs. Nelson would show this Court the following:

I. PARTIES

1. Plaintiff Samantha Nelson is a parent of an NISD student who resides in Castro County. Nelson is suing on her own behalf and on behalf of her minor child, L.N., who resides in the NISD. She may be contacted through the undersigned.

2. Defendant Nazareth Independent School District is an Independent School District in Castro County and may be served through its Superintendent, Kara Sue Garlitz, at NISD's main office, 101 S First St Nazareth, TX 79063-0189.

3. Defendant Kara Sue Garlitz is sued in her individual capacity, though she acts under color of law as NISD Superintendent and may be served as indicated above.

4. Defendant Robert O'Connor is sued in his individual capacity, though he acts under color of law as principal of NISD Elementary and may be served through the office of NISD as indicated above or wherever he may be found.

II. JURISDICTION and VENUE

5. This Court has Federal Question jurisdiction over this action as Plaintiffs seek redress for deprivations of rights (due process and equal protection) protected by the federal Constitution, pursuant to 42 U.S.C. §§ 1983 et seq., 28 U.S.C. §§ 1331, 1343.

6. This Court has supplemental jurisdiction under 28 U.S.C. § 1367(a) to hear Plaintiffs' state claims, as they form part of the same case as the federal claims.

7. Plaintiffs' claims for injunctive relief are brought pursuant to 28 U.S.C. §§ 2201-2202 and the general legal and equitable powers of this court.

8. This Court has personal jurisdiction over the defendants, who reside in Castro County, and where the events leading to this suit have all occurred.

9. Venue is proper in this district under 28 U.S.C. § 1391(B)(2) because all the events or omissions giving rise to this claim occurred in this District and because NISD is situated in this District. Venue also lies under 28 U.S.C. § 1400(a) because Defendants reside in this district.

III. BACKGROUND

A. In 2003, while in third grade, L.N. 'clicked through' the STAAR; in response, NISD amended its policy to punish Plaintiffs by requiring "approaches grade level" on STAAR tests to advance to the next grade.

10. In 2021, Defendant O'Connor, the principal of NISD, provided his opinion of the STAAR test in a letter to all parents in NISD while bemoaning the state legislature's emphasis on testing:

> "As principal of Nazareth School, I believe that your children are our focus and not the STAAR tests. Our students and teachers achieve amazing results, but this is not because we focus on tests or legislative requirements. We focus on your children and teaching them what they need to be successful. Maybe I am splitting hairs but I am certain that STAAR tests produce an immeasurable amount of stress and pressure. The legislature has added one more component schools need to address and a weighty consequence for not passing. Here at school, we plan to focus on supporting our students, helping them grow the best they can, and working our hardest. In the end, we will follow the rules laid out by the legislature and as always, we will stay focused on our students and provide them the best education and support we are able."

ECF No. 1-1 at 10.

11. Mrs. Nelson and her husband, L.N.'s father, Nicholas "Nick" Garcia, believe that the standardized STAAR test is so detrimental that they have openly derided the test and even instructed their daughter to take the test by simply 'clicking' through the test, effectively not providing useful data for assessment.

12. In September of 2022, Plaintiff Nelson informed NISD that her daughter would be opting out of the STAAR, an action that NISD opposed.

13. At that time, the NISD School Board Retention and Promotion Policy EIE (LOCAL) did not support retaining students due to STAAR performance. Instead, the retention policy focused on coursework, assessments, and final exams. ECF No. 1-2 at 2.

14. A month after the Nelsons protested the STAAR by instructing their daughter to opt out of it, the NISD Board began seeking a way to discourage NISD parents from instructing their children to opt out, as indicated by the Board's notes taken during its October 12, 2022, meeting:

> **6.K EIE(LOCAL) Update–Retention & Promotion**
> I have been looking at our E1E policy on Retention and Promotion to see if there anything we could put in place if we have some parents who follow through with their plans to "opt out" of state testing. While there is one statement in the (LEGAL) portion of the policy that says we can consider state assessments, there is really nothing in our (LOCAL) policy to actually hang our hat on to do so. Plus, any changes to this (LOCAL) policy would have to be done prior to the start of school. So, we would not be able to do anything with this policy before next year.

ECF No. 1-2 at 9.

15. From at least late 2022 on, Defendants were working to find a way to deter parents from opting out from the STAAR. On July 7, 2023, Garlitz sent an email to an agent of the Texas Association of School Boards, TASB, seeking a way to "beef up [NISD]'s EIE(LOCAL) Retention and Promotion Policy to combat against parents thinking that they can 'Opt Out' of STAAR for their students." In that email, Garlitz included a draft of the changes, which would add a requirement that students perform "at the minimal performance level" on state assessments. ECF No. 1-2 at 11.

16. While Defendants were busy amending their retention policy so it could be used as a cudgel against STAAR rebels, L.N. used the click-through approach to opt out of STAAR testing in the spring of 2023.

17. L.N. mastered her third-grade studies, and the school awarded her the Outstanding UIL Achievement Awards for Music and Spelling. ECF No. 1-1 at 33.

18. In anticipation of continued refusals to participate in STAAR testing, the NISD retention policy, "EIE (LOCAL)," was amended on September 2, 2023.[1] An email thread shows that TASB and NISD honed the approach first suggested by Garlitz the year prior, revising the policy to require students to achieve "approaches grade level" on the STAAR and a unanimous vote of a retention committee to promote a student for those who did not reach that goal. ECF No. 1-1 at 20–21; ECF No. 1-2 at 11–23.

19. The new retention policy was motivated and drafted as a tool to punish L.N. and any future STAAR rebels. Principal O'Conner and Superintendent Garlitz designed the new retention policy to prevent any student from opting out of the STAAR test. To do this, they gave Principal O'Connor the authority to unilaterally trump the recommendation of teachers and the wishes of parents without regard to a student's academic performance. This change appears designed to ensure that NISD can retain L.N. indefinitely until Plaintiffs comply with the STAAR policy or push L.N. and her family out of the district.

[1]https://www.nazarethisd.net/site/handlers/filedownload.ashx?moduleinstanceid=1159&dataid=2853&FileName=1_Minutes_Aug%202%202023_Special%20Meeting_signed.pdf

B. NISD is retaliating against Plaintiffs for their STAAR criticism and opting out, though Defendants know that L.N. has mastered fourth-grade material, and NISD is not retaining others who have *not* mastered the material.

20. As they did in the third grade, Mrs. Nelson and Mr. Garcia decided that L.N., a high-performing student, would again "click-through" the STAAR during fourth grade. But this time, the new retention policy gave NISD a retaliatory tool that it did not have the year prior.

21. NISD's new retention policy, EIE(LOCAL), requires NISD to convene a Retention Committee when students do not reach "at least approaches grade level on state assessment instruments." The Retention Committee comprises the NISD Principal, the student's parent, the "teacher who taught the grade or course for which the student did not meet the standard of mastery," and other teachers at the discretion of the principal. ECF No. 1-1 at 20–21.

22. L.N. left blank the STAAR assessment questions administered to her in April of 2024. This was the second year that this had occurred, but this time, the EIE(LOCAL) policy was available as a tool to employ to punish STAAR dissenters during the retention meeting against Plaintiffs.

23. On July 23, 2024, Mrs. Nelson received a letter from NISD informing her that the school would conduct a retention meeting. That meeting would determine whether NISD would permit L.N. to advance to the fifth grade. Mrs. Nelson was invited to participate pursuant to the retention policy. ECF No. 1-1 at 11–12.

24. Mrs. Nelson sent an email to Principal O'Connor and Superintendent Garlitz to remind them of L.N.'s excellent grades and ask for a waiver of the Retention Meeting based on L.N.'s academic performance, quoting Principal O'Connor's own words from 2021, where he wrote:

> "As principal of Nazareth School, I believe that your children are our focus and not the STAAR tests…We focus on your children and teaching them what they need to be successful….I am certain that STAAR tests produce an immeasurable amount of stress and pressure…Here at school, we plan to focus on supporting our students, helping them grow the best they can, and working our hardest…We will stay focused on our students and provide them the best education and support we are able."

ECF No. 1-1 at 10.

25. In an abrupt departure from his "children are our focus" sentiment from 2021, Principal O'Connor's August 6, 2024, reply to Mrs. Nelson set a Retention Meeting for August 8, 2024, and quoted the new NISD policy concerning retention:

> In accordance with Board Policy EIE (LOCAL), promotion shall be based on mastery of the curriculum. In determining whether to promote a student, the Nazareth Independent School District ("District") considers the recommendation of the student's teacher, the student's grade in each subject or course, the student's score on a state-mandated assessment, and determines mastery based upon the following factors:
>
> 1. Course assignments and unit evaluation shall be used to determine student grades in a subject. An average of 70 or higher shall be considered a passing grade.
>
> 2. Mastery of the skills necessary for success at the next level shall be validated by assessments that may either be incorporated into unit or final exams or may be administered separately. Mastery of at least 70 percent of the objectives shall be required.
>
> **3. Mastery of the skills necessary for success at the next level shall also be validated by performance on state assessments. Achievement of at least approaches grade level on state assessment instruments shall be required.**

ECF No. 1-1 at 14.

26. O'Connor went on, "You [*sic*] child did not achieve 'at least approaches grade level' on her state assessments and has not met the district's standard for mastery," indicating that he intended to oppose L.N.'s promotion to the fifth grade." ECF No. 1-1 at 14.

27. Mrs. Nelson and her spouse attended the retention meeting on August 6, 2024. Principal O'Connor and L.N.'s teacher, Jill Garcia, also attended. During the meeting, Ms. Garcia, the only active educator at the meeting asserted that:

a. L.N.'s grades were sufficient to easily pass fourth grade; L.N.'s year averages in Reading at 89, Math at 88, Science at 89, and Social Studies at 94 (ECF No. 1-1 at 22);
b. The i-Ready Diagnostic Assessments, conducted thrice during the school year, in addition to STAAR, showed that by year's end, L.N. was at a mid-fourth grade level in both reading and math, had exhibited typical growth in math and "stretch growth," a term of art for exceptional growth, in reading; and
c. Ms. Garcia formally recommended L.N.'s advancement to the fifth grade.

28. During the retention meeting, Defendant O'Connor recognized that L.N.'s relevant grades for the fourth grade were 88 and 89. O'Connor heard L.N.'s teacher state that L.N. had "stretch

growth" for reading that year while informing the committee that L.N. had mastered fourth-grade material and indicated she was ready to advance to the fifth grade. ECF No. 1-1 at 17 and 22.

29. Not discussed by the Retention Committee were L.N.'s UIL academic awards fourth grade, including awards for Writing, Spelling, Art Smart, and Music Memory, Ready. ECF No. 1-1 at 33.

30. As the new retention policy states that the vote of the committee must be unanimous to promote a student, Principal O'Connor had the final say. Despite the votes of other committee members, the testimony of L.N.'s teacher, the evidence of L.N.'s grades and accolades, and the wishes of Mr. Garcia and Mrs. Nelson, Principal O'Connor cast the single vote against promoting L.N. and forced her to remain in the fourth grade. He defended his position by stating that the test was "what was required of our students" for advancement.

31. During L.N.'s Retainer Committee meeting, Defendant O'Connor decided that L.N. should be retained in the fourth grade, stating that the decision was based on L.N.'s failure to demonstrate readiness for fifth grade by her performance on STAAR.

32. As a stark foil to NISD's treatment of L.N. and Mrs. Nelson, Defendants have allowed other students to advance, though they have not mastered fourth-grade material and did not perform well on the STAAR test. NISD's amended retention policy irrationally but *intentionally* focuses on the STAAR exam as the prime metric for promotion for the purpose of denying promotion to punish those who refuse to do their best on the STAAR, and to ignore all other significant indicators that a student should remain in the same grade.

C. Plaintiffs object to the STAAR test's lack of scientific rigor and harm to student health.

33. After a decade of use, the State of Texas Assessments of Academic Readiness ("STAAR"), has engendered widespread opposition. A statewide survey conducted by the office of Texas State Senator Jose Menendez in 2021 that garnered 13,000 responses determined that an extraordinary

97% of parents and 96% of educators indicated opposition to STAAR testing in 2021 during the course of the pandemic.[23]

34. Reporting by KCEN-TV, an NBC affiliate serving Central Texas, documented Texas parents' and students' opposition to STARR in April of 2024:

a. "I grew up being dyslexic for a while without being diagnosed," Joven Wesley said. "Even with being diagnosed and going through all the classes, it's hard for students like myself to really sit there and actually try to grasp it without messing up on anything. They're always trying to push us for passing or above passing on any level."
b. The student's mother expressed her opposition stating, "They push it so hard that he just gets stressed out," Lillian Wesley said. "He gets anxiety. He can't sleep. He just he dreads going to school for testing. Some parents are like, just get over it and take a test. No, we all have choices in life and you can't dictate to me what my child has to do."
c. Another parent echoed a similar sentiment, "It just brought a lot of anxiety to him," [Hope] Smith said. "These teachers hound these kids about the STAAR assessment so bad to where it was, like, deteriorating him emotionally. It was giving him anxiety."[4]

35. Opposition to STAAR is not confined to parents and students. English teacher Cynthia Ruiz of Connally High School summed up the feelings of many teachers about the adoption of STAAR, telling the Texas Monthly, "I saw a huge disconnect and disengagement." She went on to note, "I had kids drop out because they didn't see light at the end of the tunnel." Driving to the crux of the matter, she said, "Not one college or employer looks at these scores, and we are spending millions of dollars on them. And for what?" She concluded, "I'd like the pressure taken off students and teachers and more accountability placed on the TEA."[5]

---

[2] Senator Jose Menedez Letter to Texas Education Agency Commissioner Michael Morath, March 1, 2021. https://x.com/Menendez4Texas/status/1366420385940598794/photo/1.
[3] All URLs cited in this petition were last access on August 12, 2024.
[4] KCEN-TV, 'They come home crying, they can't eat, they can't sleep' Texas families take action against STAAR. April 20, 2024, https://www.kcentv.com/article/news/education/texas-families-take-action-against-staar/500-90be438d-0611-496b-814a-ce265c612d93.
[5] Swartz, Mimi, Texas Monthly, Are Texas Kids Failing? Or Are the Tests Rigged, April 2019, https://www.texasmonthly.com/news-politics/texas-kids-failing-staar-tests-rigged/.

36. Similarly, then Alief Independent School District Superintendent, H.D. Chambers opined on the STAAR,

> "Based on the many reading and literacy experts who have spent years addressing the issue of literacy, far more children are reading at or above grade level than the number the state is publishing. No one, including me, is saying it's a hundred percent, but it's a lot higher than the forty percent some claim. I want to be clear and emphasize that this issue is not an attempt to lower standards or expectations. We are trying to align the standards and what teachers are told to teach with what is tested and how those results are applied to accountability. Every reading and literacy expert who has studied our concerns can't be wrong on this. This is not anti-testing. This is not anti-accountability. We just want the truth. If the decision was made to test kids in reading passages that are above their grade level, everyone needs to know that. In football, you get to the end zone, and you score a touchdown. So what if the referees get together and decide you have to get *past* the end zone, but they don't tell the players or the coaches that? That's kind of what EA has done."[6]

37. Parent, student, and educator opposition notwithstanding, the most searing indictment of the STAAR test comes from academics. In a comprehensive readability study assessing the reading portion of the STAAR exam, Texas A&M University-Commerce professors Susan Szabo and Becky Sinclair found,[7]

> The results using the readability formula on each of the grade-level reading passages were disconcerting. The TEA website states, "The state is not building tests that nobody can pass" (TEA, 2011, slide 18). However, as the readability of the grade-level reading passages were not measured by the writers and creators of the STAAR; however, that looks like what has happened. As seen in Table 3, most reading passages were written above grade level reading. Passages in
>
> - Grade 3 was written at a 5th grade level (two grade levels too high);
> - Grade 4 was written at a 7th grade level (three grade levels too high);
> - Grade 5 was are written at a 7th grade level (two grade levels too high);
> - Grade 6 was written at high 7th - low 8th grade level (two grade levels too high);
> - Grade 7 was written at that a 8th grade level (1 grade level too high); and
> - Grade 8 was written at the 7th grade level (1 grade level below).
>
> When examining the readability of the reading passages to predict student outcome, it is believed that only 8th grade students will be successful on the new STAAR test, as they are the only grade level that had reading passages that were written at or below grade level. In addition, it appears that because the readability of the passages for 4th grade are 3-levels above grade level, they will be the least successful reading the STAAR passages.

---

[6] Swartz, Mimi, Texas Monthly, Are Texas Kids Failing? Or Are the Tests Rigged, April 2019, https://www.texasmonthly.com/news-politics/texas-kids-failing-staar-tests-rigged/.

[7] Szabo, S., & Sinclair, B. (2012). STAAR reading passages: The readability is too high. Schooling, 3(1), 1–14. https://www.nationalforum.com/Electronic%20Journal%20Volumes/Szabo,%20Susan%20STAAR%20Reading%20Passages%20The%20Readability%20is%20to%20High%20Schooling%20V3%20N1%202012.pdf. Szabo and Sinclair reexamined the issue in 2019 and came to the same conclusion, "that many students may fail the STAAR test because the reading passages are above grade level. Szabo, S., & Sinclair, B. (2019). Readability of the STAAR Test is still misaligned. Schooling, 10(1), 1–12 https://www.nationalforum.com/Electronic%20Journal%20Volumes/Szabo,%20Susan%20Readability%20of%20STARR%20%20is%20%20Misaligned%20Schooling%20V10%20N1,2019.pdf.

38. Texas Monthly summarized its findings for lay audiences:

> Their research, based on sample STAAR questions that were made available before the test's debut, suggested that the STAAR test didn't accurately measure whether students were reading at grade level. Their examination of five different readability tests—commonly used academic measures that rate the appropriateness of written passages for various grade levels—showed that in order to comprehend various STAAR reading test passages, most students would have to be reading at higher than their grade level. A third grader, for instance, would have to comprehend at a fifth-grade level.[8]

39. A 2016 study by Michael Lopez and Jodi Pilgrim of the University of Mary Hardin-Baylor conducted a subsequent readability study and found that STAAR contained passages that were too difficult for the targeted age groups.[9]

40. In sum, opposition to STAAR testing is not a fringe theory but is grounded in scientific literature and broad support among all stakeholders in the education process. STAAR poses real dangers to juvenile mental health.

D. Texas has moved away from STAAR testing as a high-stakes promotion test.

41. Mrs. Nelson includes publications that evince the State of Texas's viewpoint of emphasizing learning of subjects rather than STAAR exams, including a) House Bill 4545; b) the Texas Education Agency's Implementation Overview; and c) the history of promotion policies in Texas, 2022-23. ECF No. 1-3.

42. In particular, HB 4545 removed STAAR-retention mandates for promotion:

15 [~~(a-2) A student who fails to perform satisfactorily on an~~
16 ~~assessment instrument specified under Subsection (a) and who is~~
17 ~~promoted to the next grade level must complete accelerated~~
18 ~~instruction required under Subsection (a-1) before placement in the~~
19 ~~next grade level. A student who fails to complete required~~
20 ~~accelerated instruction may not be promoted.~~]

ECF No. 1-3 at 6, ¶ 2.

---

[8] Swartz, Mimi, Texas Monthly, Are Texas Kids Failing? Or Are the Tests Rigged, April 2019, https://www.texasmonthly.com/news-politics/texas-kids-failing-staar-tests-rigged/.

[9] Lopez, M., & Pilgrim, J. (2016). Text complexity: A study of STAAR readability. In E. Martinez & J. Pilgrim (Eds.), Literacy summit yearbook (pp. 87–93). Belton, TX: Texas Association for Literacy Education https://npr-brightspot.s3.amazonaws.com/legacy/sites/kstx/files/201904/pigrim_research.pdf Accessed August 9, 2024.

43. The TEA's Implementation Overview (ECF No. 1-3 at 21–24) and History of Promotion Policies (ECF No. 1-3 at 25–34) reiterate this reduction in militant state assessment importance, focusing instead on access to tutoring for those with academic difficulties.

44. These documents show that the State of Texas has affirmatively acted to reduce the importance of the STAAR, formally eliminating the test as a factor when considering grade retention in the high-stakes fifth and eighth grades and directing school districts to move from STAAR performance requirements for promotion decisions.

IV. ATTACHED EVIDENCE

45. Mrs. Nelson fully incorporates ECF No. 1-1, 1-2, and 1-3 into this amended complaint by reference.

V. CONDITIONS PRECEDENT

46. Plaintiffs have met all conditions precedent. Plaintiffs are not required to exhaust administrative remedies when the gravamen of their claims is a constitutional claim for deprivation of rights and remedies sought are not available under IDEA or similar statutes. *Lartigue v. Northside Indep. Sch. Dist.*, 100 F.4th 510, 515 (5th Cir. 2024).

VI. PROPOSITIONS OF LAW FOR PLAINTIFFS' CLAIMS

A. Deprivation of Constitutionally protected rights under 42 U.S.C. § 1983.

47. 42 U.S.C. § 1983 provides a private cause of action against those who, under color of law, deprive a citizen of the United States of "any rights, privileges, or immunities secured by the Constitution and laws."

48. To state a claim under section 1983, a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013).

49. Put another way, to state a cause of action under § 1983 for violation of the Due Process Clause, Plaintiffs must show they have asserted a recognized liberty or property interest within the purview of the Fourteenth Amendment and that they were intentionally or recklessly deprived of that interest, even temporarily, under color of state law. *Griffith v. Johnston,* 899 F.2d 1427, 1435 (5th Cir. 1990).

B. School Districts are liable under § 1983 for constitutional violations.

50. Municipal entities, including independent school districts, are "persons" under § 1983. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). As such, school districts can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. *Id.* at 690-91.

51. To invoke municipal (or school district) liability, a plaintiff must identify (1) an official policy, of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy. *Pineda v. Houston*, 291 F.3d 325, 328 (5th Cir. 2002).

52. Under Texas law, the final policymaking authority in an independent school district rests with the district's board of trustees. *Rivera v. Hous. Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003); Tex. Educ. Code § 11.151(b).

C. Supervisors may be held liable for their own actions under § 1983.

53. In *Bowen v. Watkins*, 669 F.2d 979, 988 (5th Cir. 1982), the Fifth Circuit observed that supervisory officials could not be held liable solely on the basis of their employer-employee relationship with a tortfeasor *but* may be liable when their own action or inaction, including a failure to supervise that amounts to gross negligence or deliberate indifference, is a proximate cause of the constitutional violation.

VII. CAUSES OF ACTION

A. Claim 1 – Defendants violated Plaintiffs' Right to Equal Protection as guaranteed by the 14th Amendment under 42 U.S.C. § 1983.

54. Incorporating the allegations above, Plaintiffs seek damages from Defendant NISD, Defendant O'Connor, and Defendant Garlitz under 42 U.S.C. § 1983 under the Equal Protection Clause of the Fourteenth Amendment.

55. Defendant NISD promulgated an official policy, EIE(LOCAL), which was amended and enforced in a discriminatory manner against L.N. by O'Connor and Garlitz. Defendants retaliated against Plaintiff L.N. for her previous actions of leaving the STAAR exam blank, specifically amending the retention policy EIE(LOCAL) to enact a discriminatory practice against individuals who refuse to do their best on the STAAR.

56. Defendant O'Connor discriminated against L.N. by personally enacting the policy and vetoing L.N.'s advancement, though he knew that L.N.'s grades were excellent, and she was fully able to proceed, while Defendants are known to promote other students who had not passed the STAAR or mastered grade material.

57. Defendant Garlitz said that she was acting "for the good of the District" to Plaintiff Nelson while actively working to amend the retention policy so she could persecute Plaintiffs by creating and supporting the discriminatory practice of holding back L.N., working to draft and revise the retention policy for the discriminatory purpose, and not to improve academic performance or make the retention policy more accurate. Additionally, her inaction of failing to supervise Defendant O'Connor amounts to deliberate action, far more than mere gross negligence or deliberate indifference. *See Bowen*, 669 F.2d at 988. Defendant Garlitz was aware of L.N.'s circumstances as described in this case and chose to ratify the actions of Defendant O'Connor's application of the official EIE(LOCAL) policy to discriminate against L.N. and retain her from moving to the 5th grade. *Id.*

58. Thus, all the Defendants used EIE(LOCAL) to discriminate against L.N. and retain her from moving up to 5th grade in violation of the 14th Amendment, deliberately holding her back while simultaneously allowing others to proceed who were not as academically prepared for purposes that were anything but academic.

B. Claim 2 – Defendants violated Plaintiffs' Right to Substantive Due Process as guaranteed by the 14th Amendment under 42 U.S.C. § 1983.

59. Defendants' actions to amend NISD's retention policy and then weaponize it against Plaintiffs constitute an arbitrary and unreasonable exercise of power to punish Plaintiffs in violation of their Fourteenth Amendment due process rights.

60. Parents have a constitutionally protected right to raise their children as they see fit. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925). The Supreme Court found in *Pierce* that the right to raise a child includes the right to resist compulsory education choices. *Id.* The Supreme Court reinforced this point in the case *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). It astutely noted that compulsory educational choices destroy parents' choices about raising their children. *Id.* at 232. The core similarity between these cases is the theory of negative rights. That is, a parent has a right to refuse whatever program that a school district might inflict on a child but does not have the right to force a school district to administer some curriculum or school program. *See Pierce*, 268 U.S. at 534–35; *see also Yoder*, 406 U.S. at 232. The Supreme Court has not disturbed those rulings since they were handed down.

61. In pleading the claim for violations of Substantive Due Process with respect to exercising her parental right to raise her child as she sees fit, Mrs. Nelson pleads that she wanted L.N. to refrain from a compulsory educational choice and that Defendants retaliated against her for exercising that right.

62. Specifically, Mrs. Nelson alleges that she wishes for L.N. to refrain from participating in the STAAR test. She does not contest any of the other state-wide tests for whether L.N. should

progress educationally. She does not wish to curate the curriculum or wish a teacher to change his class grades so that L.N. passes. She simply wished for L.N. to refrain from participating in a state-wide metric that the Texas Legislature and the Texas Education Agency now use to evaluate the health of education in Texas but not as a retention requirement. ECF 1-3 at 21.

63. In *Yoder*, the parent's choices were intimately tied to religion. *Yoder*, 406 U.S. at 232. In this case, Mrs. Nelson tied her choices to an equally important parental decision: her child's health. In a similar manner to the parents in *Pierce* and *Yoder*, Mrs. Nelson wants her child to opt out of a compulsory educational program. This is her constitutionally protected right to raise her child as she sees fit. However, Defendants retaliated against her decision by prohibiting her child from receiving the same educational opportunities as any other child who passes his classes. Defendants have trapped Mrs. Nelson and L.N. in a cycle of denial despite academic excellence because the Plaintiffs object to the STAAR test.

64. Therefore, Mrs. Nelson pleads this claim for violations of Substantive Due Process because Defendants penalized her and L.N. for exercising her constitutional right to raise her child.

C. Claim 3 – Defendants violated Plaintiffs' Right to Procedural Due Process as guaranteed by the 14th Amendment under 42 U.S.C. § 1983.

65. Incorporating the paragraphs above, NISD did not afford Plaintiffs a legitimate hearing on August 8, 2024, but had already made up its mind in choosing to punish Plaintiffs for protesting against NISD policies.

66. While the federal constitution does not guarantee the right to education, states who provide public education must do so in a manner that complies with the Equal Protection and Due Process Clauses of the Fourteenth Amendment. As Texas provides public education, the education must be available on equal terms and cannot arbitrarily deprive students of this state-created property interest without due process. *Goss v. Lopez*, 419 U.S. 565, 572-73, 95 S. Ct. 729, 735 (1975).

67. Thus, Plaintiff L.N. has a constitutionally protected property interest in her education. In light of her mastery of fourth grade, her treatment is nothing more than a capricious punishment, as demonstrated during L.N.'s retention meeting.

68. Defendant O'Connor violated the 14th Amendment's procedural due process requirements of a fair hearing, which was also violated by Super. Garlitz in ratifying those actions. NISD is liable as the government entity which formally amended the retention policy to be deliberately useful for this exact misuse.

69. Additionally, Plaintiff Nelson has a constitutionally protected interest in controlling the education of her child. See *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 627 (1923). Defendants chose to circumvent Plaintiff Nelson's constitutionally protected interest by amending their EIE (LOCAL) in response to Plaintiff Nelson's decisions to elect to opt out L.N. to purposefully target and punish Plaintiff Nelson's child and hold her back a year arbitrarily and unreasonably, violating Plaintiffs' procedural due process under the 14th Amendment.

70. In this case, Plaintiffs argue that the due process which Defendants have provided is a foregone conclusion based on the sole consideration of "you failed to do your best on STAAR, so you are punished with retention". The Constitution requires more than a mere veneer and a kangaroo committee. Texas does not allow false testimony to incriminate even when it is unknowing. *Ex parte Ghahremani*, 332 S.W.3d 470, 478 (Tex. Crim. App. 2011). Federally, the Fifth Circuit has taught that pretexts for searches cannot support illegal searches. *Morgan v. Chapman*, 969 F.3d 238, 250 (5th Cir. 2020). This Court should recognize that pretext to deny an education which all of the Defendants know is improper for a student based on a refusal to participate in the STAAR is nothing more than a decision to punish, and certainly does not comport with any obligation to provide due process regarding a right established under state law.

D. Claim 4 – Defendants violated Plaintiffs' Right to Free Speech as guaranteed by the First Amendment under 42 U.S.C. § 1983.

71. Defendants are liable for First Amendment retaliation through 42 U.S.C. § 1983. Defendants amended EIE (LOCAL) and denied L.N. advancement for the purpose of chilling Plaintiffs' speech in opting out of the STAAR. A First Amendment retaliation claim requires that a plaintiff plead (1) he was engaged in constitutionally protected activity, (2) the defendant's actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendant's adverse actions were substantially motivated against the plaintiff's exercise of constitutionally protected conduct. *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002).

72. The First Amendment broadly construes matters of public concern to broadly protect speech by default. *See Counterman v. Colorado*, 600 U.S. 66, 73–74 (2023) (noting that the First Amendment protections apply generally except to a few categories of speech); *see generally*, *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (holding that a protest of a private funeral for a veteran is commentary on a matter of public concern). Specifically, the First Amendment generally protects all types of speech unless the speech is in a historic and traditional category of unprotected speech. *Counterman*, 600 U.S. at 73. Some examples are legal obscenity, incitement, and true threats of violence. *Counterman*, 600 U.S. at 73–74. Certain categories of speech, such as commercial speech and purely private speech on private issues, have less protection but are still protected. *Snyder*, 562 U.S. at 452.

73. The Supreme Court holds that speech covers a matter of public concern when it "can be fairly considered as relating to any matter of political, social, or other concern to the community. . . or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Id.* at 453.

74. Notably, the character of the statement as inappropriate or controversial is irrelevant to whether it is a matter of public concern. *Id.* Finally, the evaluation of whether the speech is a matter of public concern requires the evaluating court to examine the content, form, and context of that speech on the whole record. *Id.* In *Snyder*, the Supreme Court looked to the message of the speech, where it occurred, who was speaking, and other factors. *Id.* at 454–55. Ultimately, the Court concluded that no matter how personal and controversial the chosen platform for the speech was, the First Amendment still protected that speech as a matter of public concern such that the courts could not enforce a defamation and invasion of privacy judgment against the Westboro Baptists. *Id.* at 458. Notably, in that situation, the actor seeking to restrain the speech was not a government actor.

75. Where a government actor is involved, the First Amendment protects speech even more rigorously. *R. A. V. v. St. Paul*, 505 U.S. 377, 382–83 (1992). The government may not discriminate against speech based on content unless the speech falls within an exempt category, such as fighting words. *Id.* A government discriminates based on content when the government actor acts in a way to punish a particular view in the marketplace of ideas. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115–16 (1991).

76. Here, Defendants retaliated against Mrs. Nelson and L.N. for expressing a particular viewpoint by conduct. Specifically, Mrs. Nelson exercised her free speech rights by informing the Defendants that she and her husband objected to the STAAR test and that L.N. would not be actively participating in the test. Mrs. Nelson has openly and publicly criticized the STAAR test as poor public policy. L.N. expressed the view that the STAAR test is useless and harmful by abstaining from active participation. In response, Defendants retaliated against this disfavored point of view in the following ways:

a. Defendant NISD, by and through Defendants O'Connor and Garlitz, changed the retention rules to include the STAAR test after Mrs. Nelson informed NISD that she would exercise her parental right to choose how to educate L.N. and their right to free speech by having her opt out of the STAAR test;

b. Defendant NISD, by and through Defendants O'Connor and Garlitz, modified EIE (LOCAL) after Mrs. Nelson exercised her right to choose how to educate L.N., and both exercised their right to free speech by protest;

c. Defendant NISD, by and through Defendants O'Connor and Garlitz, denied L.N. advancement to the next grade despite her satisfactory performance; and

d. Defendant NISD, by and through Defendants O'Connor and Garlitz, allowed other students to advance, though they had not mastered fourth-grade material and did not perform well on the STAAR test.

77. These factual allegations show a plausible claim for relief. First, these allegations show viewpoint discrimination. Mrs. Nelson and L.N. exercised their protected right to free expression by criticizing the STAAR policy and refusing to participate. Immediately after the first instance of First Amendment activity, Defendants put a policy in place to make sure there were dire consequences to engaging in the same behavior again.

78. The Board notes from the October 12, 2022, meeting specifically reference parents, here one parent, who "opted out" of STAAR testing by clicking through the STAAR exam to completion. Further, the notes show that the Board was seeking some form of enforcement mechanism to stop this behavior. Immediately after the second instance of protests against the STAAR exam, Defendants held a meeting on whether to advance L.N. to the next grade. Despite recommendations, excellent merits, passing grades, and awards for academic achievement, Defendant O'Connor was the sole but deciding member who voted against advancing L.N.

O'Connor was directly responsible for the new NISD policy to deter protests against the STAAR exam. These facts show unconstitutional viewpoint discrimination against Mrs. Nelson and L.N.

79. Second, even if Defendants did not engage in specific viewpoint discrimination, they still unconstitutionally infringed on speech concerning matters of public concern. Regardless of the Defendants' assertions that Mrs. Nelson and L.N. engaged in private speech on private concerns, this is not true. The STAAR test was originally implemented state-wide as a Legislative initiative. Since its implementation, the STAAR test has been a consistent source of public debate. This makes the STAAR test a matter of public concern. Additionally, local school boards are elected and implement policies as public servants with input from the community. That makes the policies they implement matters of public concern. The Nelsons have routinely criticized the STAAR policy as a matter of public concern. Therefore, the Defendants attempting to quash speech by demonstration on a matter of public concern is unconstitutional.

E. Claim 5 – Plaintiffs seek a preliminary and permanent injunction to prevent enforcement of Nazareth ISD Board Policy EIE (LOCAL) for violation of the 1st and 14th Amendments of the United States Constitution.

80. There are two general types of temporary injunctions: prohibitive and mandatory. *RCI Entm't (San Antonio), Inc. v. City of San Antonio, No.* SA-21-CV-0194-JKP, 2021 U.S. Dist. LEXIS 68799, at *3 (W.D. Tex. 2021). A prohibitive injunction forbids conduct, whereas a mandatory injunction requires it. *Id.* A temporary mandatory injunction changes the status quo but should be granted when necessary to prevent irreparable injury or extreme hardship. *Roark v. Individuals of the Fed. Bureau of Prisons,* No. 5:12cv60, 2013 U.S. Dist. LEXIS 69745, at *6 (E.D. Tex. 2013). A trial court has the power to grant a temporary mandatory injunction when circumstances justify it. *See id.*

81. Ordinarily, there are four elements that must be established to warrant a permanent injunction: (1) success on the merits; (2) that a failure to grant the injunction will result in

irreparable injury; (3) that said injury outweighs any damages that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest. *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 824 F.3d 507, 533 (5th Cir. 2016).

82. To establish irreparable injury, the movant must establish "a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Arthritis & Osteoporosis Clinic of E. Tex., P.A. v. Azar*, 450 F. Supp. 3d 740, 751 (E.D. Tex. 2020).

A. Plaintiff meets the elements of a permanent injunction.

83. Similarly, Plaintiff seeks that this Court preliminarily then permanently enjoin NISD, restraining it or anyone acting on its behalf, including teachers, from acting in any way contrary to advancing L.N. in the fifth grade.

84. Absent judicial intervention, L.N. faces ongoing arbitrary denial of education in comparison to her peers, with no practical ability to prevent NISD from penalizing her for her and her parents' constitutionally protected decision to opt out of the STAAR test.

85. The National Education Policy Center's Dr. Nancy Bailey (PhD in Educational Leadership) aptly summarized the conclusions of 75 years of research on the imminent harm done to students who are unnecessarily retained in a grade:

> In 1984, Holmes and Matthews found that retained students showed lower academic achievement, poorer personal adjustment, and lower self-concept. In addition, they found that in all cases, the outcomes for students promoted were more positive than for those who were retained.
>
> Owings and Kaplan found that retained students are likelier to drop out, and they also deemed retention to be expensive (2001). In addition, they emphasize licensed teachers and practical strategies to assist students.
>
> Roderick found that students who failed kindergarten through third grade have a 75 percent chance of dropping out by tenth grade, while those who fail grades four through six have a 90 percent chance of dropping out by tenth grade (1994).

> Roderick and Nagaoka examined grade retention in Chicago under their high stakes testing policy. They found that students struggled during the retained year and faced increased rates of special education placement (2005). Among third graders, retention didn't lead to greater achievement growth two years after promotion. With sixth graders, retention was associated with lower achievement growth.[10]

86. As the great Australian educator C. R. Lawton once wryly observed, "[T]ime is the one thing that can never be retrieved." Every day that L.N. spends repeating fourth grade is a day of stagnation that cannot be recovered. Her harm is actual, imminent, and irreparable.

87. Defendants can show no harm to the ISD in granting the relief requested. All reliable evidence shows that L.N. is ready for Fifth Grade. Additionally, Defendants cannot claim to be injured by being required to stop an illegal act. Because it is clear Defendants have violated the United States Constitution, Plaintiff's rights to direct her child's education, and there is no harm in forcing Defendant to obey the Constitution, there is a substantial likelihood that Plaintiff will prevail on the merits.

88. Each day, Plaintiff's daughter will suffer significant irreparable damage to her rights. L.N.'s total damages cannot be measured with certainty, and it is neither equitable, nor conscionable, to allow Defendants to violate the Constitution in what is no more than an attempt to browbeat students into STAAR testing participation.

89. The comparative injury, or balance of equities and hardships, to the parties and to the public interest, support granting injunctive relief; the Plaintiff is only asking the Court to preserve the status quo and require Defendant to cease unlawfully violating the United States Constitution resulting in an infringement upon Plaintiff's rights – with a temporary, and then permanent injunction after trial.

[10] Bailey, Nancy, National Education Policy Center (NEPC) Nancy Bailey's Education Website: Grade Retention is Unnecessary! Nov. 29, 2023, https://nepc.colorado.edu/blog/grade-retention.

90. Incorporating the paragraphs above, Plaintiff seeks an injunction to prevent NISD from enforcing its EIE (LOCAL) policy against L.N., because it violates the United States Constitution as applied here and is harming Plaintiffs' rights. Such injunctions are available to stop such constitutional violations. *A.V. v. Plano Indep. Sch. Dist.,* 585 F. Supp. 3d 881, 891 (E.D. Tex. 2022).

91. All that can be said at present, based the on Principal O'Connor's August 8 email is that NISD believes that its Board Policy EIE (LOCAL) can effectively be used to discriminate against L.N. who chose to not play the STAAR test game based on previous ratification of NISD and its agents.

92. Plaintiff seeks injunctive relief to prevent use of the newly amended EIE(LOCAL) policy to prevent retention of students based on an opt-out result on STAAR when all assessments and grades indicate mastery, because the retention policy has been developed for the purpose of retaliatory punishment for STAAR critics and opt-out students, a violation of the right to free speech and due process protected by the First and Fourteenth Amendments, respectively.

VIII. JURY DEMAND

93. Plaintiffs herewith tender the jury fee and request a jury trial.

IX. REMEDIES SOUGHT

94. Plaintiffs seek economic damages for the infringement of their rights, including money damages to allow L.N. to either attend NISD's fifth grade, or funds necessary to replace NISD's education with a private option. Additionally, Plaintiffs seek a permanent injunction against NISD preventing from prohibiting L.N. from advancing to the next grade solely based on her decision to protest the STAAR exam by submitting a blank exam.

X. PRAYER

Plaintiff Samantha Nelson for herself and on behalf of L.N. asks this Court to grant Plaintiffs economic damages for the loss of educational opportunities and infringement of constitutional rights. Plaintiffs further ask this Court to issue a a preliminary and permanent injunction against NISD and its agents and employees to prevent them from denying L.N. promotion based on her decision to protest the STAAR exam by submitting a blank exam.

Respectfully submitted,

/s/ Warren V. Norred
Warren V. Norred,
Texas Bar No. 24045094,
warren@norredlaw.com
NORRED LAW, PLLC;
515 E. Border; Arlington,
Texas 76010
P: 817-704-3984
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on October 1, 2024, I filed the preceding document using the Court's electronic service provider which will send electronic notice to all those seeking service in this case.

/s/Warren V. Norred
Warren V. Norred