UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; **C.A.**, a minor, by and through her parent and guardian, **N.A.**; **A.M.**, a minor, by and through her parents and guardians, **S.M.** and **R.M.**; **N.G.**, a minor, by and through her parent and guardian, **R.G.**; **A.V.**, a minor, by and through her parents and guardians, **T.V.** and **A.T.V.**; and **B.W.**, a minor, by and through his parents and guardians, **D.W.** and **V.W.**, Plaintiffs, vs. **UNITED STATES DEPARTMENT OF EDUCATION**; **JOHN B. KING, JR.,** in his official capacity as United States Secretary of Education; **UNITED STATES DEPARTMENT OF JUSTICE**; **LORETTA E. LYNCH**, in her official capacity as United States Attorney General; and **SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS**. Defendants.	**Case No. 1:16-cv-04945** **Magistrate Judge Jeffery T. Gilbert** **Plaintiffs' Memorandum in Opposition to Defendant District 211's Memorandum in Support of Its Request to Conduct Fact Discovery (Dkt 44), and Plaintiffs' Motion for Protective Order**

Plaintiffs' Memorandum
In Opposition to Defendant District 211's Memorandum
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And In Support of Plaintiffs' Motion for Protective Order

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INTRODUCTION

Defendant District 211 (the "District") asked to conduct expedited discovery. Dkt 43. This Court agreed to consider allowing "focused interrogatories on the hostile environment issue," and directed the District to file a memorandum stating why it believes the Court needs to see the discovery before ruling on the motion for preliminary injunction. *Id.* The District filed its memorandum, Dkt 44, along with its proposed interrogatories, Dkt 44-1. But, as explained below, the interrogatories are not needed for the Court to rule on Plaintiffs' motion. Accordingly, this Court should deny Defendants' motion for expedited discovery and enter a Protective Order.

ARGUMENT

I. The Proposed Interrogatories Are Not Needed for the Court to Rule.

Expedited discovery is not the norm. *Hard Drive Prods., Inc. v. Doe*, 283 F.R.D. 409, 410 (N.D. Ill. 2012). The party seeking it "must make some *prima facie* showing of the *need* for the expedited discovery[,]" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor*, 194 F.R.D. 618, 623 (N.D. Ill. 2000) (emphasis in original), and must show that it is "necessary," *Ibarra v. City of Chicago*, 816 F. Supp. 2d 541, 554 (N.D. Ill. 2011). Even then, the discovery must be narrowly tailored "to the minimum amount of information needed." *Hard Drive Prods., Inc. v. Doe*, No. CIV. S-11-3074 KJM, 2012 WL 90412, at *2 (E.D. Cal. Jan. 11, 2012). The District, however, is seeking "unnecessary, broad, and prejudicial early discovery." *Hard Drive Prods. Inc.*, 283 F.R.D. at 412. Rather than a handful of narrowly tailored interrogatories, the District submitted twenty-two multi-part interrogatories, with a total of 102 questions, primarily seeking information about who has seen whom nude, and who has informed whom of what. But the District has not established that it needs this discovery, or that the discovery will assist the Court with the disposition of Plaintiffs' motion.

A. The Proposed Interrogatories Seek Unnecessary Discovery.

The District's interrogatories seem to be based on two wrong assumptions: first, that Plaintiffs must show that they have seen a biological male naked, or that he has seen them naked; and second, that Plaintiffs must have complained to school officials each time they encountered a

biological male in their private facilities. Neither assumption is correct.

1. Nudity Is Not Necessary for Plaintiffs to Prevail.

Plaintiffs' constitutional privacy rights are violated every time government compels them to endure the risk that biological males may be present in their private facilities while they change clothing or attend to intimate bodily needs. Forcing them to endure that risk creates an impermissible hostile environment in violation of Title IX; and, offering Girl Plaintiffs worse facilities than those offered male students violates Title IX. Who has seen whom naked is irrelevant to these claims. This Court recognized that allowing the opposite sex into one's private facilities "would cause embarrassment and increased stress" and be an "extreme" privacy invasion, even if no one saw anyone naked. *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1415-17 (N.D. Ill. 1984). Indeed, "the presence of unrelated males in [areas] where intimate bodily functions take place is a cause of stress to females." *Torres v. Wis. Dep't of Health & Soc. Servs.*, 859 F.2d 1523, 1531 (7th Cir. 1988) (citation omitted). This is because of the "real . . . differences between men and women." *Id*. at 1527.

The District represented that their discovery would "focus[] . . . on the hostile environment issue." Dkt 43. Nudity is irrelevant to that claim, and is not necessary for the privacy claim. This Court does not need to know who has seen whom naked to rule whether forcing school girls to share their restroom and locker room with a biological male violates their privacy rights or creates a hostile environment. These interrogatories should not be allowed.

2. The District Knew of the Title IX Violation.

The District also seems to believe that, to prevail on their Title IX claim, Plaintiffs must have notified school officials every time they experienced a hostile environment. *District's Memorandum*, Dkt 44 ("To establish a violation of Title IX based on a hostile environment theory, a plaintiff must prove . . . that school officials had 'actual knowledge' of harassment.") Accordingly, many of their interrogatories are focused on who told whom what. But this misunderstands the nature of Plaintiffs' Title IX claim. A typical Title IX claim involves a school employee, or a student, behaving badly. In such situations, the school might not know about the

bad behavior unless the victim notifies it. Here, though, the District knows about the hostile environment, because it is *the District's policy* that allows a biological male the right of entry and use of the girls' locker rooms and restrooms. Incidentally, Plaintiffs *have* notified District officials that the environment is hostile. *V. Compl.*, Dkt 1, ¶¶ 459-61. But the law does not require them to notify District officials every time they encounter a biological male in their facilities, when it is the District's policy that allows Student A access to their facilities.

B. The Necessary Facts Are Included in Plaintiffs' Verified Complaint.

Plaintiffs' preliminary injunction motion places before this Court two questions of law related to the activities of the District. First, does letting a biological male use the girls' locker rooms and restrooms, and so subjecting the Girl Plaintiffs to the risk of compelled exposure of their bodies to the opposite biological sex, violate the Girl Plaintiffs' constitutional right to privacy? Second, does letting a biological male use these private female facilities create a hostile environment for the Girl Plaintiffs, in violation of Title IX, and does offering the Girl Plaintiffs incomparable facilities as compared to boy students violate Title IX? These questions are not fact-intensive, but may be decided as matters of law. The few facts necessary to their disposition are pled in the Verified Complaint, and are not in dispute. The District's policies allow Student A access to the girls' private facilities, so the District knows that Student A has access to the girls' facilities. Student A has used the girls' facilities while some Girl Plaintiffs were present. Girl Plaintiffs know that any time they use the restroom or locker room, Student A has the right to be present with them. They also know that, even if he is not present, he could walk in at any time. As a result, Girl Plaintiffs are suffering stress, anxiety, embarrassment, and intimidation.

The District seeks discovery of facts that are unnecessary to the disposition of the preliminary injunction motion, including such things as the full name of each Plaintiff, including the parents (who are not at issue in the preliminary injunction motion); the dates and times when the Girl Plaintiffs encountered Student A in their locker room or restroom, along with the full names of the Girl Plaintiffs and "the precise location" they encountered Student A; the full name of the Girl Plaintiff who was verbally harassed because she used the privacy stall, along with the

"specific location" that the harassment took place and the full names of any students who may have witnessed the incident; and the dates and times "for every occasion" that a Girl Plaintiff declined to use the restroom because she feared encountering a biological male. Dkt 44-1.

But the answers to these interrogatories are not necessary at this early stage of the litigation. Knowing the Plaintiffs' full names will not assist the District with its defense, nor assist the Court with the disposition of Plaintiffs' preliminary injunction motion. Nor will knowing the precise dates and times when Student A was seen using the girls' facilities, or the precise dates and times when the Girl Plaintiffs felt the urge to use the restroom, but declined to do so. The Girl Plaintiffs have not kept a "potty record book," nor are they required to. It is undisputed that Student A uses the girls' facilities, so the precise dates and times are irrelevant. To prevail on their claims, the Girl Plaintiffs do not need to document the dates and times when they wished to use the restroom but declined to do so. Such discovery is not necessary.

Nor does the District need to know the name of the Girl Plaintiff who wears her PE clothes under her regular clothes, so she does not have to suffer the indignity of changing her clothing knowing that a biological male may be present, or the names of the Girl Plaintiffs who are in the same PE period as Student A, or whether they have ever observed him nude, or whether they are aware that he has observed them nude. The District has not demonstrated how the answers to these interrogatories provide it a defense to Plaintiffs' preliminary injunction motion, which presents this Court with questions of law that are not fact-intensive. Because the District has not met its burden to establish the need for expedited discovery, and because its proposed discovery is neither necessary to its defense nor to the Court's disposition of the Plaintiffs' motion, this Court should deny the District's request for expedited discovery.

II. The Proposed Interrogatories Are Harassing and Unduly Burdensome.

Additionally, many of these interrogatories are harassing and unduly burdensome. For example, it is not reasonable to expect teenage girls to remember the date and precise time, *every time*, that they felt the urge to use the restroom but did not do so. Nor is it reasonable to expect them to recall the date and precise time of *every time* they encountered Student A in their private

facilities. Such questions are unduly burdensome.

Similarly, asking for the Plaintiffs to identify themselves at this early stage of the litigation, without proper showing of need, is harassing and impairs First Amendment associational rights and privacy interests. *Cf. NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (recognizing that disclosure of names of association's members imperils First Amendment associational rights and privacy interests). The Plaintiffs fear retaliation by the District, which has conveyed to the Plaintiffs that any objection to the restroom and locker room policies is viewed as intolerance and bigotry. *V. Compl.*, Dkt 1, ¶¶ 148-54. For example, the District organized community meetings, at which the District brought in speakers who exclusively supported girls' locker room and restroom usage by biological males. The message communicated was that anyone who disagrees does so because of bigotry or ignorance. The District has also conveyed the same message through announcements its personnel have made to the student body at Fremd High School. For these and other reasons, the Plaintiffs fear retaliation from the District if they are identified. The Plaintiffs fear that such retaliation could negatively impact the students' current and future educational opportunities. Some members would even drop out of the group—thereby abandoning their First Amendment right to associate with others to press their rights—if they are ordered to disclose their identities.

Moreover, the federal rules provide that minors should be able to litigate anonymously, using only their initials. Fed. R. Civ. P. 5.2(a). At this early stage of the litigation, the District has not demonstrated that knowledge of the Plaintiffs' identities is necessary to some legal claim or defense. Accordingly, demanding that the Plaintiffs disclose their identities, even with a protective order, is harassing and imperils First Amendment rights and privacy interests.

CONCLUSION

Because the District has not met the legal standard for expedited discovery, and because their proposed discovery will not assist the Court with the disposition of Plaintiffs' motion, this Court should grant Plaintiffs their requested protected order.

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Respectfully submitted this the 8th day of June, 2016.

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THIS DOCUMENT HAS BEEN ELECTRONICALLY FILED

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record who are registered users of the ECF system:

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