

CLIENT ALERT

Three New Filings Show Where School Board Liability Is Heading This Fall — And Why Your Opt-Out Policy and Equity Plan Both Need a Second Look

A second wave of Mahmoud opt-out suits, a new constitutional challenge to a school district's own vendor-certification practices in New York City, and a homeschool-curriculum discrimination case together show where school board liability is heading this fall — and how exposed an undocumented policy leaves a district.

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KEY TAKEAWAYS

- A second wave of *Mahmoud v. Taylor* litigation is testing the opt-out right well beyond its original facts. In *Averkiev v. Lake Washington School District* (W.D. Wash., filed Sept. 8, 2026), a parent sued the district and all five board members individually after the district declined to extend opt-out rights beyond the state-mandated sex-ed carve-out.
- Similarly, *Bulzan v. Hillsboro School District* (D. Or., filed Sept. 23, 2026), challenges a district's homeschool-partnership reimbursement program for excluding religious curriculum — the same theory the Ninth Circuit rejected in *Woolard v. Thurmond*, now pending before the U.S. Supreme Court on a cert petition.
- In *American Alliance for Equal Rights v. Mamdani* (S.D.N.Y., filed Oct. 1, 2026), the same organization that brought the Fearless Fund litigation has sued New York City, its Mayor, and — notably — the Chancellor of New York City Public Schools, challenging the City's M/WBE contractor-certification program under the Equal Protection Clause and 42 U.S.C. § 1981. The complaint is built around a school vendor's experience and cites the City's new Racial Equity Plan as proof the City is “doubling down” on race-conscious practice.
- None of these matters has produced a final ruling against a school board. But each shows where plaintiffs' counsel are already pointing, and boards should not wait for a judgment to assess their own exposure.
- Two actions belong at the top of every board's list this fall: adopting or updating a well-considered, Mahmoud-compliant notice-and-opt-out policy, and commissioning a privileged legal review of any racial-equity-labeled plan, program, vendor-preference practice, or demographic goal adopted since 2020.

Since the Supreme Court decided *Mahmoud v. Taylor* in June 2025, school board members have known the parental opt-out right was coming for curriculum policy. What has changed in just the past several weeks is how fast — and how far — the pressure is spreading, on two fronts at once: a new generation of opt-out suits pushing *Mahmoud* past its original fact pattern, and a direct constitutional challenge reaching into the procurement and vendor-contracting side of district operations, not just curriculum or HR.

THE OPT-OUT WAVE IS WIDENING

Averkiev v. Lake Washington School District was filed in the Western District of Washington on September 8, 2026, naming the district, its superintendent, and all five school board members individually as defendants. The complaint alleges the district refused a parent’s request for advance notice and a broad religious opt-out after his son was taught a lesson touching on gender-transition surgery — well outside the narrow, state-law sex-education opt-out the district had offered. The suit invokes *Mahmoud* alongside the Supreme Court’s related decision in *Mirabelli*, and asserts First and Fourteenth Amendment claims.

Bulzan v. Hillsboro School District, filed in the District of Oregon on September 23, 2026, takes the same underlying theory — government may not treat religious and secular materials unequally when it funds a public benefit — and applies it somewhere boards may not have been looking: homeschool partnership programs. The plaintiff’s reimbursement claim for Abeka and Classical Conversations curriculum was denied because the district’s homeschool-partnership policy limits reimbursement to “approved, non-religious curriculum.” That is the same theory at issue in *Woolard v. Thurmond*, where the Ninth Circuit upheld California’s exclusion of religious materials from a public homeschool-funding program in September 2025, denied rehearing en banc in March 2026 over two dissents, and now faces a pending certiorari petition at the Supreme Court.

The throughline: plaintiffs — frequently represented by Alliance Defending Freedom — are no longer limited to challenging a single curriculum decision. They are testing how far the opt-out and equal-treatment principles reach into adjacent programs: homeschool partnerships, counseling conversations, pronoun policies, and more. A district that has only addressed *Mahmoud* at the level of “which storybooks require notice” has not actually mapped its exposure.

A SCHOOL DISTRICT’S OWN VENDOR PROGRAM IS NOW THE TEST CASE

On October 1, 2026, American Alliance for Equal Rights — the organization behind *AAER v. Fearless Fund* — sued New York City, Mayor Zohran Mamdani, the City’s Department of Small Business Services and its Commissioner, and, notably, New York City Public Schools and its Chancellor, Kamar H. Samuels.

The suit challenges the City's M/WBE (minority- and women-owned business enterprise) certification program, which requires at least 51% minority or female ownership for a business to qualify for streamlined, higher-value contracts.

What makes this suit a direct school board concern, rather than a city-government story, is its plaintiff and its facts. Kevin Ray is a self-employed arts educator who has delivered theater and music residencies in New York City public schools for over a decade as a “non-contracted vendor.” Because he cannot obtain M/WBE certification, his annual contracting with any single school is capped at \$25,000 — versus up to \$1.5 million, with no competitive process required, for certified vendors. The complaint describes in detail how the Department of Education's own procurement portal (FAMIS) displays a separate, preferred category for M/WBE-certified vendors, and alleges that individual schools have repeatedly urged Ray to restructure his sole proprietorship — including adding a co-owner of a qualifying race or sex — simply to do more of the work schools already wanted from him. The complaint asserts claims under the Equal Protection Clause (via 42 U.S.C. § 1983) and 42 U.S.C. § 1981, and expressly cites the City's newly released Racial Equity Plan as evidence that the City is expanding, rather than winding down, race-conscious contracting.

The Chancellor is named as a defendant specifically because of his statutory duty to set a DOE procurement policy that “enhance[s]” M/WBE participation — meaning the lawsuit treats the school system's own contracting rules, not just the Mayor's citywide program, as part of the challenged conduct. For boards anywhere, the lesson isn't about New York's specific ordinance. It's that a district's vendor-certification, procurement-preference, or contracting-participation-goal practices — the parts of equity work that often get far less legal attention than curriculum, admissions, or hiring — are now squarely within the same constitutional theory already proven against Fearless Fund, and the same plaintiff's bar is actively bringing it to district doorsteps.

WHAT THIS MEANS FOR YOUR BOARD

1. Build or update a Mahmoud-compliant opt-out policy now — before a parent complaint, not after one. That means a clear notice process, a defined scope for what triggers it, and documented criteria for where the district's obligations end.
2. Order a privileged review of every racial-equity-labeled plan, program, demographic goal, or achievement initiative your board has adopted since 2020 — and extend that review past curriculum and hiring to procurement, vendor certification, and contracting-participation goals. *AAER v. Mamdani* shows plaintiffs are now reading district vendor practices the same way courts have read admissions and employment preferences.
3. Map adjacent programs, not just the curriculum decisions directly in Mahmoud's path — homeschool partnerships, counseling practices, facilities policies, and procurement portals are all now demonstrably in scope.

4. Decide, and document, your risk tolerance. Where a board chooses to keep a values-driven program despite litigation exposure, that decision should be made deliberately, with counsel, and communicated honestly to the community — not left to be discovered in a complaint.

WHAT WE'RE WATCHING

Both *Averkiev* and *Bulzan* are at early stages; motions to dismiss are expected in the coming months and will test how far courts are willing to extend *Mahmoud* beyond its facts. The *Woolard* cert petition is pending at the Supreme Court and could resolve the broader question of religious-curriculum funding exclusions for every public homeschool-support program in the country. And *AAER v. Mamdani* is just three weeks old — defendants have not yet responded — but given the same plaintiff's success in the Eleventh Circuit against Fearless Fund, districts with their own vendor-certification or contracting-participation-goal programs should not assume this stays a New York story.

This is exactly the fast-moving landscape we built our litigation monitoring practice to track — and why we're launching a periodic School Board Litigation Update, a short, plain-language briefing flagging new filings, rulings, and federal guidance that affect elected school board members, sent only when the law actually moves.

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