UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUIN CARCANO et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CASE NO. 1:16-CV-00236-TDS-JEP
	)	
PATRICK MCCRORY, in his official capacity as Governor of North Carolina, et al.	)	
	)	
Defendants.	)	

DEFENDANT PATRICK L. MCCRORY'S INITIAL RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

STATEMENT OF FACTS

Plaintiffs seek to enjoin enforcement of North Carolina's Public Facilities Privacy and Security Act, N.C. Session Law 2016-3 ("the Act"), a law duly enacted by the North Carolina General Assembly. The Act created common sense bodily privacy protections for, among others, state employees, by requiring public agencies to require multiple occupancy bathroom and changing facilities to be designated for and used by persons based on their biological sex. S.L. 2016-3, H.B. 2, §§ 1.1-1.3 (N.C. 2016). Biological sex is the physical condition of being male or female, and the Act notes that such condition is "stated on a person's birth certificate." Id. §§ 1.2(a)(1) & 1.3(a)(1). The Act also allows accommodations based on special circumstances. Id. §§ 1.2(c) & 1.3(c).

On April 12, 2016, Governor McCrory issued "Executive Order 93 to Protect Privacy and Equality" ("EO 93"). N.C. Exec. Order No. 93 (Apr. 12, 2016). EO 93 expanded discrimination protections to state employees on the basis of sexual orientation

and gender identity, among others. Id. § 2. EO 93 also affirmed North Carolina law that cabinet agencies should require multiple occupancy bathroom and changing facilities to be designated for and only used by persons based on their biological sex. Id. § 3. EO 93 further reaffirmed North Carolina law that agencies may make a reasonable accommodation upon request due to special circumstances and directed all agencies to make a reasonable accommodation of a single occupancy restroom, locker room, or shower facility when readily available and when practicable. Id.

ARGUMENT

I. THE ACT IS CONSTITUTIONAL BECAUSE IT IS RATIONALLY RELATED TO LEGITIMATE GOVERNMENT INTERESTS.

A. The Act Is Rationally Related To The State's Legitimate Interests In Protecting Privacy And Safety.

Plaintiffs purportedly seek to overturn a single state statute, but in reality they seek to overturn millennia of accepted practice by which men and women utilize separate facilities for using the restroom, bathing, and changing clothes. When a person uses such a facility, the most intimate parts of her body are exposed and highly personal bodily functions are engaged in. It is difficult to "conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." York v. Story, 324 F.2d 450, 455 (9th Cir. 1963). Thus, it cannot be seriously contested that a person using the restroom, showering, or changing clothes deserves privacy from the opposite sex in these circumstances. See, e.g., Hutchinson v. Lemmon, 436 F. App'x 210, 214-17 (4th Cir. 2011) (arrestee who was

forced to remain naked in front of members of opposite sex, including officers, stated civil rights claim for which qualified immunity was not applicable because right violated was clearly established); Cumbey v. Meachum, 684 F.2d 712, 714 (10th Cir. 1982) ("[I]f guards regularly watch inmates of the opposite sex who are engaged in personal activities, such as undressing, using toilet facilities, or showering, the inmates' constitutional rights to privacy are being violated."); Klein v. Pyle, 767 F. Supp. 215, 218-19 (D. Colo. 1991) (male prisoners stated claim for civil rights violations where they alleged female guards regularly viewed them showering); Dawson v. Kendrick, 527 F. Supp. 1252, 1316 (S.D. W. Va. 1981) ("[T]he privacy of female prisoners is severely infringed by the fact that male prisoners, trusties and deputies can peer into the side cells occupied by female prisoners and view the beds and toilet contained in each cell."). Likewise, a person should not be compelled to observe a member of the opposite sex engaging in these same activities. See, e.g., N.C. Gen. Stat. § 14-190.9(a) (2016) (making it illegal for a person to "willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, except for those places designated for a public purpose where the same sex exposure is incidental to a permitted activity").

The State's interest in protecting against violation of this expectation of privacy is particularly strong with minors. Cf. Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980) ("It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude."). As such, a teenage girl, for instance, should not be compelled to change clothes or shower with a

biological boy or a man (even if he is transgender), and likewise she should not be compelled to see him change clothes or shower. Otherwise, very settled and accepted concepts of bodily privacy are fundamentally and irreparably undermined.

This desire to protect personal privacy constitutes a legitimate governmental interest, and restricting access to such facilities is rationally related to this interest. The State's interest, however, does not end with protecting privacy. It extends to personal safety as well. An individual using the restroom, showering, or changing clothes is naturally in a heightened state of vulnerability. See, e.g., State v. Rhodes, No. M2009–00077–CCA–R3–CD, 2010 WL 5061016, at *4 (Tenn. Crim. App. Dec. 8, 2010) ("The defendant regularly entered the bathroom while the victim was vulnerable because she was naked and showering."). Facilities of this type are usually, of necessity, shielded from the view of the general public and not monitored through, for example, closed circuit television.

Indeed, contrary to plaintiffs' assertions, this threat is not mere conjecture. There have in fact been reported instances of individuals using restrooms as a place to commit criminal acts against members of the opposite sex, sometimes under the guise of policies that permit transgender access to such facilities. See, e.g., Alison Morrow, Man in Woman's Locker Room Cites Transgender Rule, King 5 NBC News, Seattle, Wash. (February 16, 2016), http://www.king5.com/news/local/seattle/man-in-womens-locker-room-cites-gender-rule/65533111 (Ex. A hereto); Man Dressed as Woman Arrested for Spying into Mall Bathroom Stall, Police Say, NBC 4, Washington, DC (November 17,

2015), http://www.nbcwashington.com/news/local/Man-Dressed-as-Woman-Arrested-for-Spying-Into-Mall-Bathroom-Stall-Police-Say-351232041.html (Exhibit B hereto).

Furthermore, the State must be mindful of the civil liability it can incur, as both an employer and a property owner and operator, if it fails to take appropriate steps to protect both privacy and safety. See, e.g., Flick v. Aurora Equip. Co., Inc., No. Civ.A. 03–CV–2508, 2004 WL 220859, at *4 (E.D. Pa. Jan. 13, 2004) (employer could be held liable under Title VII for hostile work environment for not preventing co-worker sexual harassment that included level of nudity); Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 638-39, 281 S.E.2d 36, 38 (1981) (owner of property may be liable for injuries cause by intentional acts of third parties on that property if owner failed to act reasonably). A state government has a legitimate interest in creating a work environment free of sexual harassment, in protecting the safety of those using its property, and furthermore in avoiding the civil liability that could result from failing to protect against sexual harassment and physical harm.

The Act's clear, bright-line rule separating use of bathrooms and changing facilities according to biological sex is rationally related to advancing these interests. The fact that plaintiffs may dislike the way such a rule operates in some circumstances does not entitle them to judicial invalidation of the law or erase the fact that the Act generally achieves its intended purposes. See, e.g., Delong v. U.S. Dep't of Health and Human Servs., 264 F.3d 1334, 1343 (Fed. Cir. 2001) ("Like all bright line rules, [the statute] is both over-inclusive and under-inclusive, but the imprecision of the statute does not make it unconstitutional."). To the contrary, under rational basis review, "courts

generally accord the legislation a strong presumption of validity . . . [that] simply requires courts to determine whether the classification in question is, at a minimum, rationally related to legitimate governmental goals." Wilkins v. Gaddy, 734 F.3d 344, 347-48 (4th Cir. 2003) (internal quotation marks and citations omitted). "To sustain the validity of its policy, the government is not required to provide empirical evidence . . . [because] the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (internal quotation marks and citations omitted). Here, however, plaintiffs have not and cannot offer evidence to carry their burden of establishing that the Act is not rationally related to its intended interest of protecting privacy and safety. Accordingly, the Act satisfies rational basis review and is constitutional.

B. Plaintiffs' Position Would Undermine And Frustrate The State's Interests.

Notably, plaintiffs disclaim any desire to end the practice of separate restrooms and changing facilities for men and women. The exception plaintiffs urge for persons claiming transgender status, though, would swallow the rule. To the users of such a facility, it is irrelevant that the person of the opposite sex with them has gender dysphoria and thus identifies with the sex of those for whom the facility is designated. The other person is still, *in actuality*, being exposed to a member of the opposite sex while attempting to use the restroom, shower, or change clothes, and this interest in not being exposed to a member of the opposite sex is a constitutionally protected interest. See, e.g., Sepulveda v. Ramirez, 967 F.2d 1413, 1415 (9th Cir. 1992) (male parole official violated

clearly established fundamental constitutional rights of female parolee when he observed her giving urine sample).

C. Plaintiffs Present A False Picture Of Current Gender Theory.

The complications in plaintiffs' position are only exacerbated by the fact that gender theory is far more nuanced than the picture painted by plaintiffs in their court filings. Plaintiffs would have this Court accept that a person's "gender identity" is fixed and unchanging—one identifies as a either a man or a woman, which in many, but not all, cases correlates with the person's biological sex. In reality, though, at least according to modern gender theory, there are many individuals who display gender fluidity—that is, they sometimes feel like a man and sometimes like a woman—as well as a large number of individuals who manifest a gender identity that otherwise defies traditional classification. See, e.g., Lauren Booker, What it Means to be Gender Fluid, CNN (Apr. 13, 2016), http://www.cnn.com/2016/04/13/living/gender-fluid-feat/ (describing individual who "might wake up as a man or as a woman, sometimes as both and sometimes as neither" and another whose "gender-fluid expression alternates from masculine to feminine with how they dress, from suits to skirts") (Exhibit C hereto); see also Vanessa V. Urquhart, What the Heck is Genderqueer?, Slate (Mar. 24, 2015), http://www.slate.com/blogs/outward/2015/03/24/genderqueer_what_does_it_mean_and_where_does_it_come_from.html (Exhibit D hereto); Russell Goldman, Here's a List of 58 Gender Options for Facebook Users, ABC News (Feb. 13, 2014), http://abcnews.go.com/blogs/headlines/2014/02/heres-a-list-of-58-gender-options-for-facebook-users/ (Exhibit E hereto). Additionally, plaintiffs' most basic assertions about

gender dysphoria and transgender status are not without controversy in the medical field. See Paul McHugh, M.D., Transgender Surgery isn't the Solution, Wall St. J., May 13, 2016, http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120 (Exhibit F hereto).

Plaintiffs offer no explanation for how gender fluid or genderqueer individuals would be accommodated under their conception of the law. If plaintiffs' assertions about equal protection are correct, though, there is no principled basis on which to exclude a gender fluid or genderqueer individual from the facility that matches his or her identity at that particular moment in time. Under such a scenario, then, enforcing any norm or pretense of separating facilities according to sex disappears entirely.

II. THOUGH THE ACT IS ONLY SUBJECT TO RATIONAL BASIS REVIEW, IT NONETHELESS SATISFIES HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.

A. The Act Does Not Discriminate On The Basis Of Sex And Thus Does Not Warrant Intermediate Scrutiny.

Because the Equal Protection Clause protects biological sex, not gender identity, the Act is not subject to intermediate scrutiny. Though plaintiffs advance several novel theories for attempting to redefine the understanding of "sex" for purposes of the Equal Protection Clause, none of them can overcome the fact that transgender status does not trigger heightened scrutiny.

1. The Fourth Circuit's G.G. Decision Is Inapplicable.

Plaintiffs place great reliance on the Fourth Circuit's recent decision in G.G. v. Gloucester County School Board, No. 15-2056, 2016 WL 1567467 (4th Cir. April 19,

2016), but this reliance is misplaced because the Court there addressed only administrative interpretation of Title IX regulations, not the Fourteenth Amendment's Equal Protection Clause. G.G. concerned a transgender student who sought to use the school restroom that was consistent with the student's gender identity. Id. at *1. The Fourth Circuit upheld the student's right to access that restroom because it accorded deference to the U.S. Department of Education's interpretation of its own regulations implementing Title IX of the Education Amendments of 1972, under Auer v. Robbins, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). Id. at *6 ("Because we conclude that the regulation is ambiguous as applied to transgender individuals, the Department's interpretation is entitled to Auer deference[.]").

The Court did not conclude that the Constitution's Equal Protection Clause compels the same result. Moreover, the fact that one administration may have redefined a term for purposes of its own regulations does not mean that it can thereby alter the meaning of the Constitution itself. As such, rational basis scrutiny applies to the Act just as it would have prior to any administrative regulations such as those at issue in G.G. It also merits noting that G.G. specifically concerned only access within a public school to restrooms. Thus, the Court did not address whether a transgender individual must be afforded access to other types of facilities such as locker rooms and showers, where there is a greater likelihood of full or partial nudity by those present and thus a greater interest in protecting privacy and security. Accordingly, G.G. is properly read as confined to its

facts rather than understood as announcing a paradigm shift toward forevermore equating "gender identity" with "sex" for all legal purposes.[1]

2. The Act Is Not An Instance Of Sex Stereotyping Or Discrimination On The Basis of Gender Identity And Does Not Stigmatize Gender Transitioning.

Plaintiffs also place great weight on Title VII case law protecting transgender individuals from sex discrimination. These cases, however, are all merely instances of a plaintiff receiving Title VII protections because he or she failed to act like other members of the same sex typically do. Nothing in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), protects transgender status *per se* under Title VII or any other law. See, e.g., Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007) ("[Plaintiff] may not claim protection under Title VII based upon her transsexuality *per se*."). Further, requiring an individual to use the restroom or similar such facility that matches his or her biological sex is simply not sex stereotyping on the basis of "gender noncomforming behavior." If it were, then any person—regardless of gender identity—should be free to use whichever restroom, locker room, shower, or changing facility he or she desires. Any insistence to the contrary is simply seeking to impose sex stereotypes.

To escape this consequence, plaintiffs insist that "sex" really means "gender identity." Thus, one's subjective sense of identity is controlling of one's sex, whereas chromosomes and genitalia are not. But, no federal court has ever held that the Equal

[1] G.G. is also flawed because, among other reasons, the redefinition at issue was not properly promulgated under the Administrative Procedure Act, it violates the separation of powers, and, if applied to the states, it would violate the U.S. Constitution's Spending Clause.

Protection Clause protects gender identity rather than biological sex. Case law has in fact long looked to *biological sex* in interpreting the scope of the clause. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 686-87, 93 S. Ct. 176, 436 L. Ed. 2d 583 (1973) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . [and] statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.").

The Act likewise does not constitute sex-based discrimination against gender transitioning simply because the Act itself references one's biological sex. If a person completes a transition to the opposite biological sex, the law treats that person accordingly. See S.L. 2016-3, H.B. 2, §§ 1.1(a)(1) & 1.3(a)(1). Prior to any transition the person is treated according to his or her present biological sex. This is the same, equal treatment received by all persons, according to biology, regardless of gender identity. Plaintiffs attempt to describe this as the State determining what constitutes a "real" man or "real" woman, but that is precisely the same invitation plaintiffs make to the Court here. The only area of dispute is how sex should be defined by the State—whether it will be decided according to objective, ascertainable facts (i.e., biology) or according to an individual's subjective sense of gender identity at the moment.

B. Gender Identity Does Not Trigger Heightened Scrutiny.

Eventually plaintiffs come around to arguing for heightened scrutiny for transgender status on the grounds that it *should* be recognized as a protected class under the Equal Protection Clause. Of course, neither the Supreme Court nor any federal court

of appeals has ever so held. Furthermore, transgender status lacks the attributes that merit protection as a class under the Equal Protection Clause. While plaintiffs repeatedly insist that gender identity does not change, there is evidence to the contrary. In point of fact, some people who transition from one sex to the other elect to change back to their birth sex. Other individuals express different genders at different times. Perhaps plaintiffs here seek only to protect those members of the transgender community whose gender identity is constant, but there is simply no principled way to constitutionally draw such a line and extend protections only to some and not other individuals identifying with the opposite sex. See, e.g., Corey Airport Servs., Inc. v. Clear Channel Outdoor, Inc., 682 F.3d 1293, 1296-97 (11th Cir. 2012) (protection under the Equal Protection Clause depends on "the existence of a discrete and identifiable group"). As such, transgender identity cannot constitute a discrete group for purposes of Equal Protection Clause protections.

Additionally, plaintiffs have not offered evidence of the precise manner in which transgender individuals have been discriminated against historically. In such cases, it is not enough to simply assert discrimination; what the party is deeming to be discrimination must also be explained. (It is not, for example, discrimination to require that a person use the restroom that aligns with his or her biological sex, even if he or she claims a different gender identity.) Finally, it is not accurate to assert that transgender individuals are politically powerless. One need look no further than the political reaction to the instant Act to see that transgender individuals can exercise significant political

influence. Accordingly, plaintiffs have failed to establish that transgender status warrants heightened scrutiny under the Equal Protection Clause.

C. Even Under Intermediate Scrutiny, The Act Is Constitutional Because It Is Substantially Related To Important Government Interests.

The Act nonetheless withstands intermediate scrutiny because of the simple fact that separating restrooms, locker rooms, showers, and changing facilities according to biological sex is substantially related to the important governmental interests of protecting both privacy and safety. Under intermediate scrutiny, it is required that "the asserted governmental end . . . [be] 'significant,' 'substantial,' or 'important'" and that "the fit between the challenged regulation and the asserted objective be reasonable, not perfect." United States v. Marzzarella, 614 F.3d 85, 98 (3d Cir. 2010) (internal quotation marks and citations omitted); accord United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010). "The regulation need not be the least restrictive means of serving the interest[.]" Marzzarella, 614 F.3d at 98 (citations omitted).

As discussed above, the State has ample important interests at stake here, including protecting individuals (especially minors) from being exposed in a state of undress to members of the opposite sex, protecting individuals (especially minors) from observing members of the opposite sex in a state of undress, protecting individuals from physical harm that might come from those who would abuse a more permissive policy on use of the subject facilities according to sex, and preventing civil liability to the state as both an employer and property owner and operator. See New York v. Ferber, 458 U.S. 747, 757, 102 S. Ct. 334, 873 L. Ed. 2d 1113 (1982) ("The prevention of sexual

exploitation and abuse of children constitutes a government objective of surpassing importance."); Playboy Entm't Grp., Inc. v. United States, 945 F. Supp. 772, 788 (D. Del. 1996) ("[T]he government has a well-established compelling interest in protecting children from unsupervised exposure to sexually explicit material."). As also discussed above, restricting biological males from using a women's facility, and vice versa, bears a reasonable and substantial relationship to these interests.

Plaintiffs attempt to dismiss these concerns as imaginary, but the proof says otherwise. First, plaintiffs purport to offer evidence that there is no safety risk posed by allowing men into women's restrooms, locker rooms, showers, and changing facilities, but this assertion is belied by the ascertainable facts demonstrated by the instances cited above. Plaintiffs also attempt to rest on the fact that North Carolina law already criminalizes such offenses rape, assault, and indecent exposure. ***The point of the Act, however, is to keep these terrible things from happening in the first place by preventing the abuse of a permissive access policy.*** "Legislation to prevent crime is of greater benefit to society than the punishment of the offender after the crime has been committed and innocent persons have been made to suffer. Statutes enacted for such purposes ought not to be declared invalid by the courts upon slight grounds, even if extreme cases can be imagined where they may work an injustice." Standard Home Co. v. Davis, 217 F. 904, 919 (E.D. Ark. 1914).

Plaintiffs likewise casually dismiss the privacy concerns expressed by the people of North Carolina who object to using restrooms, locker rooms, showers, and changing facilities with members of the opposite sex. Those individuals who object to sharing

such facilities with members of the oppose sex, though, have their rights as well—namely, a fundamental right to privacy in not having their bodies involuntarily exposed to members of the opposite sex. Plaintiffs contend that these individuals should simply change in a stall or other more private place in order to accommodate their objections. This is a striking assertion. The very same plaintiffs who argue that being provided a single-occupancy facility is a degradation of constitutional proportions simultaneously assert that those with more traditional values about being exposed to members of the opposite sex should seek a place to hide themselves. Indeed, while plaintiffs declare that a transgender person cannot actualize his or her subjective gender identity without being able to use the other sex's facilities freely, it must be the case that a non-transgender person's sense of her own identity may be infringed upon and diminished when she discovers that she has disrobed or showered next to a biological male. Nevertheless, argue plaintiffs, the former concern merits constitutional protection while the latter should be ridiculed and belittled.

According to plaintiffs, these objecting individuals are no different from those who supported "decades of racial segregation in housing, education, and access to public facilities like restrooms, locker rooms, swimming pools, eating facilities and drinking fountains." (Pls.' Mem. of Law in Supp. of Mot. for Preliminary Injunction 34) (quoting California Superior Court order). Even if they are not outright bigots, say plaintiffs, these objectors are nonetheless acting from fear and prejudice. So long, however, as this Court accepts the very reasonable position that a person may permissibly desire to not be exposed to a member of the opposite sex while utilizing a restroom, locker room, shower,

or changing facility and that such a desire is not the product of bigotry, fear, and hatred, plaintiffs' arguments fail, and the Act must be sustained.

Finally, plaintiffs go so far as to claim the narrowness of the Act as a ground to criticize it. Plaintiffs seize upon the fact that the Act defines biological sex in terms of an individual's birth certificate and that certain other states have various requirements for changing one's birth certificate that may—according to plaintiffs—in some cases prevent a person from changing the sex on his or her birth certificate after gender reassignment surgery. This argument, of course, misapprehends the nature of intermediate scrutiny. If the relationship between the challenged law and the government's end is reasonable, the law passes muster. See, e.g., United States v. Staten, 666 F.3d 154, 162 (4th Cir. 2011) ("In other words, the fit needs to be reasonable; a perfect fit is not required."). Here, there is no showing as to the number of these potentially exceptional cases, and there is certainly no showing that the possible existence of these exceptional cases renders the Act unconstitutional.

Additionally, plaintiffs criticize the fact that the Act only applies to state government and leaves private businesses free to set their own policies. Of course, the government—as both an employer and an owner and operator of property—can incur liability for not acting appropriately to protect employees and others. The Act diminishes this risk of liability for state government purposes by drawing the line in a certain manner. The fact that the General Assembly did not see fit to dictate to private businesses throughout the State how they should proceed is hardly a flaw, especially since the Act was in fact motivated in part by the decision of the Charlotte City Council

to deprive private business owners of the ability to adopt a policy like that enacted by the State for its own property. Whereas Charlotte sought to preclude businesses from adopting such common sense policies, the Act expressly allows them to now do so. As plaintiffs state in their pleadings, the vast majority of citizens must access government facilities at some point in time, as opposed to the voluntary choice to access private facilities.

III. PLAINTIFFS ALSO FAIL TO STATE A CLAIM UNDER THE DUE PROCESS CLAUSE.

A. The Act Does Not Constitute Compelled Disclosure Of Private Information.

Plaintiffs here further seek to have the Court declare that a person's biological sex is a matter so private it merits constitutional protection. The fact that some of the plaintiffs may desire to keep such information secret does not mean that biological sex is itself protected. The proper inquiry is not whether an individual or small group of individuals would consider the information so private as to be protected, but whether the nation's history and tradition would agree. For a fundamental right to be recognized, it must be a right "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed[.]" Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (internal quotation marks and citations omitted). Furthermore, the "asserted fundamental liberty interest" must be capable of "careful description." Id. at 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (citations omitted); e.g., Lambert v. Hartman, 517 F.3d 433, 443-45 (6th Cir. 2008) (clerk's posting of plaintiff's Social Security

number on website did not violate fundamental right). Rather than being private information, one's status as a biological male or female is something that in fact constitutes part of the basic vital information about a person. People regularly address one another with courtesy titles based on sex, children are announced at birth based on sex, sports teams are often organized by sex, and a person's sex is often the first fact noticed when meeting a stranger. In light of such longstanding practices, it is impossible to conclude that a person's biological sex is a secret protected in the nation's history and traditions and that such secrecy is implicit in the concept of ordered liberty.

B. The Act Does Not Result In Forced Surgical Treatment.

Plaintiffs also advance the rather bold assertion that the Act violates their right to avoid forced medical treatment. Of course, the Act does nothing of the sort. Whether plaintiffs ever change their biology to match their gender identity is a matter left entirely to their own choosing. Plaintiffs and other transgender individuals are free to decide to live their lives according to a subjective sense of gender identity. That choice, however, does not result in a constitutional right to compel everyone else around them to act in accordance with this subjective sense.

IV. ENTRY OF A PRELIMINARY INJUNCTION IS NOT WARRANTED.

Finally, plaintiffs have not carried the heavy burden of demonstrating that a state statute should be enjoined. To prevail in obtaining a preliminary injunction, plaintiffs must demonstrate each of the following factors as articulated: (1) that they are likely to succeed on the merits; (2) that they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an

injunction is in the public interest. Winter v. Nat'l Resources Defense Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Moreover, because plaintiffs are seeking a preliminary injunction that does preserve the status quo, they must satisfy a heightened burden to prevail. Specifically, "'[m]andatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief.'" E. Tenn. Nat'l Gas Co. v. Sage, 361 F.3d 808, 828 (4th Cir. 2004) (quoting Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980)). Plaintiffs in this case cannot satisfy any of the factors for issuance of a preliminary injunction and certainly cannot satisfy the heightened standard for issuance of an injunction that would overturn the status quo.

First, as discussed above, plaintiffs cannot demonstrate a likelihood of success on the merits.[2] This alone should end the inquiry. Nevertheless, plaintiffs have also not demonstrated a risk of irreparable harm, that the equities tip in their favor, or that the public interest supports having a state statute that was enacted to protect the privacy and safety of all persons enjoined. Enjoining a state law is a drastic remedy. See Voting for Am., Inc. v. Andrade, 488 F. App'x 890, 895 (5th Cir. 2012). Any harm to plaintiffs due to lack of access to restrooms designated for the opposite sex certainly cannot outweigh

[2] Additionally, the defendants sued in this case enjoy immunity from suits for claims of discrimination based on transgender status. See Huang v. Bd. of Governors of Univ. of N.C., 902 F.2d 1134, 1138 (4th Cir. 1990). This immunity has never been waived, surrendered, or abrogated for claims of discrimination based on transgender status. Even assuming there has been a purported abrogation of such immunity, this abrogation would not be addressed to remedying a direct violation of rights secured by the Fourteenth Amendment and would fail the test of congruence and proportionality. See City of Boerne v. Flores, 521 U.S. 507, 518-20, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

the privacy and safety risks presented to the public. As such, neither the equities nor the public interest weighs in favor of precluding the State from continuing to enforce its law.

CONCLUSION

For the foregoing reasons, Governor McCrory respectfully requests that plaintiffs' motion for a preliminary injunction be denied. As set forth in his contemporaneously filed motion for expedited discovery, Governor McCrory would also respectfully request that the Court permit discovery, supplemental briefing, and an evidentiary hearing.

Respectfully submitted, this the 9th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 9th day of June, 2016.

By: /s/ William W. Stewart, Jr.
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EXHIBIT A

Man in women's locker room cites gender rule

Alison Morrow and KING 5 News , KING *5:25 PM. PST February 16, 2016*

(Photo: KING)

Seattle Parks and Recreation is facing a first-of-a-kind challenge to gender bathroom rules. A man undressed in a women's locker room, citing a new state rule that allows people to choose a bathroom based on gender identity.

It was a busy time at Evans Pool around 5:30pm Monday February 8. The pool was open for lap swim. According to Seattle Parks and Recreation, a man wearing board shorts entered the women's locker room and took off his shirt. Women alerted staff, who told the man to leave, but he said "the law has changed and I have a right to be here."

"Really bizarre," MaryAnne Sato said. "I can't imagine why they would want to do that anyway!"

Sato uses the locker room a few times a week, but she says this is a first for her. It's also a first for Seattle Parks and Recreation. Employees report that the man made no verbal or physical attempt to identify as a woman, yet he still cited a new rule that allows bathroom choice based on gender identification.

The issue drew protesters from both sides to Olympia (http://www.king5.com/story/news/politics/state/2016/02/15/supporters-protesters-wa-transgender-bathroom-rule-protest/80410108/) on Monday. Opponents claim the rule opens up bathrooms to voyeurs but supporters say that's an unrealistic fear.

No one was arrested in this case and police weren't called, even though the man returned a second time while young girls were changing for swim practice.

"Sort of works against the point they're trying to make. They're causing people to feel exposed and vulnerable with the intention of reducing people feeling exposed and vulnerable," said pool regular Aldan Shank.

The man's protest, if that's what it was, hurts the greater cause, Shank says.

As far as policy to protect everyone, Seattle Parks spokesman David Takami says they're still working on the issue. Right now, there's no specific protocol for how someone should demonstrate their gender in order to access a bathroom. Employees just rely on verbal identification or physical appearance, and this man offered neither.

"This didn't seem like a transgender issue to staff – someone who was "identifying" as a woman," Takami wrote in a statement to KING 5. "We have guidelines that allow transgender individuals to use restrooms and locker rooms consistent with their gender identity. We want everyone to feel comfortable in our facilities."

JOIN THE CONVERSATION

To find out more about Facebook commenting please read the
Conversation Guidelines and FAQs (http://$staticDomain/conversation-guidelines/)

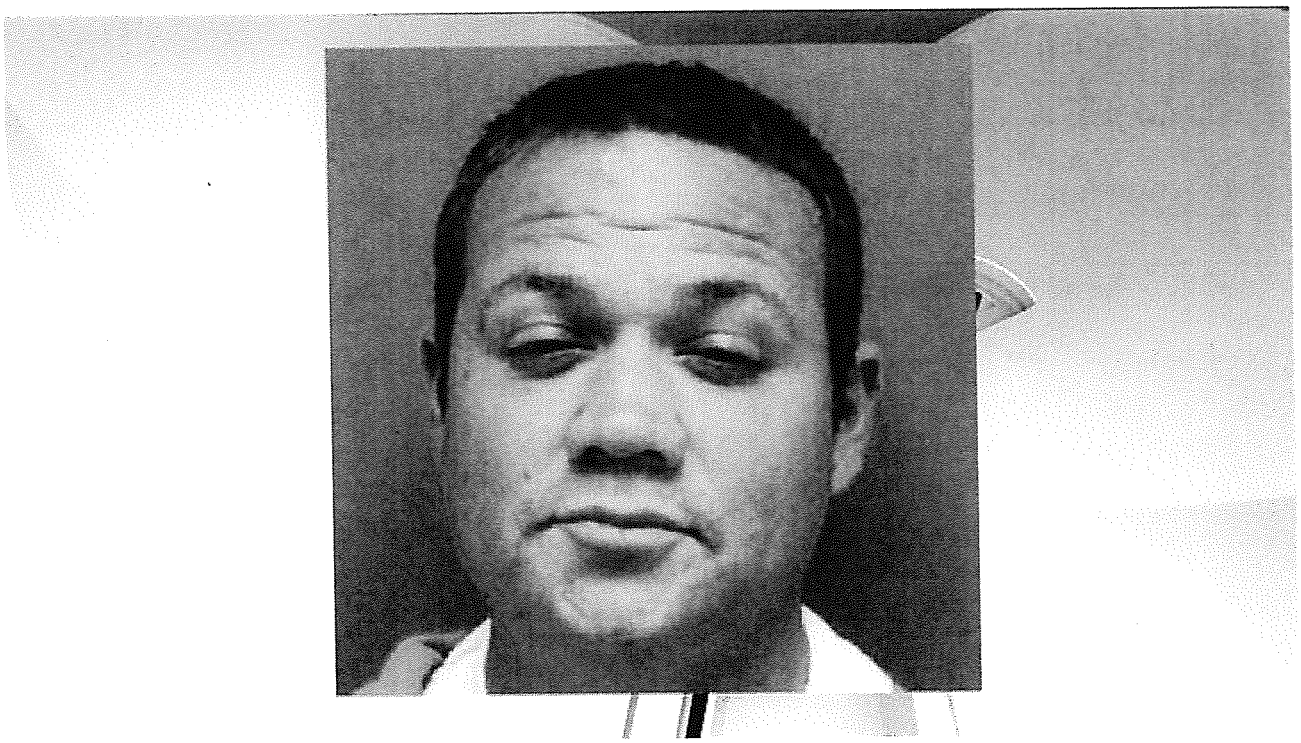
LEAVE A COMMENT ()

EXHIBIT B

NBC WASHINGTON

PRINTTHIS
Powered by Clickability

Man Dressed as Woman Arrested for Spying Into Mall Bathroom Stall, Police Say



A man dressed as a woman was arrested in Virginia on Monday after police say he was caught peeping into restroom stalls three times in the past year.

Richard Rodriguez, 30, filmed a woman in a bathroom stall at the Potomac Mills Mall, Prince William County Police said on Tuesday. A 35-year-old woman was in the stall when she saw a bag moved toward her under the stall divider. Rodriguez apparently had been filming her, police said.

The victim rushed out of the stall to confront the man and saw him hurry to another stall, next to another woman. The victim alerted the woman and then contacted mall security of the shopping center on 2700 block of Potomac Mills Circle in Woodbridge, Virginia.

Photo of suspect in May 15 and Oct. 11 peeping incidents
Photo credit: Prince William County Police Department

Mall security detained Rodriguez until police arrived. Police then determined that he matches the description of a man who is accused of using a mirror to see into a women's restroom stall on May 15 at a nearby Walmart and also at the Potomac Mills Mall on Oct. 11.

The suspect in the May 15 incident allegedly spied on a 53-year-old woman, police said. The suspect in the Oct. 11 incident -- believed to be the same man -- looked in on a 35-year-old woman and her 5-year-old daughter.

Rodriguez, of Fredericksburg, was charged with three counts of unlawful filming of a non-consenting person and three counts of peeping.

He's due in court Dec. 22 and is being held without bond.

Published at 9:44 PM EST on Nov 17, 2015

div id="taboola-below-article-text-links" style="clear:none">
/div>

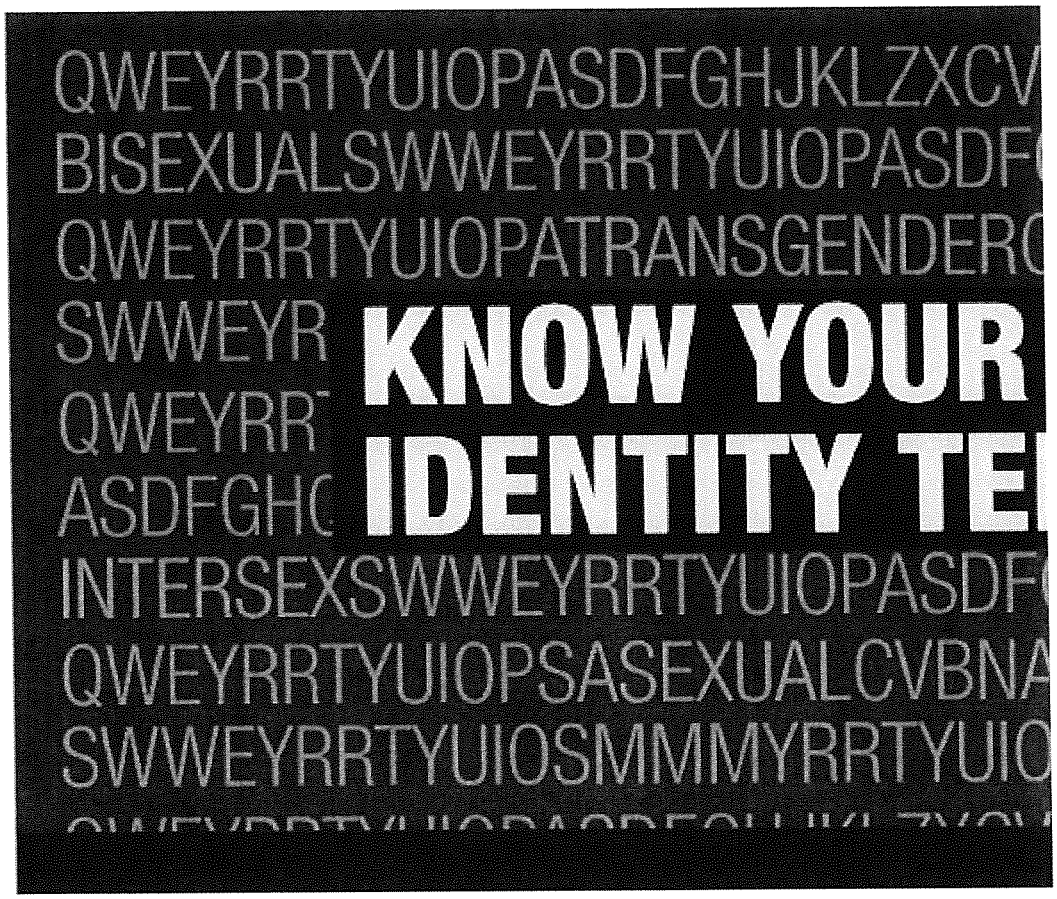
Find this article at:
http://www.nbcwashington.com/news/local/Man-Dressed-as-Woman-Arrested-for-Spying-Into-Mall-Bathroom-Stall-Police-Say-351232041.html

Check the box to include the list of links referenced in the article.

EXHIBIT C

What it means to be gender-fluid

By Lauren Booker, Special to CNN
Updated 1:22 PM ET, Wed April 13, 2016



Photos: Know your identity terms

New terms are entering the cultural lexicon as people endeavor to co
gender. These definitions, which have been edited, are primarily from
Trevor Project. The gender fluid definition is from Dictionary.com. Vis
details.

Story highlights

Gender fluidity is when gender identity shifts between masculine and feminine

"Orange Is the New Black" actor Ruby Rose

(CNN) For some people, gender is not just about being male or female; in fact, how one identifies can change every day or even every few hours.

identifies as gender-fluid

Expert: Millennials are using the Internet as a guide to put a name to their gender identity

Gender fluidity, when gender expression shifts between masculine and feminine, can be displayed in how we dress, express and describe ourselves.

Everyone's gender exists on a spectrum, according to Dot Brauer, director of the LGBTQA Center at the University of Vermont. Progressive gender expression is the norm for the university, which offers gender-neutral bathrooms and allows students to use their preferred names.

"If you imagine the spectrum and imagine the most feminine expression you have ever seen and most masculine you have ever seen and just sort of imagine where you are on that," Brauer said.

Brauer, who identifies as gender-queer and prefers the pronoun "they," said gender identification is about what feels right for the person.

Information is fluid

"In my generation, all the information that came to me was filtered through some very sort of limited perspectives and limiting languages. So for example, if I was going to find out about gender, I was going to find out about it through health class in a curriculum that was set by the Board of Education," Brauer said.

Since millennials grew up with the Internet, members of that generation can easily find information on topics like gender expression, added Brauer, 58.

Lee Luxion, who is 26 and also prefers the pronoun "they," might wake up as a man or as a woman, sometimes as both and sometimes as neither.

"How I express it is usually how I dress, how I do my hair. But then my mannerisms change.

Lee Luxion

The way I speak might change a little, too," Luxion said.

Luxion agreed that the Internet, along with the emergence of gender-fluid celebrities such as "Orange Is the New Black's"Ruby Rose, has made millennials more comfortable with expressing their gender.

"There shouldn't be a sense of what's normal and what is not," Luxion said. "And (with) more representation of transgender or gender-fluid or non-binary individuals, the more likely it is that we are going to feel safe to also be that publicly."

There are lots of misconceptions about gender fluidity, according to those in the community. Being gender-fluid doesn't determine a person's sexual preference.

Gender fluidity isn't the equivalent of transgenderism, in which a person's gender identity is different from the one assigned at birth.

Luxion balks at the idea that gender fluidity isn't a valid gender, a refrain they've heard time and again.

"Gender fluidity is much more than saying, 'oh, I want to play up the femininity traits that I have' or that 'I want to play up the masculine traits that I have.' It's an actual physical, mental and, for me, emotional shift in how I interact with the world."

More than just appearance

Theresa "TDo" Do

Theresa "TDo" Do, a 37-year-old San Francisco native, was born and raised female but never felt that way. She appears androgynous with a short haircut and expresses her gender fluidity in how she behaves.

In situations when Do feels challenged, she said, she feels more masculine and

expresses herself in that way.

"The tone of my voice does change. It comes a little bit more forward. My voice drops a bit," she said. "I have been told that I walk really masculine, and I puff my chest out when I'm walking."

When she feels like she is in a safer place, she becomes more feminine.

"My voice gets a little higher. I drop my shoulders. I allow people to just get closer to me emotionally and in a physical way," Do said. "For me in particular, when I am in touch with my feminine side, I feel soft."

Brauer said others' perceptions and an individual's interpretation of their own gender play a part in how gender is conveyed.

"There's this constant exchange going on. ... Identity is this weird thing that exists between us people. It's like this perception, thought space, between us and other people," they said.

Thomas Webb, 33, identifies as gender-fluid and feels masculine "two-thirds" of the time. Webb's gender-fluid expression alternates from masculine to feminine with how they dress, from suits to skirts.

"When I was in high school, I don't remember words like that ever existing. I didn't learn about the word 'gender-queer' until my early 20s. I was using terms like 'cross-dresser' or 'transvestite' to describe myself, because that was all that I was aware of at the time," they said.

Raising a gender-fluid child

Franki Davis, 14, identifies as gender-fluid demiboy and uses the "they" pronoun.

Demiboy means a person identifies partially as a man.

Franki has bright green hair and an androgynous, neutral appearance. Like any teenager, they like to go to concerts, take pictures and Skype with friends.

Franki discovered their gender identity during adolescence. And when they came out as demiboy, mom Kristen Shaw homeschooled Franki due to the anxiety they faced at school.

"My greatest concern was that they were going to be more isolated and the limited friendships they have socially," Shaw said.

Shaw said she would tell a parent of a child like hers to understand that it's important to let them grow.

"Before our children were born, what was most important was that we proclaimed that all we wanted was a healthy baby. And if we are lucky enough to have that, then we just take it from there. It's a one day at a time process. Our job is to be their life cheerleader and set them up for success," she said.

Opinion and intersectionality

Brauer writes in a paper titled "Gender: It's Complicated" that younger generations see identity through "the lens of intersectionality," which includes age, sex, location, socioeconomic class and other factors.

"I might be perceived as someone who has a female sex to be pretty masculine by the gender standards of femininity that exists" in the mid-Atlantic, Brauer said. "But here, in Vermont, the standards for gender and femininity are different. So, right here I would be seen not overly masculine and not overly feminine."

When Do is in the office, she said, she gets stares from clients when expressing her gender fluidity.

"In a business meeting, I might have to look a little bit harder to earn the respect of others," she said. And when she leaves the "San Francisco bubble," she feels more tension.

Webb, who lives in Southern California, said they haven't felt discriminated against because they stopped publicly wearing women's clothing and dressing

androgynously. They said it was easier dressing as a man than a woman.

"People kind of confuse personality and gender. My personality isn't stereotypically feminine. So even when I'm wearing a skirt and everything, people just look at me as a dude in a skirt for better or worse. ... I don't think they treat me as they would a lot of the trans or other gender-fluid people who happen to act more feminine," Webb said.

For Luxion, telling someone their gender identity can lead to hurtful responses.

"When I get negative responses or people telling me that my gender is invalid or wrong, it's frustrating and it's hurtful, but really it's making me sad that people still aren't willing to take a step back," Luxion said. "It's not doing anyone harm. So I don't understand why they would be so opposed to it."

EXHIBIT D

EXPANDING THE LGBTQ CONVERSATION

MARCH 24 2015 10 00 AM

What the Heck Is *Genderqueer*?

By Vanessa Vitiello Urquhart

Photo illustration by Holly Allen. Photo by ThinkStock.

Are gender stereotypes a natural, if culturally influenced, outgrowth of **sexual dimorphism**? Or are they a coercively imposed social regime that stifles individual expression in order to maintain oppressive, entrenched power structures? A great many self-certain peopl argue passionately for the former point of view, using it to justify everything from differences in employment patterns and wages betwe the sexes to their distaste for individuals who fall too far outside the expectations for persons with their genital configuration. On the oth hand, members of the LGBTQ community tend to incline more toward the latter view, which is intellectually based in **queer theory** and culturally practiced by individuals who declare themselves to fall under the genderqueer umbrella.

Genderqueer, along with the somewhat newer and less politicized term *nonbinary*, are umbrella terms intended to encompass individu who feel that terms like *man* and *woman* or *male* and*female* are insufficient to describe the way they feel about their gender and/or the way they outwardly present it. The term*genderqueer* was originally coined in the 1990s to describe those who "queered" gender by defying oppressive gender norms in the course of their binary-defying activism. Members of the genderqueer community differentiate themselves from people who are transgender (itself originally intended as an umbrella term), because that word has come to refer primarily to people who identify with the binary gender different from the one they were assigned in infancy.

Some genderqueer individuals undergo surgery or take synthetic hormones, while others do not. Some genderqueer people continue t identify partially with one gender, others do not. What they share is a deep, persistent unease with being associated *only*with the binar gender assigned to them from infancy—apart from that, their expressions, experiences, and preferences vary greatly from individual tc individual.

"Genderqueer is about acknowledging that gender expression and identity is not binary, that there are more than just two genders," explained Jordan Miller, a grad student in Atlanta who described zirself as genderqueer, transmasculine, transgender, and femme. (Multiple and ever-expanding labels to describe the many different nonbinary identities seem to be a feature of the genderqueer community at this point in its development—along with the occasional use of **bespoke pronouns**.)

"I tend to not identify with a gender, because I would not be able to stick with one for a long time," is how Sarah (who asked that their l name not be used for this article), explained their genderqueer identity, which they experience as something that shifts around significantly.

"From [ages] 7 through 9, I believed I was a boy and prayed I'd wake up and have the right body," Kyle Jones, a **blogger** and worksho

but masculine. I was in my 40s when I did some soul-searching and realized that genderqueer really resonated with me because I'd always felt more masculine, but not male."

"I've identified as genderqueer for a long time. Femme (which is my main identity) came later, after a lot of reading. My history is as a lif long crossdresser (we mostly use the term *transvestite* in the U.K.). I spent a long time trying to understand what I was doing without reference to notions of 'femaleness' (which aren't correct for me; I'm not trans in that way). Eventually I realized that 'femme' fit me very well, though I came to that sort of by reflection: by reading about butch women, and in particular **Leslie Feinberg's *Stone Butch Blue*** writes Jonathan Tait, who **blogs**about gender from Nottingham, England, via email.

The complex and swiftly changing terminology of the genderqueer subculture creates a barrier to increased understanding and acceptance of genderqueer individuals by those on the outside. Identifiers such as *agender*, *bigender*,*trigender*, *neutrois*, *genderfluid*, *trans**, *transmasculine*, *transfeminine*,*bear*, *butch*, *femme*, *boi*, *demiboy*, *demigirl* and others form a densely overlapping and ever-expanding thicket of language that can make the terrain of genderqueer identities feel bit forbidding to those encountering it for the first time. Dividing the world into males and female is such a big part of the culture that it c seem impossible, and perhaps even aggravating, to try to think outside those categories. This is not only a problem for squares stuck ir a binary way of thinking—many of the terms associated with genderqueerness end up referring back to masculinity or femininity in som way, which is a bit tricky if the ideal is to move beyond the gender binary entirely.

Outside of academic arguments about queer theory, however, the fact is that some people feel constrained by a culture that insists that they be either male or female, with all the expectations, assumptions, and stereotypes that come along with choosing one of those identities. Whether they shift their clothing and expression to suit their moods, work to achieve an ambiguous appearance that cannot easily be classified as male or female, or dress or act in a way that fails to conform with the expectations for members of their gender, or *any* gender (or something else altogether—when reporting on this community one learns there's always room for more exceptions), accommodating genderqueer individuals really isn't so difficult. It comes down to listening to what they say about themselves, acceptin that this is true for them, and not making a fuss about it. Occasionally, it may also mean making an effort to remember a pronoun that feels a little awkward.

The gender binary works fine for most of us, but who are we to impose it on those few people for whom it doesn't? Perhaps the cultural concept of gender really did develop naturally from sexual dimorphism—but just as there are **intersex** individuals whose biological sex does not fit neatly in the categories of male and female, so, too, are there individuals for whom the standard gender categories aren't working, for whatever reason. It seems unreasonably petty to seek to restrict them to those categories.

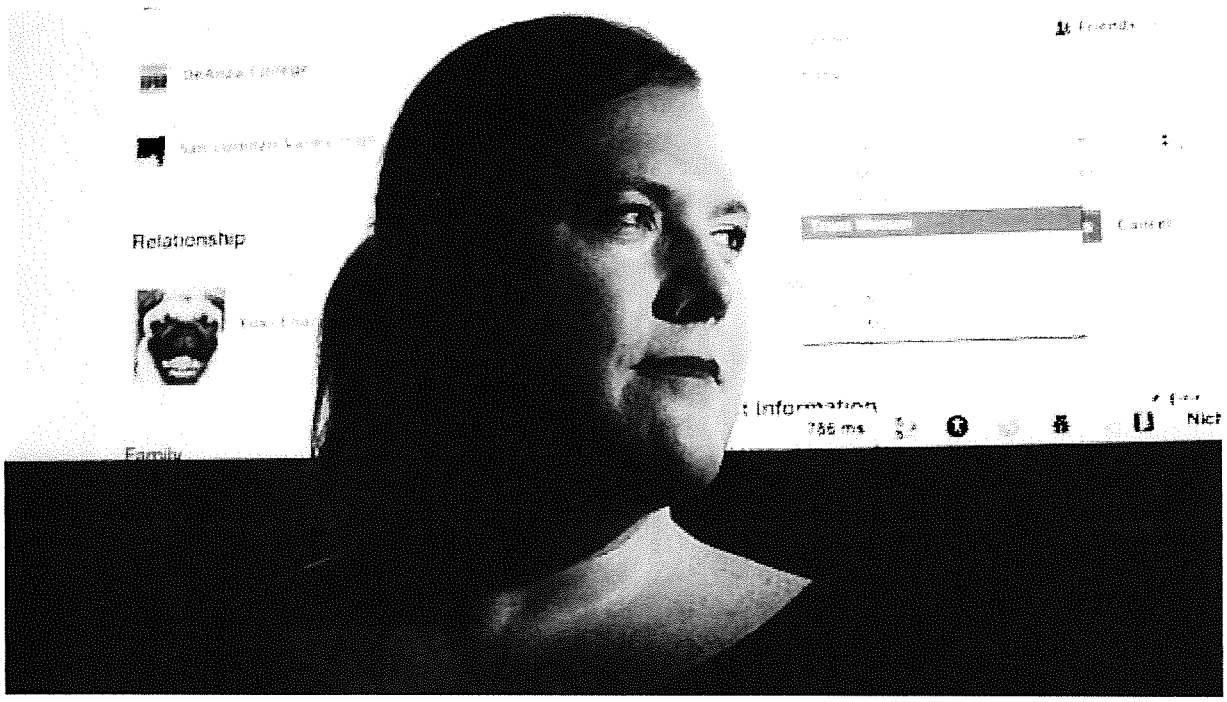
Vanessa Vitiello Urquhart is working to improve comments on ***Slate***.

EXHIBIT E

Here's a List of 58 Gender Options for Facebook Users

February 13, 2014

By RUSSELL GOLDMAN



Facebook introduced dozens of options for users to identify their gender today - and although the social media giant said it would not be releasing a comprehensive list, ABC News has found at least 58 so far.

Previously, users had to identify themselves as male or female. They were also given the option of not answering or keeping their gender private.

User's can now select a "custom" gender option.

"There's going to be a lot of people for whom this is going to mean nothing, but for the few it does impact, it means the world," Facebook software engineer Brielle Harrison told the Associated Press. Harrison, who worked on the project, is in the process of gender transition, from male to female.

Facebook will also allow users to select between three pronouns: "him," "her" or "their."

The following are the 58 gender options identified by ABC News:

Agender
Androgyne
Androgynous
Bigender
Cis
Cisgender

Cis Female
Cis Male
Cis Man
Cis Woman
Cisgender Female
Cisgender Male
Cisgender Man
Cisgender Woman
Female to Male
FTM
Gender Fluid
Gender Nonconforming
Gender Questioning
Gender Variant
Genderqueer
Intersex
Male to Female
MTF
Neither
Neutrois
Non-binary
Other
Pangender
Trans
Trans*
Trans Female
Trans* Female
Trans Male
Trans* Male
Trans Man
Trans* Man
Trans Person
Trans* Person
Trans Woman
Trans* Woman
Transfeminine
Transgender
Transgender Female
Transgender Male
Transgender Man
Transgender Person
Transgender Woman
Transmasculine
Transsexual
Transsexual Female
Transsexual Male
Transsexual Man
Transsexual Person
Transsexual Woman
Two-Spirit

EXHIBIT F

THE WALL STREET JOURNAL.

http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120

COMMENTARY

Transgender Surgery Isn't the Solution

A drastic physical change doesn't address underlying psycho-social troubles.

By PAUL MCHUGH
Updated May 13, 2016 2:18 p.m. ET

Editors' note: This op-ed was originally published on June 12, 2014.

The government and media alliance advancing the transgender cause has gone into overdrive in recent weeks. On May 30, a U.S. Department of Health and Human Services review board ruled that Medicare can pay for the "reassignment" surgery sought by the transgendered—those who say that they don't identify with their biological sex. Earlier last month Defense Secretary Chuck Hagel said that he was "open" to lifting a ban on transgender individuals serving in the military. Time magazine, seeing the trend, ran a cover story for its June 9 issue called "The Transgender Tipping Point: America's next civil rights frontier."

Yet policy makers and the media are doing no favors either to the public or the transgendered by treating their confusions as a right in need of defending rather than as a mental disorder that deserves understanding, treatment and prevention. This intensely felt sense of being transgendered constitutes a mental disorder in two respects. The first is that the idea of sex misalignment is simply mistaken—it does not correspond with physical reality. The second is that it can lead to grim psychological outcomes.

The transgendered suffer a disorder of "assumption" like those in other disorders familiar to psychiatrists. With the transgendered, the disordered assumption is that the individual differs from what seems given in nature—namely one's maleness or femaleness. Other kinds of disordered assumptions are held by those who suffer from anorexia and bulimia nervosa, where the assumption that departs from physical reality is the belief by the dangerously thin that they are overweight.

With body dysmorphic disorder, an often socially crippling condition, the individual is consumed by the assumption "I'm ugly." These disorders occur in subjects who have come to believe that some of their psycho-social conflicts or problems will be resolved if they can change the way that they appear to others. Such ideas work like ruling passions in their subjects' minds and tend to be accompanied by a solipsistic argument.

For the transgendered, this argument holds that one's feeling of "gender" is a conscious, subjective sense that, being in one's mind, cannot be questioned by others. The individual often seeks not just society's tolerance of this "personal truth" but affirmation of it. Here rests the support for "transgender equality," the demands for government payment for medical and surgical treatments, and for access to all sex-based public roles and privileges.

With this argument, advocates for the transgendered have persuaded several states—including California, New Jersey and Massachusetts—to pass laws barring psychiatrists, even with parental permission, from striving to restore natural gender feelings to a transgender minor. That government can intrude into parents' rights to seek help in guiding their children indicates how powerful these advocates have become.

How to respond? Psychiatrists obviously must challenge the solipsistic concept that what is in the mind cannot be questioned. Disorders of consciousness, after all, represent psychiatry's domain; declaring them off-limits would eliminate the field. Many will recall how, in the 1990s, an accusation of parental sex abuse of children was deemed unquestionable by the solipsists of the "recovered memory" craze.

You won't hear it from those championing transgender equality, but controlled and follow-up studies reveal fundamental problems with this movement. When children who reported transgender feelings were tracked without medical or surgical treatment at both Vanderbilt University and London's Portman Clinic, 70%-80% of them spontaneously lost those feelings. Some 25% did have persisting feelings; what differentiates those individuals remains to be discerned.

We at Johns Hopkins University—which in the 1960s was the first American medical center to venture into "sex-reassignment surgery"—launched a study in the 1970s comparing the outcomes of transgendered people who had the surgery with the outcomes of those who did not. Most of the surgically treated patients described themselves as "satisfied" by the results, but their subsequent psycho-social adjustments were no better than those who didn't have the surgery. And so at Hopkins we stopped doing sex-reassignment surgery, since producing a "satisfied" but still troubled patient seemed an inadequate reason for surgically amputating normal organs.

It now appears that our long-ago decision was a wise one. A 2011 study at the Karolinska Institute in Sweden produced the most illuminating results yet regarding the transgendered, evidence that should give advocates pause. The long-term study—up to 30 years—followed 324 people who had sex-reassignment surgery. The study revealed that beginning about 10 years after having the surgery, the transgendered began to experience increasing mental difficulties. Most shockingly, their suicide mortality rose almost 20-fold above the comparable nontransgender population. This disturbing result has as yet no explanation but probably reflects the growing sense of isolation reported by the aging transgendered after surgery. The high suicide rate certainly challenges the surgery prescription.

There are subgroups of the transgendered, and for none does "reassignment" seem apt. One group includes male prisoners like Pvt. Bradley Manning, the convicted national-security leaker who now wishes to be called Chelsea. Facing long sentences and the rigors of a men's prison, they have an obvious motive for wanting to change their sex and hence their prison. Given that they committed their crimes as males, they should be punished as such; after serving their time, they will be free to reconsider their gender.

Another subgroup consists of young men and women susceptible to suggestion from "everything is normal" sex education, amplified by Internet chat groups. These are the transgender subjects most like anorexia nervosa patients: They become persuaded that seeking a drastic physical change will banish their psycho-social problems. "Diversity" counselors in their schools, rather like cult leaders, may encourage these young people to distance themselves from their families and offer advice on rebutting arguments against having transgender surgery. Treatments here must begin with removing the young person from the suggestive environment and offering a counter-message in family therapy.

Then there is the subgroup of very young, often prepubescent children who notice distinct sex roles in the culture and, exploring how they fit in, begin imitating the opposite sex. Misguided doctors at medical centers including Boston's Children's Hospital have begun trying to treat this behavior by administering puberty-delaying hormones to render later sex-change surgeries less onerous—even though the drugs stunt the children's growth and risk causing sterility. Given that close to 80% of such children would abandon their confusion and grow naturally into adult life if untreated, these medical interventions come close to child abuse. A better way to help these children: with devoted parenting.

At the heart of the problem is confusion over the nature of the transgendered. "Sex change" is biologically impossible. People who undergo sex-reassignment surgery do not change from men to women or vice versa. Rather, they become feminized men or masculinized women. Claiming that this is civil-rights matter and encouraging surgical intervention is in reality to collaborate with and promote a mental disorder.

Dr. McHugh, former psychiatrist in chief at Johns Hopkins Hospital, is the author of "Try to Remember: Psychiatry's Clash Over Meaning, Memory, and Mind" (Dana Press, 2008).

2010 WL 5061016
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
at Nashville.

STATE of Tennessee
v.
Michael Martez RHODES.

No. M2009–00077–CCA–R3–CD.
|
Assigned on Briefs March 2, 2010.
|
Dec. 8, 2010.
|
Application for Permission to Appeal
Denied by Supreme Court
April 14, 2011.

West KeySummary

1 **Sentencing and Punishment**
Criminal sexual conduct, incest, and prostitution
Sentencing and Punishment
Nature and degree of harm or injury
Sentencing and Punishment
Separate acts

Trial court did not abuse its discretion by ordering defendant's sentences to run consecutively, in a prosecution for two counts of aggravated sexual battery. Defendant, who was victim's step-father, entered a bathroom while the 11 year old victim was showering and touched her breasts. He also touched her on the outside of her vagina while she was undressed in the bathroom. The offenses occurred several months apart before the crimes were detected. Defendant cause emotional distress to victim because he was the undisputed chief disciplinarian in the household.

2 Cases that cite this headnote

Direct Appeal from the Criminal Court for Davidson County, No.2007–B–1384; Cheryl Blackburn, Judge.

Attorneys and Law Firms

J. David Wicker, Nashville, Tennessee, for the appellant, Michael Martez Rhodes.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Senior Counsel; Victor S. (Torry) Johnson, III, District Attorney General; and Katrin Miller, Assistant District Attorney General, for the appellee, State of Tennessee.

JOHN EVERETT WILLIAMS, J., delivered the opinion of the Court, in which JOSEPH M. TIPTON, P.J., and ALAN E. GLENN, J., joined.

OPINION

JOHN EVERETT WILLIAMS, J.

***1** The defendant, Michael Martez Rhodes, pursuant to a plea agreement, entered an *Alford* "best interest" plea of guilty to two counts of attempted aggravated sexual battery, a Class C felony. The agreement provided for a four-year sentence for each conviction, with the manner of service to be determined by the trial court. Following a sentencing hearing, the trial court imposed consecutive sentences for a total effective sentence of eight years, to be served in the Department of Correction. On appeal, the defendant argues that the trial court erred in denying probation and in imposing consecutive sentences. After careful review, we affirm the judgments from the trial court. However, we note the transcript shows an *Alford* "best-interest" guilty plea. The judgment reflects a plea of *nolo contendere*. We remand for a correction of the judgment.

Had the State proceeded to trial, it would have presented the following facts. On April 5, 2006, the eleven-year-old victim disclosed to her mother that her stepfather, the defendant, had grabbed her breasts. The victim's mother, who was the defendant's wife, immediately reported this to the Department of Children's Services and the Metro Police Department. A controlled telephone call between the victim's mother and

the defendant was arranged by the detective assigned to investigate this case. During the telephone call, the defendant admitted that he had pinched the victim's breasts and had touched the outside of the victim's vagina. He claimed the touches were not sexual in nature but, rather, were playful and were intended to show her where she needed to shave and that she needed to start wearing a bra.

In another recorded telephone conversation between the victim's mother and the defendant, he made the same admissions and urged her not to reveal the information. He asked her to speak to the victim and instruct her not to tell anyone that he had touched her vagina. However, the defendant told the victim's mother that the victim could tell that he had touched her breasts.

The detective's testimony would have been that he recorded an interview with the defendant in which the defendant acknowledged that he pinched the victim's nipples but denied that the touching was sexual in nature. During the plea hearing, the defendant acknowledged the accuracy of the facts recited by the State. The defendant entered a *nolo contendere* plea to two counts of attempted aggravated sexual battery in exchange for two four-year sentences, with the manner of service to be determined by the trial court.

During the sentencing hearing, the victim testified that she was eleven years old when the defendant, her ex-stepfather, touched her vaginal area. She said that she would like to see the defendant go to jail. The victim testified that she told her mother and her best friend what had happened and, further, said that the incidents "ruined [her] life." She said that she told her friend because she thought her friend would not tell anyone; however, people at school learned about the incidents, pointed at her, and talked about how she was molested. She testified that she had been in counseling since the defendant touched her.

***2** During cross-examination, the victim acknowledged that she also made similar allegations against another man and that she had been in counseling prior to making the underlying allegations. She did not recall how long she had been in counseling before she made these allegations. She testified that there were three people living in their home in addition to herself: the defendant, his son, and her mother.

The victim testified that the defendant walked around the home in his boxers. She testified that they all shared the same bathroom and that the defendant would enter the bathroom while she was showering. He told her that he did this when the victim's stepbrother needed to use the bathroom to ensure that the stepbrother was not looking at her because they used a transparent shower curtain. The victim thought it was inappropriate for the defendant to enter the bathroom while she was showering.

The victim testified that on both occasions when the defendant pinched her breasts, he told her that she needed to talk to her mother about wearing a bra. The victim testified that the defendant was wearing boxers when he touched her breasts. She testified that he touched her vaginal area while she was in the shower. The defendant told her she needed to start shaving "down there because [she] was starting to get a lot of hair right there." She testified that she wanted to shave and had discussed it with her mother but had not discussed it with the defendant.

The victim testified that a neighbor had also entered a guilty plea to touching her. The neighbor touched her repeatedly when he assaulted her. She said that was different from the touching in the instant case. The victim reiterated that she was shaving her legs in the shower when the defendant entered. The defendant opened the shower curtain when he walked into the bathroom. He told the victim to bend over and said she needed to start shaving her vaginal area. She said that she was blow drying and brushing her hair in the bathroom when the defendant entered and touched her breast. She said that the defendant would enter the bathroom "out of the blue" to wash his hands or use the restroom while she was taking a shower. She said that whenever she was in the shower, "he always seemed to kind of come in there ... he always did that when [I] was in the shower." She said that the defendant said he entered the bathroom because his son needed to use the bathroom and the defendant was shielding him from seeing the victim.

The victim was not sure how much time passed between the touches but thought it was probably a couple of months. She complained to her mother about the touches after the third incident. The victim testified that she did not complain to the defendant about the touches because he was the disciplinarian in the home and was not very nice to her. She said that he had previously spanked her with a belt, causing bruises on her legs.

The defendant testified that he was employed and was living in Kentucky with his mother. In May 2006, when the underlying events occurred, he was a manager at Christie's

Cabaret, which he characterized as "a strip club," and the victim's mother worked at a different "strip club." He said that it was common for him to walk around the home wearing only his boxers. He said the victim always wore a shirt, but her mother would sometimes walk around in boxers and a tank top with "no kind of support." He said that the entire family used the same restroom and that, until he was charged with the crimes, he did not see it as a problem to enter the restroom while it was occupied. He testified that he now understood that what they were doing was wrong and maintained that it was not done for sexual gratification.

***3** The defendant acknowledged that he touched the victim on her breast and told her she needed to wear a bra. He said that the victim's mother had several conversations with him about the victim's need to shave her vaginal area. He testified that he told the victim's mother that the victim could hurt herself if the mother did not show her what to do. He acknowledged that he was the disciplinarian of the household, and he agreed that it was inappropriate for him to touch the victim.

He testified that he entered a best interest plea because he was facing eight to twelve years in prison and hoped to be placed on probation. The defendant underwent a psychosexual evaluation, which concluded that he denied, defended, or repressed the truth of the events that occurred. The psychologist also made a finding that the defendant might have some sexual deviance or disorder resulting from his attitude toward women. The defendant said he was willing to get treatment, if necessary. He attributed some of his problems to his prior employment in the adult entertainment industry but testified that he had left that field of work. The psychosexual evaluation classified his risk for sexual recidivism as low but noted that he had some enhancing factors present in the low category, including a need to control his anger and negative emotions. He acknowledged that there had been two incidents involving his temper in his current job but stated that neither incident resulted in physical violence. He also said that he was working on his anger issues with the victim's mother and that he had no desire to talk to her about any issue other than his son. The psychosexual report also indicated that it was unclear if the defendant had a sexual interest in young girls or a disorder related to his attitudes toward females.

During cross-examination, the defendant acknowledged that he did not tell the detective that he touched the victim to educate her on how to shave. He said that he was afraid to talk to the police and also acknowledged that he instructed the victim's mother not to tell anyone that he had touched the victim. He agreed that in the psychosexual report, he said that the victim's breasts were "barely formed" even though he testified that "she walked around with tank tops and they would pop out." The defendant testified that on two prior occasions, he had been placed on probation. He was also convicted of possession of a controlled substance while in possession of a firearm. He testified that, even though he did not have a carry permit, he carried a firearm on occasion when he worked at the "strip clubs." He also testified that it had been sixteen months since he last used drugs.

The victim's mother testified that she discussed shaving with the victim and told her not to shave anything between her legs. She acknowledged that she told the defendant she was not comfortable talking to the victim about shaving but stated she did not ask him to talk to the victim about it. She told her daughter not to shave there because she did not want her to get cut and because it was inappropriate to discuss such things with an eleven-year-old.

***4** The trial court sentenced the defendant to two consecutive four-year sentences and ordered the sentences to be served in confinement. This appeal followed.

Analysis

On appeal, the defendant argues that the trial court erred in ordering his sentences to run consecutively and in denying him full probation. First, we will consider the issue of consecutive sentencing. A court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:

> (5) [t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of [the] defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

T.C.A. § 40–35–115(b)(5) (2006); *see also State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn.2002). In imposing consecutive sentences, the trial court found that: the defendant was convicted of two or more sexual offenses against a minor; the offenses occurred several months apart before the crimes were detected; and the defendant caused emotional distress to the victim because he was the undisputed chief disciplinarian in the household.

Here, although the victim testified that she had been undergoing counseling for an unrelated incident, she stated that the assaults by the defendant caused her to seek additional counseling and to suffer unwanted attention at school from her peers, making it necessary for her to change schools. The victim characterized these crimes as "ruining her life." The defendant regularly entered the bathroom while the victim was vulnerable because she was naked and showering. The record supports the trial court's finding that there were circumstances present to impose consecutive sentences. We also note this court's decision in *State v. Brandon Raymond Bartee*, No. M2004–02637–CCA–R3–CD, 2005 Tenn.Crim.App. LEXIS 1045, at * *11–12 (Tenn.Crim.App. at Nashville, Sept. 20, 2005), where the defendant entered guilty pleas to three counts of sexual battery as lesser included offenses of the indicted offenses of aggravated sexual battery. The defendant in *Bartee* was a registered sex offender who deceived his neighbors into allowing him to play with their children. While wrestling with the children, he touched a six-year-old victim's breasts, buttocks, and genitalia. The defendant in *Bartee* contended that the trial court should not have imposed consecutive sentences, but this court concluded that the predatory nature of the defendant's actions, together with the psychological effects incurred by the victim, were sufficient to warrant consecutive sentences. Here, on multiple occasions, the defendant, who was an authority figure in the victim's life, entered the bathroom while the victim was showering and touched her bare breasts. He also touched her on the outside of her vagina while she was undressed in the bathroom. Though this defendant was not a registered sex offender, he exhibited predatory behavior by touching the victim when she was at her most vulnerable. Therefore, we conclude that the nature of the defendant's actions, combined with the parties' relationship as parent and child and the victim's other issues, warrant an imposition of consecutive sentences.

***5** Next, the defendant argues that he should have been sentenced to probation. When a defendant challenges the manner of the service of a sentence, this court conducts a *de novo* review of the record with a presumption that the determinations made by the sentencing court are correct. T.C.A. § 40–35–401(d) (2006). If our review reflects that the trial court followed the statutory sentencing procedure, that it imposed a lawful sentence after duly considering and weighing the factors and principles set out under the sentencing law, and that its findings are adequately supported by the record, then we may not disturb the sentence even if we would have preferred a different result. *State v. Hooper*, 29 S.W.3d 1, 5 (Tenn.2000). However, if the trial court failed to comply with the statutory guidelines, we must review the sentence *de novo* without a presumption of correctness. *State v. Poole*, 945 S.W.2d 93, 96 (Tenn.1997). The defendant bears the burden of proving the sentence is improper. T.C.A. § 40–35–401, Sentencing Comm'n Comments.

A trial court must impose a sentence within the applicable range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. T.C.A. § 40–35–210(c) (2006). In conducting our review, we are required, pursuant to Tennessee Code Annotated section 40–35–210(b), to consider the following factors in sentencing:

> (1) [t]he evidence, if any, received at the trial and the sentencing hearing; (2)[t]he presentence report; (3)[t]he principles of sentencing and arguments as to sentencing alternatives; (4)[t]he nature and characteristics of the criminal conduct involved; (5)[e]vidence and information offered by the parties on the enhancement and mitigating factors in [sections] 40–35–113 and 40–35–114; and (6)[a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing.

The trial court's weighing of various mitigating and enhancement factors is left to its sound discretion, as the factors are merely advisory. *State v. Carter*, 254 S.W.3d 335, 345 (Tenn.2008). Our Sentencing Act provides that a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to

the contrary." T.C.A. § 40–35–102(6) (2006); *see also State v. Fields*, 40 S.W.3d 435, 440 (Tenn.2001).

Even though probation must be automatically considered, "the defendant is not automatically entitled to probation as a matter of law." T.C.A. § 40–35–303(b) (2006), Sentencing Comm'n Comments; *State v. Hartley*, 818 S.W.2d 370, 373 (Tenn.Crim.App.1991). On appeal, a defendant seeking full probation bears the burden of showing that the imposed sentence is improper and that full probation will be in the best interest of the defendant and the public. *State v. Baker*, 966 S.W.2d 429, 434 (Tenn.Crim.App.1997).

***6** In determining whether to grant or deny probation, a trial court should consider the circumstances of the offense, the defendant's criminal record, the defendant's social history and present condition, the need for deterrence, and the best interest of the defendant and the public. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn.1978); *State v. Boyd*, 925 S.W.2d 237, 244 (Tenn.Crim.App.1995). The defendant's lack of credibility is also an appropriate consideration and reflects on a defendant's potential for rehabilitation. *State v. Nunley*, 22 S.W.3d 282, 289 (Tenn.Crim.App.1999). Under Tennessee's revised Sentencing Act, the provision that certain defendants should be considered favorable candidates for alternative sentencing is an "advisory sentencing guideline" that the trial court "shall consider, but is not bound by...." T.C.A. § 40–35–102(6)(D). The Tennessee Supreme Court has held that it is proper for a trial court to look beyond a plea bargain and consider the "true nature of the offenses committed." *State v. Hollingsworth*, 647 S.W.2d 937, 939 (Tenn.1983).

Here, the trial court did not find credible the defendant's explanation that he did not understand that his actions were wrong. The court did not accept the defendant's argument that he was trying to instruct the victim that she needed to begin shaving and wear a bra. Instead, the trial court concluded that the defendant engaged in the touching for sexual gratification because it was not necessary for the defendant to enter the bathroom on multiple occasions while the victim was showering to deliver those instructions. Further, the victim testified that the defendant was aroused when he touched her breasts.

The trial court also found that the defendant abused a position of trust because it was testified to that he was the disciplinarian in the household. Additionally, the defendant had two 1997 convictions in Tennessee for possession of drugs and for a weapons offense. He received probation for these convictions. The trial court also noted that the defendant had tried to mislead the police about these crimes.

The defendant argues that the trial court erred in finding Tennessee Code Annotated section 40–35–103(1)(c) applicable because he successfully completed his probation for the 1997 convictions. This argument supports a position that as long as a defendant completes a sentence of probation without incident that, upon his return to society, he can continue to commit crimes and remain eligible for probation. This argument should fail because the defendant's behavior indicates a disregard for the law and reflects that his prior period of probation did not serve to rehabilitate him from committing future violations of the law.

As previously stated, the trial court is free to look behind the plea agreement and consider the true nature of the crimes. Here, the defendant was indicted for aggravated sexual battery after he touched the eleven-year-old victim on her breasts on two separate occasions and on her vagina on one occasion. The statute governing eligibility for probation specifically excludes those convicted of aggravated sexual battery. T.C.A. § 40–35–303(a). The defendant asserts that the trial court made no finding as to his prospects for rehabilitation. The trial court stated that it did not find the defendant credible in his explanation of his motives for committing the crimes. The trial court found that the defendant's lack of candor would have an effect on his ability to successfully complete probation. As previously stated, a defendant's credibility is an appropriate consideration and reflects on a defendant's potential for rehabilitation. *Nunley*, 22 S.W.3d at 289. In light of the above, the trial court properly denied probation.

***7** We also note the transcript and the judgment contain a differing description of the type of plea entered by the defendant. The transcript presents a "best interest" guilty plea, pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), and the judgment refers to the guilty plea as *nolo contendere.* We remand only this issue to the trial court for correction of judgment.

Conclusion

Based on the foregoing and the record as a whole, we affirm the judgments from the trial court and remand to the trial court for correction of the judgment.

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United States District Court,
E.D. Pennsylvania.

Diane FLICK
v.
AURORA EQUIPMENT
COMPANY, INC. d/b/a Equipto

No. Civ.A. 03–CV–2508.
|
Jan. 13, 2004.

Attorneys and Law Firms

Barry H. Dyller, Law Office of Barry Dyller, Wilkes–Barre, PA, for Plaintiff.

Nancy A. Conrad, Fitzpatrick Lentz & Bubba, PC, Center Valley, PA, for Defendants.

MEMORANDUM & ORDER

SURRICK, J.

***1** Presently before the Court is Defendant Aurora Equipment Company, Inc. d/b/a Equipto's Motion for Summary Judgment (Doc. No. 12) and Defendant's Motion for Permission to File Reply Brief in Response to Plaintiff's Memorandum of Law (Doc. No. 18). Defendant's Motion for Permission to File Reply Brief is granted. For the following reasons, Defendant's Motion for Summary Judgment will be denied.

Background [1]

Plaintiff began employment with Defendant on February 3, 1997. (Doc. No. 14, Ex. 1, ¶ 7.) At first, Plaintiff worked as a paint line unloader on the first shift. (*Id.*) In May 1997, Plaintiff was transferred to the second shift to accommodate an employee who returned from sick leave. (*Id.;* Doc. No. 12, Ex. A at 28–29, "Flick Dep.") Plaintiff was the only female employee on the second shift. (Flick Dep. at 52.) Plaintiff alleges that several of her co-workers on the second shift acted in such a manner as to subject her to a sexually hostile work environment. Plaintiff complained to her supervisors about the sexual harassment, but the supervisors largely failed to take any corrective action. Eventually, Plaintiff resigned. She claims that she was constructively discharged. Plaintiff also alleges that Defendant retaliated against her for complaining about the sexual harassment she suffered. Plaintiff seeks relief under Title VII of the Civil Rights Act of 1964, 42 U.S .C. § 2000e, et seq. ("Title VII") and the Pennsylvania Human Relations Act, 43 PA. CONS.STAT. § 951, et seq. ("PHRA"). [2]

Plaintiff suffered harassment that was both sexual and non-sexual in nature. With respect to the non-sexual harassment, Plaintiff described a variety of "nasty" conduct allegedly directed at her because of her sex. For example, on a number of occasions Plaintiff asked her male co-workers for assistance in unloading heavy items and they either ignored her or refused to help. (Flick Dep. at 33–35 .) Other workers did not have a problem getting assistance. Plaintiff was told she needed to prove herself because she was a woman. (*Id.* at 58.) On one occasion Plaintiff asked Dale Heckman, one of her co-workers, for help and in front of a group of male employees he called her a "fucking bitch." (*Id.* at 39.) Other co-workers said that they were going to get Plaintiff to quit one way or another. (*Id.* at 38.) Some co-workers refused to train Plaintiff as they were supposed to do. (*Id.* at 61.) On one occasion Jim Miller, one of Plaintiff's supervisors, reprimanded Plaintiff for speaking with a female human relations manager when Plaintiff was supposed to be working. Miller did not reprimand male workers for similar conduct. (*Id.* at 47–51.) Another one of Plaintiff's supervisors, Will Shaffer, conducted meetings with Plaintiff and her male co-workers and addressed the group as "gentlemen," seemingly excluding Plaintiff. (*Id.* at 52.) Finally, one of Plaintiff's co-workers, Willie Drummer, would often tell Plaintiff to "screw" herself. (*Id.* at 69.)

***2** After the incident when Heckman cursed at Plaintiff, Plaintiff complained to Miller. (*Id.* at 39.) Miller laughed and told Plaintiff not to worry about it and that nothing would be done. Plaintiff then told Miller that she was going to complain to Lee Parks, the next level supervisor. Miller told Plaintiff to keep her mouth shut and not to butt heads with him. (*Id.* at 39–40, 100–101.) The next morning, Plaintiff called Tom Madyas, the owner of the company, in Texas and told him about the incident. Madyas was upset and said he was going to call Parks at once. (*Id.* at 102.) The next day, Plaintiff met with Parks. Parks was upset that Plaintiff had gone over

his head by complaining to Madyas, but he understood why Plaintiff had done so. He told her not to do it again. (*Id.* at 103.) Later Plaintiff met with Parks and Heckman. At this meeting, Heckman apologized to Plaintiff. (*Id.* at 43.) Although Plaintiff did not know it at the time, Heckman was issued a written warning in connection with this incident. (*Id.* at 107.) Nevertheless, Heckman continued to use foul language with Plaintiff and Plaintiff continued to report this conduct to her supervisors. (*Id.* at 44.)

After the meeting with Plaintiff, Parks and Miller decided to move Plaintiff to a different position with the company —one that did not require her to work with Heckman—in order to allow things to cool off. (*Id.* at 40–41.) Plaintiff was assigned to the shipping department. (*Id.* at 41.) Plaintiff was not happy with her new assignment. In her new position, Plaintiff was forced to work behind file boxes and anyone who attempted to talk to her was chased away by Miller. (*Id.* at 45–47.) In addition, all of Plaintiff's co-workers worked overtime, but Plaintiff was not permitted to do so. (*Id.* at 45.) After approximately three months Plaintiff was transferred back to the paint line department and was forced to work along side her husband because no one else wanted to work with her. (Am.Compl.¶ 14.) Working along side her husband contributed to marital problems between Plaintiff and her husband. (Flick Dep. at 93–96.) In June, 2000, Plaintiff's husband quit his job because he was unhappy about being forced to work along side his wife. (*Id.* at 97.)

In September, 2001, one of Plaintiff's co-workers told her that when their supervisor left for vacation, "all hell was going to break loose," and Plaintiff's co-workers were going to get Plaintiff to quit "one way or another." (*Id.* at 151.) The same co-worker advised Plaintiff to take a week of vacation to avoid trouble. (*Id.* at 156.) The next morning, Plaintiff called Grace Smith, a human relations manager, and told her about the co-workers' plan. Smith told Plaintiff to "ignore it, just come in and be a better woman—to be a better person and just do [your] job." (*Id.* at 154.) Later, however, Smith held two meetings to address Plaintiff's allegations. (*Id.* at 157.) During the second meeting Plaintiff decided she was fed up with her working conditions and quit. (*Id.* at 160.)

***3** At times, the harassment directed at Plaintiff was of a sexual nature. For example, Mike Witkowski, one of Plaintiff's co-workers, repeatedly made motions simulating masturbation in front of Plaintiff. (*Id.* at 53, 72–75, 77.) Witkowski would make these motions directly in front of Plaintiff when no one else was around. (*Id.* at 77.) Plaintiff reported Witkowski's conduct to her supervisors, Miller and Greg Stocker. Miller replied that he would not do anything about the conduct because it "was a man's world." (*Id.* at 75.) Witkowski continued to engage in this conduct in front of Plaintiff daily until the day that she resigned. (*Id.* at 76.) Another of Plaintiff's co-workers would moon Plaintiff and pull up his shirt to show Plaintiff his "hairy chest." (*Id.* at 81.) The same employee followed Plaintiff into the women's restroom several times. (*Id.* at 139.) This conduct continued even after Plaintiff complained to her supervisor. (*Id.* at 142.) Finally, several of Plaintiff's male co-workers would urinate outside a door near where Plaintiff worked. (*Id.* at 33.)

Standard of Review

Defendant has moved for summary judgment on three separate grounds. First, Defendant claims that there is not sufficient evidence that the alleged harassment Plaintiff suffered was so severe and pervasive as to create a hostile work environment. Second, Defendant claims that there is not sufficient evidence that the alleged harassment Plaintiff suffered was based on her sex. Third, Defendant claims that there is not sufficient evidence that Defendant failed to take remedial action reasonably designed to resolve Plaintiff's complaints. For all three reasons, Defendant claims that Plaintiff has failed to demonstrate genuine issues of material fact that would entitle Plaintiff to relief on any of her discrimination claims.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Defendant, the moving party, bears the burden of proving that no genuine issue of material fact is in dispute. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Once Defendant carries this initial burden, Plaintiff may not rest upon the mere allegations her pleading, but must set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e). However, in considering Defendant's motion, we will not resolve factual disputes or make credibility determinations, and we must view facts and inferences in the light most favorable to Plaintiff. *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir.1995).

Analysis

I. Pervasive and Regular Requirement

To survive a motion for summary judgment on a claim of sexual harassment based on a sexually hostile work environment, a plaintiff must raise a genuine issue of material fact as to the following five elements: (1) the plaintiff suffered intentional discrimination because of his or her sex; (2) the discrimination was pervasive and regular; [3] (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of respondeat superior liability. *Andrews v. City of Phila.*, 895 F.2d 1469, 1482 (3d Cir.1990). With respect to the second element, the Third Circuit has held that "[h]arassment is pervasive when 'incidents of harassment occur in concert or with regularity." ' *Andrews*, 895 F.2d at 1484 (quoting *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1189 (2d Cir.1987)). The Supreme Court has emphasized that the harassment "must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (quotation omitted). Whether an environment is hostile and therefore actionable can be determined only by looking at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

***4** Defendant claims that even when the evidence is viewed in the light most favorable to Plaintiff, no reasonable jury could conclude that Plaintiff experienced pervasive and regular harassment. According to Defendant, the record in this case, at best, depicts Plaintiff's co-workers as immature and unmotivated, but fails to demonstrate a hostile work environment required for liability under Title VII. Defendant argues that the facts alleged in this case compare favorably to those alleged in *Barbosa v. Tribune Co.*, No. 01–cv–1262, 2003 WL 22238984 (E.D.Pa. Sept.25, 2003), wherein the district court granted summary judgment in favor of the defendant because the evidence did not support pervasive or severe harassment. In *Barbosa*, the plaintiff was employed for eighteen months, but could only point to seven specific incidents of harassment to support his claim of a hostile work environment. 2003 WL 22238984, at *4. The court could not conclude from so few instances that the plaintiff experienced pervasive or severe harassment. *Id.*

The facts in this case are clearly distinguishable from *Barbosa* . While the plaintiff in *Barbosa* could only point to seven instances of harassment over eighteen months, Plaintiff points to *daily* harassment over a period of many months. That harassment included one of her co-workers simulating masturbation directly in front of her on a daily basis, and another co-worker mooning Plaintiff and pulling up his shirt to show his "hairy chest." (*Id.* at 81.) Plaintiff further states that when she complained about the harassment to her supervisor she was told he would do nothing about it because it "was a man's world." The harassment alleged in this case is more like the harassment alleged in *Suders v. Easton*, 325 F.3d 432 (3d Cir.2003), where the plaintiff, a female, began work as a police communications operator. Every day during the five months she was employed one of her supervisors performed a simulated professional wrestling move in front of her that involved his grabbing his crotch and yelling "suck it." *Suders*, 325 F.3d at 437. The supervisor would perform this move as many as five to ten times a shift. Another one of the plaintiff's supervisors regularly engaged plaintiff in sexually explicit conversations, though not on a daily basis. The Third Circuit found that this conduct constituted pervasive and regular harassment. Most persuasive to the court was the plaintiff's testimony regarding the wrestling move that her supervisor allegedly performed. *Id.* at 442. Similarly, Plaintiff here was subjected to daily harassment of a sexual nature. Moreover, Plaintiff alleges that her co-workers harassed her in a variety of other sexual and non-sexual ways, both on a regular and irregular basis. The combined effect of these acts is sufficient, in our view, to create a jury question as to whether Plaintiff worked in a hostile environment for purposes of Title VII.

This conclusion is reinforced by the fact that the harassment alleged by Plaintiff has many of the same characteristics of pervasive and regular harassment described in *Andrews* and *Harris.* For example, in *Andrews* the Third Circuit held that "[h]arassment is pervasive when 'incidents of harassment occur in concert or with regularity." ' 895 F.2d at 1484. Here, there is evidence that Plaintiff's co-workers were acting in concert to harass Plaintiff. The threats that "all hell was going to break loose," and that Plaintiff's co-workers were going to get Plaintiff to quit "one way or another," are evidence that Plaintiff's co-workers were acting in concert to harass her. Considering all of the conduct alleged by Plaintiff, and considering the fact that Plaintiff was the only woman working with a group of men and was the only target of

hostility, [4] a reasonable inference can be drawn that Plaintiff's co-workers were harassing her because she was a woman.

***5** The *Harris* court held that whether or not harassment is actionable can be determined only by looking at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." 510 U .S. at 23. Here, the discriminatory conduct occurred frequently, and was physically threatening and/or humiliating as opposed to merely offensive. Clearly, a man mooning a woman or simulating masturbation in front of a woman on a regular basis could be considered threatening and/or humiliating to that woman. In addition, the harassment interfered with Plaintiff's performance of her job. As a result of the harassment she failed to get proper training, failed to receive assistance on certain jobs, was transferred to another position, and ultimately, was forced to resign. We are satisfied that, construing the facts in the light most favorable to Plaintiff, as we must, a reasonable jury could find that Plaintiff suffered harassment that was pervasive, severe, and regular.

II. Requirement of Intentional Discrimination Based on Sex

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e2(a)(1). "To make out a case under Title VII it is 'only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff 'had been a man she would not have been treated in the same manner." ' *Andrews,* 895 F.2d at 1485 (quoting *Tomkins v. Public Serv. Elec. & Gas Co.,* 568 F.2d 1044, 1047 n. 4 (3d Cir.1977)). A valid claim of sex discrimination based on a hostile work environment may, but need not include allegations of harassing conduct with sexual overtones. Instead, "[i]ntimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances." *Id.* (quoting *Hall v. Gus Constr. Co.,* 842 F.2d 1010, 1014 (8th Cir.1988)). *See also Anderson v. Deluxe Homes of Pa., Inc.,* 131 F.Supp.2d 637, 644 (M.D.Pa.2001) ("Sexual harassment can take different forms, both sexual and non-sexual.").

In this case, Plaintiff has pointed to evidence that at least two of her co-workers regularly engaged in offensive conduct towards her with sexual overtones. This evidence, if believed, is by itself sufficient to show an intent to discriminate on the basis of sex. *See Andrews,* 895 F.2d at 1482 n. 3 ("The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course."). Defendant claims that we should discount the evidence that one of Plaintiff's co-workers made daily masturbation motions in front of her because he also made these motions in front of her husband and other men (Pl.'s Mot., Ex. F at 93–94), and he once told Plaintiff that his conduct showed "how [he] fe[lt] about this place" (Flick Dep. at 74). However, Plaintiff testified that Witkowski made these motions directly in front of her when no one else was around. (*Id.* at 77.) She told him she thought his conduct was "sick," but he refused to stop. When she complained to a supervisor, she was told that nothing would be done because it "was a man's world." One could reasonably conclude that Witkowski's conduct was directed at Plaintiff because of her sex. In any event, there is also evidence that one of Plaintiff's co-workers would moon Plaintiff and pull up his shirt to show Plaintiff his "hairy chest." This can also be considered harassing conduct directed at Plaintiff because of her sex.

***6** In addition to the sexual conduct directed at Plaintiff, Plaintiff has pointed to evidence of non-sexual but hostile conduct directed at her by her co-workers. For example, Plaintiff states that one of her co-workers called her a "fucking bitch," and thereafter regularly used foul language towards her. (*Id.* at 39, 44.) Another co-worker told Plaintiff that she needed to prove herself because she was a woman and her supervisor once refused to address Plaintiff's complaints, saying it was "a man's world." (*Id.* at 38, 75.) The combination of these sex-specific comments and the regular instances of hostility directed at Plaintiff by her co-workers creates an inference of a hostile work environment sufficient to survive summary judgment. *See Andrews,* 895 F.2d at 1485 ("[W]e hold that the pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment."); *Williams v. Gen. Motors Corp.,* 187 F.3d 553, 565–66 (6th Cir.1999) ("The myriad instances in which [the plaintiff] was ostracized, when others were not, combined with the gender-specific epithets used, such as 'slut' and 'fucking women,' create an inference, sufficient to survive summary judgment, that her gender was the motivating impulse for her co-workers' behavior.").

Defendant argues that any hostility directed at Plaintiff was not on account of her sex. Rather, Defendant argues that Plaintiff was treated differently by her co-workers because they belonged to a clique, and Plaintiff was not a member of their clique. In fact, Plaintiff's husband testified that "[m]y understanding of the problems was—from my observation and stuff, was the guys that was up unloading had a little clique together, and they kind of like—as soon as anything that involved work would come down, they would take a hike and leave [Plaintiff] holding the bag." (Pl.'s Mot., Ex. F at 46.) We are not convinced. Even if the hostility directed at Plaintiff by her co-workers was a result of her not belonging to their clique, it is a reasonable inference, based on the evidence, that the reason Plaintiff was not a member of their all-male clique was because she was a woman. Construing the evidence in the light most favorable to Plaintiff, we conclude that a reasonable jury could find that Plaintiff's co-workers had an intent to discriminate against Plaintiff based upon sex.

III. Requirement of Respondeat Superior Liability

Employers are not strictly liable for hostile work environments created by their employees. *Vinson,* 477 U.S. at 72. Rather, in the context of a hostile work environment claim under Title VII, employers are liable for their employees' sexual harassment only if a plaintiff can prove that management-level employees had actual or constructive knowledge of the existence of the hostile environment and failed to take prompt and adequate remedial action. *Andrews,* 895 F.2d at 1486 (citing *Katz v. Dole,* 709 F.2d 251, 255 (4th Cir.1983)). Adequate remedial action is action "reasonably calculated to prevent further harassment." *Knabe v. Boury Corp.,* 114 F.3d 407, 412–13 (3d Cir.1997) (quoting *Saxton v. AT & T Co.,* 10 F.3d 526, 535 (7th Cir.1993)). In other words, an employer is only liable for a hostile work environment under Title VII if the employer is negligent in responding to incidents of sexual harassment. *See Bouton v. BMW of N. Am., Inc.,* 29 F.3d 103, 107 (3d Cir.1994).

***7** Defendant does not dispute that it had knowledge of the hostile work environment about which Plaintiff repeatedly complained. However, Defendant claims that it should not be liable for the actions of its employees because it took prompt and adequate remedial action in response to Plaintiff's complaints. We agree that the evidence in this case suggests that at times Defendant acted reasonably when responding to Plaintiff's complaints. However, other times Defendant did not act reasonably. For example, when Plaintiff complained to Miller about the incident with Heckman, Miller laughed and told Plaintiff he would not do anything about it. Clearly, this was not a reasonable response. On the other hand, after Plaintiff complained to Madyas, a meeting was held with Plaintiff and Parks and Heckman. At this meeting Heckman apologized to Plaintiff, and Heckman was issued a written warning. (Flick Dep. at 43, 107.) In addition, Plaintiff was temporarily transferred to another position—away from Heckman—in order to allow the situation to cool off. (*Id.* at 40–41.) This response appears to have been reasonable. However, Plaintiff indicates that Heckman continued to use inappropriate language with her after this meeting and this conduct continued even though Plaintiff complained to three different supervisors. (*Id.* at 44.) Construing the evidence in a light most favorable to Plaintiff, we conclude that a reasonable inference can be drawn that Defendant stopped responding to Plaintiff's complaints about Heckman. In sum, we conclude that a jury question exists as to whether Defendant acted reasonably in responding to Plaintiff's continuing complaints.

A jury question also exists concerning whether Defendant acted reasonably in responding to Plaintiff's other complaints of sexual harassment. When Plaintiff reported Witkowski's conduct to her supervisors, she was told nothing would be done because it "was a man's world." Apparently nothing was done because Witkowski continued to engage in this conduct in front of Plaintiff on a daily basis until the day that Plaintiff resigned. In addition, another employee continued to follow Plaintiff into the women's restroom even after Plaintiff complained to her supervisor. This certainly raises a jury question as to whether Defendant acted reasonably in responding to Plaintiff's complaints.

Under the circumstances, we are compelled to conclude that Plaintiff has raised genuine issues of material fact that preclude us from granting Defendant's motion for summary judgment.

An appropriate order follows.

ORDER

AND NOW, this *13th* day of January, 2004, upon consideration of Defendant Aurora Equipment Company, Inc. d/b/a Equipto's Motion for Summary Judgment (Doc. No. 12) and Defendant's Motion for Permission to File Reply Brief in Response to Plaintiff's Memorandum of Law (Doc. No. 18), and all papers filed in support thereof and opposition thereto,

it is ORDERED that Defendant's Motion for Permission to File Reply Brief (Doc. No. 18) is GRANTED and Defendant's Motion for Summary Judgment (Doc. No. 12) is DENIED.

***8** IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2004 WL 220859

Footnotes

1 Our review resolves all factual doubts and draws all reasonable inferences in favor of Plaintiff, the party opposing summary judgment. *See Aman v. Cort Furniture Rental Corp.* 85 F.3d 1074, 1077 n. 1 (3d Cir.1996).

2 The analysis required for adjudicating Plaintiff's claim under the PHRA is identical to a Title VII inquiry. *Jones v. Sch. Dist. of Phila.,* 198 F.3d 403, 410–11 (3d Cir.1999). We therefore do not need to separately address her claims under the PHRA.

3 The Court of Appeals for the Third Circuit has repeatedly recognized that its formulation of this prong differs from the Supreme Court's, which requires that the harassment be "severe or pervasive." *See, e.g., Abramson v. William Paterson College of New Jersey,* 260 F.3d 265, 277 n. 6 (3d Cir.2001). As discussed herein, a reasonable jury could conclude from the evidence in this case that Plaintiff suffered harassment that was pervasive, severe, and regular. Any difference in the two formulations is therefore not relevant to our decision on Defendant's motion.

4 Plaintiff testified that her co-workers refused to help her with certain tasks and no one else had that problem. (Flick Dep. at 57–58.)

2016 WL 1567467
Only the Westlaw citation is currently available.
United States Court of Appeals,
Fourth Circuit.

G.G., by his next friend and mother, Deirdre Grimm, Plaintiff–Appellant,
v.
GLOUCESTER COUNTY SCHOOL BOARD, Defendant–Appellee.
Judy Chiasson, Ph. D., School Administrator California; David Vannasdall, School Administrator California; Diana K. Bruce, School Administrator District of Columbia; Denise Palazzo, School Administrator Florida; Jeremy Majeski, School Administrator Illinois; Thomas A. Aberli, School Administrator Kentucky; Robert Bourgeois, School Administrator Massachusetts; Mary Doran, School Administrator Minnesota; Valeria Silva, School Administrator Minnesota; Rudy Rudolph, School Administrator Oregon; John O'Reilly, School Administrator New York; Lisa Love, School Administrator Washington; Dylan Pauly, School Administrator Wisconsin; Sherie Hohs, School Administrator Wisconsin; The National Women's Law Center; Legal Momentum; The Association of Title IV Administrators; Equal Rights Advocates; Gender Justice; The Women's Law Project; Legal Voice; Legal Aid Society—Employment Law Center; Southwest Women's Law Center; California Women's Law Center; The World Professional Association for Transgender Health; Pediatric Endocrine Society; Child and Adolescent Gender Center Clinic at UCSF Benioff Children's Hospital; Center for Transyouth Health and Development at Children's Hospital Los Angeles; Gender & Sex Development Program at Ann & Robert H. Lurie Children's Hospital of Chicago; Fan Free Clinic; Whitman–Walker Clinic, Inc., d/b/a Whitman–Walker Health; GLMA: Health Professionals Advancing LGBT Equality; Transgender Law & Policy Institute; Gender Benders; Gay, Lesbian & Straight Education Network; Gay–Straight Alliance Network; Insideout; Evie Priestman; Rosmy; Time Out Youth; We are Family; United States of America; Michelle Forcier, M.D.; Norman Spack, M.D., Amici Supporting Appellant,
State of South Carolina; Paul R. LePage, In his official capacity as Governor State of Maine; State of Arizona; The Family Foundation of Virginia; State of Mississippi; John Walsh; State of West Virginia; Lorraine Walsh; Patrick L. McCrory, In his official capacity as Governor State of North Carolina; Mark Frechette; Judith Reisman, Ph.D.; Jon Lynsky; Liberty Center for Child Protection; Bradly Friedlin; Lisa Terry; Lee Terry; Donald Caulder; Wendy Caulder; Kim Ward; Alice May; Jim Rutan; Issac Rutan; Doretha Guju; Doctor Rodney Autry; Pastor James Larsen; David Thornton; Kathy Thornton; Joshua Cuba; Claudia Clifton; Ilona Gambill; Tim Byrd; Eagle Forum Education and Legal Defense Fund, Amici Supporting Appellee.

No. 15–2056.
|
Argued Jan. 27, 2016.
|
Decided April 19, 2016.

Synopsis

Background: Transgender high school student, by his next friend and mother, brought action against school board under the Equal Protection Clause and Title IX of the Education Amendments of 1972, challenging school board's policy requiring students to use the restroom consistent with their birth sex, rather than their gender identity. Student moved for preliminary injunction allowing him to use the boys' restroom, and school board filed motion to dismiss for failure to state a claim. The United States District Court for the Eastern District of Virginia, 2015 WL 5560190, ---F.Supp.3d---, Robert G. Doumar, Senior District Judge, dismissed Title IX claim and denied student's request for preliminary injunction. Student appealed.

Holdings: The Court of Appeals, Floyd, Circuit Judge, held that:

[1] Department of Education's letter interpreting its Title IX regulation permitting schools to provide sex-segregated bathrooms, in which Department instructed that schools must treat transgender students consistent with their gender identity

if they provided sex-segregated bathrooms, was entitled to deference;

[2] District Court applied incorrect evidentiary standard on motion for preliminary injunction; and

[3] reassignment to another judge following remand was not warranted.

Reversed in part, vacated in part, and remanded.

Davis, Senior Judge, concurred and filed opinion.

Niemeyer, Circuit Judge, concurred in part and dissented in part and filed opinion.

West Headnotes (22)

[1] Federal Courts
Dismissal or Nonsuit in General

Court of appeals reviews de novo the district court's grant of a motion to dismiss.

Cases that cite this headnote

[2] Federal Civil Procedure
Insufficiency in General

Federal Civil Procedure
Matters Deemed Admitted; Acceptance as True of Allegations in Complaint

To survive a motion to dismiss for failure to state a claim, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

[3] Federal Courts
In General; Necessity

On appeal of dismissal of one of two claims, court of appeals would not consider merits of the other claim, which had not yet been considered or decided by district court; court of appeals was a court of review, not of first view.

Cases that cite this headnote

[4] Civil Rights
Sex Discrimination

To allege a violation of Title IX, student must allege (1) that he or she was excluded from participation in an education program because of his or her sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused him or her harm. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[5] Civil Rights
Discrimination by Reason of Sexual Orientation or Identity

School board's policy requiring students to use the restroom consistent with their birth sex, rather than their gender identity, involved an "educational program" under Title IX, as required for transgender student to challenge policy as discriminatory under Title IX; access to a restroom at a school could be considered either an "aid, benefit, or service" or a "right, privilege, advantage, or opportunity" under implementing regulation. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.31(b).

Cases that cite this headnote

[6] Civil Rights
Sex Discrimination

Federal courts look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX. 20 U.S.C.A. § 1686; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[7] Administrative Law and Procedure
Administrative Construction

Auer deference requires that an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute.

Cases that cite this headnote

[8] Administrative Law and Procedure
Administrative Construction

Agency interpretations of ambiguous agency regulations need not be well-settled or long-standing to be entitled to *Auer* deference; they must, however, reflect the agency's fair and considered judgment on the matter in question.

Cases that cite this headnote

[9] Administrative Law and Procedure
Administrative Construction

An agency's interpretation of its own ambiguous regulation is not the result of the agency's fair and considered judgment, and will not be accorded *Auer* deference, when the interpretation conflicts with a prior interpretation, when it appears that the interpretation is no more than a convenient litigating position, or when the interpretation is a post hoc rationalization.

Cases that cite this headnote

[10] Civil Rights
Administrative Agencies and Proceedings

Department of Education's letter interpreting its Title IX regulation permitting schools to provide sex-segregated bathrooms, in which Department instructed that schools providing sex-segregated bathrooms must treat transgender students consistent with their gender identity, was entitled to *Auer* deference, in transgender student's action alleging that school board's policy requiring students to use the restroom consistent with their birth sex, rather than their gender identity, violated Title IX; regulation was ambiguous as applied to transgender students, and Department's interpretation was not plainly erroneous or inconsistent with the regulation or Title IX. 20 U.S.C.A. § 1686; 34 C.F.R. § 106.33.

Cases that cite this headnote

[11] Federal Courts
Statutes, Regulations, and Ordinances, Questions Concerning in General

Determining whether a regulation or statute is ambiguous presents a legal question, which court of appeals determines de novo..

Cases that cite this headnote

[12] Statutes
What Constitutes Ambiguity; How Determined

Statutes
Context

The plainness or ambiguity of statutory language is determined by reference to (1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole.

Cases that cite this headnote

[13] Administrative Law and Procedure
Administrative Construction

In determining whether an agency's interpretation of its own ambiguous regulation is plainly erroneous or inconsistent with the regulation or statute, as would preclude *Auer* deference, federal court's review is highly deferential; an agency's interpretation need not be the only possible reading of a regulation, or even the best one, to prevail, but need only be reasonable to warrant deference.

Cases that cite this headnote

[14] Injunction
Grounds in General; Multiple Factors

To win on a motion for preliminary injunction, movants must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor;

and (4) the injunction is in the public interest. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

Cases that cite this headnote

[15] Federal Courts
Preliminary Injunction; Temporary Restraining Order

Court of appeals reviews a district court's denial of a preliminary injunction for abuse of discretion. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

Cases that cite this headnote

[16] Federal Courts
Abuse of Discretion in General

Federal Courts
Definite and Firm Conviction of Mistake

A district court has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding; court of appeals does not ask whether it would have come to the same conclusion as the district court if it were examining the matter de novo, but instead reverses for abuse of discretion if it forms a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

Cases that cite this headnote

[17] Federal Courts
Need for Further Evidence, Findings, or Conclusions

Injunction
Admissibility

Injunction
Hearsay

Federal district court applied incorrect evidentiary standard in denying motion for preliminary injunction by excluding movant's proffered evidence on grounds that it would be inadmissible at trial, warranting remand for consideration of such evidence; nature and purpose of preliminary injunction proceedings was to prevent irreparable harm before full trial on the merits, and therefore, court could look to, and rely on, hearsay or other inadmissible evidence when deciding whether preliminary injunction was warranted. (Per Floyd, Circuit Judge, with one judge concurring). Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

Cases that cite this headnote

[18] Injunction
Preservation of Status Quo

Injunction
Standard of Proof in General

Injunction
Hearing Procedure

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held; given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

Cases that cite this headnote

[19] Injunction
Admissibility

Injunction
Hearsay

Because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted. Fed.Rules Civ.Proc.Rule 65, 28 U.S.C.A.

Cases that cite this headnote

[20] Federal Courts
Reassignment to New Judge on Remand

District court's expression of opinions about medical facts and skepticism of transgender student's Title IX claims, which challenged school board's restroom policy requiring students to use restroom consistent with birth sex rather than gender identity, did not warrant reassignment of case to another judge on remand following appeal; the record did not clearly indicate that the district judge would refuse to consider and credit sound contrary evidence. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[21] Courts

Designation or Assignment of Judges

Absent claim that federal district judge is biased, reassignment of case is only appropriate in unusual circumstances, where both for the judge's sake and the appearance of justice an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality.

Cases that cite this headnote

[22] Federal Courts

Reassignment to New Judge on Remand

In determining whether reassignment of a federal district judge is warranted, court should consider: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Cases that cite this headnote

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Robert G. Doumar, Senior District Judge. (4:15–cv–00054–RGD–DEM).

Attorneys and Law Firms

ARGUED: Joshua A. Block, American Civil Liberties Union Foundation, New York, New York, for Appellant. David Patrick Corrigan, Harman, Claytor, Corrigan & Wellman, Richmond, Virginia, for Appellee. **ON BRIEF:**Rebecca K. Glenberg, Gail Deady, American Civil Liberties Union of Virginia Foundation, Inc., Richmond, Virginia; Leslie Cooper, American Civil Liberties Union Foundation, New York, New York, for Appellant. Jeremy D. Capps, M. Scott Fisher, Jr., Harman, Claytor, Corrigan & Wellman, Richmond, Virginia, for Appellee. Cynthia Cook Robertson, Washington, D.C., Narumi Ito, Amy L. Pierce, Los Angeles, California, Alexander P. Hardiman, Shawn P. Thomas, New York, New York, Richard M. Segal, Nathaniel R. Smith, Pillsbury Winthrop Shaw Pittman LLP, San Diego, California; Tara L. Borelli, Atlanta, Georgia, Kyle A. Palazzolo, Lambda Legal Defense and Education Fund, Inc., Chicago, Illinois; Alison Pennington, Transgender Law Center, Oakland, California, for Amici School Administrators Judy Chiasson, David Vannasdall, Diana K. Bruce, Denise Palazzo, Jeremy Majeski, Thomas A. Aberli, Robert Bourgeois, Mary Doran, Valeria Silva, Rudy Rudolph, John O'Reilly, Lisa Love, Dylan Pauly, and Sherie Hohs. Suzanne B. Goldberg, Sexuality and Gender Law Clinic, Columbia Law School, New York, New York; Erin E. Buzuvis, Western New England University School of Law, Springfield, Massachusetts, for Amici The National Women's Law Center, Legal Momentum, The Association of Title IX Administrators, Equal Rights Advocates, Gender Justice, The Women's Law Project, Legal Voice, Legal Aid Society–Employment Law Center, Southwest Women's Law Center, and California Women's Law Center. Jennifer Levi, Gay & Lesbian Advocates & Defenders, Boston, Massachusetts; Thomas M. Hefferon, Washington, D.C., Mary K. Dulka, New York, New York, Christine Dieter, Jaime A. Santos, Goodwin Procter LLP, Boston, Massachusetts; Shannon Minter, Asaf Orr, National Center for Lesbian Rights, San Francisco, California, for Amici The World Professional Association for Transgender Health, Pediatric Endocrine Society, Child and Adolescent Gender Center Clinic at UCSF Benioff Children's Hospital, Center for Transyouth Health and Development at Children's Hospital Los Angeles, Gender & Sex Development Program at Ann & Robert H. Lurie Children's Hospital of Chicago, Fan Free Clinic, Whitman–Walker Clinic, Inc., GLMA: Health Professionals Advancing LGBT Equality, Transgender Law & Policy Institute, Michelle Forcier, M.D. and Norman Spack, M.D. David Dinielli, Rick Mula, Southern Poverty Law

Center, Montgomery, Alabama, for Amici Gender Benders, Gay, Lesbian & Straight Education Network, Gay–Straight Alliance Network, InsideOut, Evie Priestman, Rosmy, Time Out Youth, and We Are Family. James Cole, Jr., General Counsel, Francisco Lopez, Vanessa Santos, Michelle Tucker, Attorneys, Office of the General Counsel, United States Department of Education, Washington, D.C.; Gregory B. Friel, Deputy Assistant Attorney General, Diana K. Flynn, Sharon M. McGowan, Christine A. Monta, Attorneys, Civil Rights Division, Appellate Section, United States Department of Justice, Washington, D.C., for Amicus United States of America. Alan Wilson, Attorney General, Robert D. Cook, Solicitor General, James Emory Smith, Jr., Deputy Solicitor General, Office of the Attorney General of South Carolina, Columbia, South Carolina, for Amicus State of South Carolina; Mark Brnovich, Attorney General, Office of the Attorney General of Arizona, Phoenix, Arizona, for Amicus State of Arizona; Jim Hood, Attorney General, Office of the Attorney General of Mississippi, Jackson, Mississippi, for Amicus State of Mississippi; Patrick Morrisey, Attorney General, Office of the Attorney General of West Virginia, Charleston, West Virginia, for Amicus State of West Virginia; Amicus Paul R. LePage, Governor, State of Maine, Augusta, Maine; Robert C. Stephens, Jr., Jonathan R. Harris, Counsel for the Governor of North Carolina, Raleigh, North Carolina, for Amicus Patrick L. McCrory, Governor of North Carolina. Mary E. McAlister, Lynchburg, Virginia, Mathew D. Staver, Anita L. Staver, Horatio G. Mihet, Liberty Counsel, Orlando, Florida, for Amici Liberty Center for Child Protection and Judith Reisman, PhD. Jeremy D. Tedesco, Scottsdale, Arizona, Jordan Lorence, Washington, D.C., David A. Cortman, J. Matthew Sharp, Rory T. Gray, Alliance Defending Freedom, Lawrenceville, Georgia, for Amici The Family Foundation of Virginia, John Walsh, Lorraine Walsh, Mark Frechette, Jon Lynsky, Bradly Friedlin, Lisa Terry, Lee Terry, Donald Caulder, Wendy Caulder, Kim Ward, Alice May, Jim Rutan, Issac Rutan, Doretha Guju, Rodney Autry, James Larsen, David Thornton, Kathy Thornton, Joshua Cuba, Claudia Clifton, Ilona Gambill, and Tim Byrd. Lawrence J. Joseph, Washington, D.C., for Amicus Eagle Forum Education and Legal Defense Fund.

Before NIEMEYER and FLOYD, Circuit Judges, and DAVIS, Senior Circuit Judge.

Opinion

Reversed in part, vacated in part, and remanded by published opinion. Judge FLOYD wrote the opinion, in which Senior Judge DAVIS joined. Senior Judge DAVIS wrote a separate concurring opinion. Judge NIEMEYER wrote a separate opinion concurring in part and dissenting in part.

FLOYD, Circuit Judge:

***1** G.G., a transgender boy, seeks to use the boys' restrooms at his high school. After G.G. began to use the boys' restrooms with the approval of the school administration, the local school board passed a policy banning G.G. from the boys' restroom. G.G. alleges that the school board impermissibly discriminated against him in violation of Title IX and the Equal Protection Clause of the Constitution. The district court dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction. This appeal followed. Because we conclude the district court did not accord appropriate deference to the relevant Department of Education regulations, we reverse its dismissal of G.G.'s Title IX claim. Because we conclude that the district court used the wrong evidentiary standard in assessing G.G.'s motion for a preliminary injunction, we vacate its denial and remand for consideration under the correct standard. We therefore reverse in part, vacate in part, and remand the case for further proceedings consistent with this opinion.

I.

At the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity. Title IX provides: "[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Department of Education's (the Department) regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." 34 C.F.R. § 106.33. In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights (OCR) interpreted how this regulation should apply to transgender individuals: "When a school elects to separate or treat students differently on the basis of sex ... a school generally must treat transgender students consistent with their gender identity." J.A. 55. Because this case comes to us after dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), the facts below are generally as stated in G.G.'s complaint.

A.

G.G. is a transgender boy now in his junior year at Gloucester High School. G.G.'s birth-assigned sex, or so-called "biological sex," is female, but G.G.'s gender identity is male. G.G. has been diagnosed with gender dysphoria, a medical condition characterized by clinically significant distress caused by an incongruence between a person's gender identity and the person's birth-assigned sex. Since the end of his freshman year, G.G. has undergone hormone therapy and has legally changed his name to G., a traditionally male name. G.G. lives all aspects of his life as a boy. G.G. has not, however, had sex reassignment surgery. [1]

Before beginning his sophomore year, G.G. and his mother told school officials that G.G. was a transgender boy. The officials were supportive and took steps to ensure that he would be treated as a boy by teachers and staff. Later, at G.G.'s request, school officials allowed G.G. to use the boys' restroom. [2] G.G. used this restroom without incident for about seven weeks. G.G.'s use of the boys' restroom, however, excited the interest of others in the community, some of whom contacted the Gloucester County School Board (the Board) seeking to bar G.G. from continuing to use the boys' restroom.

***2** Board Member Carla B. Hook (Hook) added an item to the agenda for the November 11, 2014 board meeting titled "Discussion of Use of Restrooms/Locker Room Facilities." J.A. 15. Hook proposed the following resolution (hereinafter the "transgender restroom policy" or "the policy"):

> Whereas the GCPS [i.e., Gloucester County Public Schools] recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

J.A. 15–16; 58.

At the November 11, 2014 meeting twenty-seven people spoke during the Citizens' Comment Period, a majority of whom supported Hook's proposed resolution. Many of the speakers displayed hostility to G.G., including by referring pointedly to him as a "young lady." J.A. 16. Others claimed that permitting G.G. to use the boys' restroom would violate the privacy of other students and would lead to sexual assault in restrooms. One commenter suggested that if the proposed policy were not adopted, non-transgender boys would come to school wearing dresses in order to gain access to the girls' restrooms. G.G. and his parents spoke against the proposed policy. Ultimately, the Board postponed a vote on the policy until its next meeting on December 9, 2014.

At the December 9 meeting, approximately thirty-seven people spoke during the Citizens' Comment Period. Again, most of those who spoke were in favor of the proposed resolution. Some speakers threatened to vote the Board members out of office if the Board members voted against the proposed policy. Speakers again referred to G.G. as a "girl" or "young lady." J.A. 18. One speaker called G.G. a "freak" and compared him to a person who thinks he is a "dog" and wants to urinate on fire hydrants. *Id.* Following this second comment period, the Board voted 6–1 to adopt the proposed policy, thereby barring G.G. from using the boys' restroom at school.

G.G. alleges that he cannot use the girls' restroom because women and girls in those facilities "react[ ] negatively because they perceive[ ] G.G. to be a boy." *Id.* Further, using the girls' restroom would "cause severe psychological distress" to G.G. and would be incompatible with his treatment for gender dysphoria. J.A. 19. As a corollary to the policy, the Board announced a series of updates to the school's restrooms to improve general privacy for all students, including adding or expanding partitions between urinals in male restrooms, adding privacy strips to the doors of stalls in all restrooms, and constructing single-stall unisex restrooms available to all students. G.G. alleges that he cannot use these new unisex restrooms because they "make him feel even more stigmatized .... Being required to use the separate restrooms sets him apart from his peers, and serves as a daily reminder that the school views him as 'different.' " *Id.* G.G. further alleges that, because of this stigma and exclusion, his social transition is undermined and he experiences "severe and persistent emotional and social harms." *Id.* G.G. avoids

using the restroom while at school and has, as a result of this avoidance, developed multiple urinary tract infections.

B.

***3** G.G. sued the Board on June 11, 2015. G.G. seeks an injunction allowing him to use the boys' restroom and brings underlying claims that the Board impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution. On July 27, 2015, the district court held a hearing on G.G.'s motion for a preliminary injunction and on the Board's motion to dismiss G.G.'s lawsuit. At the hearing, the district court orally dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction, but withheld ruling on the motion to dismiss G.G.'s equal protection claim. The district court followed its ruling from the bench with a written order dated September 4, 2015 denying the injunction and a second written order dated September 17, 2015 dismissing G.G.'s Title IX claim and expanding on its rationale for denying the injunction.

In its September 17, 2015 order, the district court reasoned that Title IX prohibits discrimination on the basis of sex and not on the basis of other concepts such as gender, gender identity, or sexual orientation. The district court observed that the regulations implementing Title IX specifically allow schools to provide separate restrooms on the basis of sex. The district court concluded that G.G.'s sex was female and that requiring him to use the female restroom facilities did not impermissibly discriminate against him on the basis of sex in violation of Title IX. With respect to G.G.'s request for an injunction, the district court found that G.G. had not made the required showing that the balance of equities was in his favor. The district court found that requiring G.G. to use the unisex restrooms during the pendency of this lawsuit was not unduly burdensome and would result in less hardship than requiring other students made uncomfortable by G.G.'s presence in the boys' restroom to themselves use the unisex restrooms.

This appeal followed. G.G. asks us to reverse the district court's dismissal of his Title IX claim, grant the injunction he seeks, and, because of comments made by the district judge during the motion hearing, to assign the case to a different district judge on remand. The Board, on the other hand, asks us to affirm the district court's rulings and also asks us to dismiss G.G.'s equal protection claim—on which the district court has yet to rule—as without merit. The United States, as it did below, has filed an *amicus* brief supporting G.G.'s Title IX claim in order to defend the government's interpretation of Title IX as requiring schools to provide transgender students access to restrooms congruent with their gender identity.

II.

[1] **[2]** **[3]** We turn first to the district court's dismissal of G.G.'s Title IX claim. [3] We review *de novo* the district court's grant of a motion to dismiss. *Cruz v. Maypa*, 773 F.3d 138, 143 (4th Cir.2014). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citations and quotations omitted).

***4** **[4]** **[5]** **[6]** As noted earlier, Title IX provides: "[n]o person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To allege a violation of Title IX, G.G. must allege (1) that he was excluded from participation in an education program because of his sex; (2) that the educational institution was receiving federal financial assistance at the time of his exclusion; and (3) that the improper discrimination caused G.G. harm. [4] *See Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir.1994) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 680, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)). We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX. *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir.2007).

Not all distinctions on the basis of sex are impermissible under Title IX. For example, Title IX permits the provision of separate living facilities on the basis of sex: "nothing contained [in Title IX] shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. The Department's regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33. The Department recently delineated how this regulation should be applied to transgender individuals. In an opinion letter dated January 7,

2015, the Department's Office for Civil Rights (OCR) wrote: "When a school elects to separate or treat students differently on the basis of sex ... a school generally must treat transgender students consistent with their gender identity." [5] J.A. 55.

A.

[7] **[8]** **[9]** G.G., and the United States as *amicus curiae*, ask us to give the Department's interpretation of its own regulation controlling weight pursuant to *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). *Auer* requires that an agency's interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. *Id.* at 461. Agency interpretations need not be well-settled or long-standing to be entitled to deference. They must, however, "reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. An interpretation may not be the result of the agency's fair and considered judgment, and will not be accorded *Auer* deference, when the interpretation conflicts with a prior interpretation, when it appears that the interpretation is no more than a convenient litigating position, or when the interpretation is a *post hoc* rationalization. *Christopher v. Smithkline Beecham Corp.*, ––U.S. ––––, ––––, 132 S.Ct. 2156, 2166, 183 L.Ed.2d 153 (2012) (citations omitted).

***5** The district court declined to afford deference to the Department's interpretation of 34 C.F.R. § 106.33. The district court found the regulation to be unambiguous because "[i]t clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth or biological sex." *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15cv54, 2015 WL 5560190, at *8 (E.D.Va. Sept.17, 2015). The district court also found, alternatively, that the interpretation advanced by the Department was clearly erroneous and inconsistent with the regulation. The district court reasoned that, because "on the basis of sex" means, at most, on the basis of sex and gender together, it cannot mean on the basis of gender alone. *Id.*

The United States contends that the regulation clarifies statutory ambiguity by making clear that schools may provide separate restrooms for boys and girls "without running afoul of Title IX." Br. for the United States as Amicus Curiae 24–25 (hereinafter "U.S. Br."). However, the Department also considers § 106.33 itself to be ambiguous as to transgender students because "the regulation is silent on what the phrases 'students of one sex' and 'students of the other sex' mean in the context of transgender students." *Id.* at 25. The United States contends that the interpretation contained in OCR's January 7, 2015 letter resolves the ambiguity in § 106.33 as that regulation applies to transgender individuals.

B.

[10] We will not accord an agency's interpretation of an unambiguous regulation *Auer* deference. Thus, our analysis begins with a determination of whether 34 C.F.R. § 106.33 contains an ambiguity. Section 106.33 permits schools to provide "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

[11] **[12]** "[D]etermining whether a regulation or statute is ambiguous presents a legal question, which we determine *de novo*." *Humanoids Grp. v. Rogan*, 375 F.3d 301, 306 (4th Cir.2004). We determine ambiguity by analyzing the language under the three-part framework set forth in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). The plainness or ambiguity of language is determined by reference to (1) the language itself, (2) the specific context in which that language is used, and (3) the broader context of the statute or regulation as a whole. *Id.* at 341.

First, we have little difficulty concluding that the language itself—"of one sex" and "of the other sex"—refers to male and female students. Second, in the specific context of § 106.33, the plain meaning of the regulatory language is best stated by the United States: "the mere act of providing separate restroom facilities for males and females does not violate Title IX ...." U.S. Br. 22 n. 8. Third, the language "of one sex" and "of the other sex" appears repeatedly in the broader context of 34 C.F.R. § 106 Subpart D, titled "Discrimination on the Basis of Sex in Education Programs or Activities Prohibited." [6] This repeated formulation indicates two sexes ("one sex" and "the other sex"), and the only reasonable reading of the language used throughout the relevant regulatory section is that it references male and female. Read plainly then, § 106.33 permits schools to provide separate toilet, locker room, and shower facilities for its male and female students. By implication, the regulation also permits schools to exclude males from the female facilities and vice-versa.

***6** Our inquiry is not ended, however, by this straightforward conclusion. Although the regulation may refer unambiguously to males and females, it is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms. We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity. *Cf. Dickenson–Russell Coal Co. v. Sec'y of Labor*, 747 F.3d 251, 258 (4th Cir.2014) (refusing to afford *Auer* deference where the language of the regulation at issue was "not susceptible to more than one plausible reading" (citation and quotation marks omitted)). It is not clear to us how the regulation would apply in a number of situations—even under the Board's own "biological gender" formulation. For example, which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X–X–Y sex chromosomes? What about an individual who lost external genitalia in an accident? The Department's interpretation resolves ambiguity by providing that in the case of a transgender individual using a sex-segregated facility, the individual's sex as male or female is to be generally determined by reference to the student's gender identity.

C.

[13] Because we conclude that the regulation is ambiguous as applied to transgender individuals, the Department's interpretation is entitled to *Auer* deference unless the Board demonstrates that the interpretation is plainly erroneous or inconsistent with the regulation or statute. *Auer*, 519 U.S. at 461. "Our review of the agency's interpretation in this context is therefore highly deferential." *Dickenson–Russell Coal*, 747 F.3d at 257 (citation and quotation marks omitted). "It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail." *Decker v. Nw. Envtl. Def. Ctr.*, ——U.S. ——, ——, 133 S.Ct. 1326, 1337, 185 L.Ed.2d 447 (2013). An agency's view need only be reasonable to warrant deference. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991) ("[I]t is axiomatic that the [agency's] interpretation need not be the best or most natural one by grammatical or other standards. Rather, the [agency's] view need be only reasonable to warrant deference.").

Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and were adopted unchanged by the Department in 1980. 45 Fed.Reg. 30802, 30955 (May 9, 1980). Two dictionaries from the drafting era inform our analysis of how the term "sex" was understood at that time. The first defines "sex" as "the character of being either male or female" or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished...." *American College Dictionary* 1109 (1970). The second defines "sex" as:

> ***7** the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness ....

Webster's Third New International Dictionary 2081 (1971).

Although these definitions suggest that the word "sex" was understood at the time the regulation was adopted to connote male and female and that maleness and femaleness were determined primarily by reference to the factors the district court termed "biological sex," namely reproductive organs, the definitions also suggest that a hard-and-fast binary division on the basis of reproductive organs—although useful in most cases—was not universally descriptive. [7] The dictionaries, therefore, used qualifiers such as reference to the "*sum* of" various factors, "*typical* dichotomous occurrence," and "*typically* manifested as maleness and femaleness." Section 106.33 assumes a student population composed of individuals of what has traditionally been understood as the usual "dichotomous occurrence" of male and female where the various indicators of sex all point in the same direction. It sheds little light on how exactly to determine the "character of being either male or female" where those indicators diverge. We conclude that the Department's interpretation of how § 106.33 and its underlying assumptions should apply to transgender individuals is not plainly erroneous or inconsistent with the text of the regulation. The regulation is silent as to which restroom transgender individuals are to

use when a school elects to provide sex-segregated restrooms, and the Department's interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects—or, in the words of an older dictionary, "the morphological, physiological, and behavioral peculiarities"—included in the term "sex."

D.

Finally, we consider whether the Department's interpretation of § 106.33 is the result of the agency's fair and considered judgment. Even a valid interpretation will not be accorded *Auer* deference where it conflicts with a prior interpretation, where it appears that the interpretation is no more than a convenient litigating position, or where the interpretation is a *post hoc* rationalization. *Christopher*, 132 S.Ct. at 2166 (citations omitted).

Although the Department's interpretation is novel because there was no interpretation as to how § 106.33 applied to transgender individuals before January 2015, "novelty alone is no reason to refuse deference" and does not render the current interpretation inconsistent with prior agency practice. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 131 S.Ct. 2254, 2263, 180 L.Ed.2d 96 (2011). As the United States explains, the issue in this case "did not arise until recently," *see id.*, because schools have only recently begun citing § 106.33 as justification for enacting new policies restricting transgender students' access to restroom facilities. The Department contends that "[i]t is to those 'newfound' policies that [the Department's] interpretation of the regulation responds." U.S. Br. 29. We see no reason to doubt this explanation. *See Talk Am., Inc.*, 131 S.Ct. at 2264.

***8** Nor is the interpretation merely a convenient litigating position. The Department has consistently enforced this position since 2014. *See* J.A. 55 n. 5 & n. 6 (providing examples of OCR enforcement actions to secure transgender students access to restrooms congruent with their gender identities). Finally, this interpretation cannot properly be considered a *post hoc* rationalization because it is in line with the existing guidances and regulations of a number of federal agencies—all of which provide that transgender individuals should be permitted access to the restroom that corresponds with their gender identities.[8] U.S. Br. 17 n. 5 & n. 6 (citing publications by the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, and the Office of Personnel Management). None of the *Christopher* grounds for withholding *Auer* deference are present in this case.

E.

We conclude that the Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case.[9] We reverse the district court's contrary conclusion and its resultant dismissal of G.G.'s Title IX claim.

F.

In many respects, we are in agreement with the dissent. We agree that "sex" should be construed uniformly throughout Title IX and its implementing regulations. We agree that it has indeed been commonplace and widely accepted to separate public restrooms, locker rooms, and shower facilities on the basis of sex. We agree that "an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts" are not involuntarily exposed.[10] Post at 56. It is not apparent to us, however, that the truth of these propositions undermines the conclusion we reach regarding the level of deference due to the Department's interpretation of its own regulations.

The Supreme Court commands the use of particular analytical frameworks when courts review the actions of the executive agencies. G.G. claims that he is entitled to use the boys' restroom pursuant to the Department's interpretation of its regulations implementing Title IX. We have carefully followed the Supreme Court's guidance in *Chevron*, *Auer*, and *Christopher* and have determined that the interpretation contained in the OCR letter is to be accorded controlling weight. In a case such as this, where there is no constitutional challenge to the regulation or agency interpretation, the weighing of privacy interests or safety concerns[11]—fundamentally questions of policy—is a task committed to the agency, not to the courts.

The Supreme Court's admonition in *Chevron* points to the balance courts must strike:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

***9** *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Not only may a subsequent administration choose to implement a different policy, but Congress may also, of course, revise Title IX explicitly to prohibit or authorize the course charted here by the Department regarding the use of restrooms by transgender students. To the extent the dissent critiques the result we reach today on policy grounds, we reply that, our *Auer* analysis complete, we leave policy formulation to the political branches.

III.

[14] **[15]** **[16]** G.G. also asks us to reverse the district court's denial of the preliminary injunction he sought which would have allowed him to use the boys' restroom during the pendency of this lawsuit. "To win such a preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir.2014) (citation omitted). We review a district court's denial of a preliminary injunction for abuse of discretion. *Id.* at 235. "A district court has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir.2006) (citation and quotations omitted). "We do not ask whether we would have come to the same conclusion as the district court if we were examining the matter *de novo*." *Id.* (citation omitted). Instead, "we reverse for abuse of discretion if we form a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Id.* (citations and quotations omitted).

The district court analyzed G.G.'s request only with reference to the third factor—the balance of hardships—and found that the balance of hardships did not weigh in G.G.'s favor. G.G. submitted two declarations in support of his complaint, one from G.G. himself and one from a medical expert, Dr. Randi Ettner, to explain what harms G.G. will suffer as a result of his exclusion from the boys' restroom. The district court refused to consider this evidence because it was "replete with inadmissible evidence including thoughts of others, hearsay, and suppositions." *G.G.*, 2015 WL 5560190, at *11.

[17] **[18]** The district court misstated the evidentiary standard governing preliminary injunction hearings. The district court stated: "The complaint is no longer the deciding factor, admissible evidence is the deciding factor. Evidence therefore must conform to the rules of evidence." *Id.* at *9. Preliminary injunctions, however, are governed by less strict rules of evidence:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.

***10** *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981); *see also Elrod v. Burns*, 427 U.S. 347, 350 n. 1, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (taking as true the "well-pleaded allegations of respondents' complaint and uncontroverted affidavits filed in support of the

motion for a preliminary injunction"); *compare* Fed.R.Civ.P. 56 (requiring affidavits supporting summary judgment to be "made on personal knowledge, [and to] set out facts that would be admissible in evidence"), *with* Fed R. Civ. P. 65 (providing no such requirement in the preliminary injunction context). Thus, although admissible evidence may be more persuasive than inadmissible evidence in the preliminary injunction context, it was error for the district court to summarily reject G.G.'s proffered evidence because it may have been inadmissible at a subsequent trial.

[19] Additionally, the district court completely excluded some of G.G.'s proffered evidence on hearsay grounds. The seven of our sister circuits to have considered the admissibility of hearsay in preliminary injunction proceedings have decided that the nature of evidence as hearsay goes to "weight, not preclusion" and have permitted district courts to "rely on hearsay evidence for the limited purpose of determining whether to award a preliminary injunction." *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir.2010); *see also Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir.2004); *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir.1997); *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir.1995) ("At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." (citation and internal quotations omitted)); *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir.1993) ("[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence."); *Asseo v. Pan Am. Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir.1986); *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir.1984). We see no reason for a different rule to govern in this Circuit. Because preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards, district courts may look to, and indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted.

Because the district court evaluated G.G.'s proffered evidence against a stricter evidentiary standard than is warranted by the nature and purpose of preliminary injunction proceedings to prevent irreparable harm before a full trial on the merits, the district court was "guided by erroneous legal principles." We therefore conclude that the district court abused its discretion when it denied G.G.'s request for a preliminary injunction without considering G.G.'s proffered evidence. We vacate the district court's denial of G.G.'s motion for a preliminary injunction and remand the case to the district court for consideration of G.G.'s evidence in light of the evidentiary standards set forth herein.

IV.

***11 [20] [21] [22]** Finally, G.G. requests that we reassign this case to a different district judge on remand. G.G. does not explicitly claim that the district judge is biased. Absent such a claim, reassignment is only appropriate in "unusual circumstances where both for the judge's sake and the appearance of justice an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality." *United States v. Guglielmi*, 929 F.2d 1001, 1007 (4th Cir.1991) (citation and internal quotation marks omitted). In determining whether such circumstances exist, a court should consider: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *Id.* (citation omitted).

G.G. argues that both the first and second *Guglielmi* factors are satisfied. He contends that the district court has pre-existing views which it would be unwilling to put aside in the face of contrary evidence about medical science generally and about "gender and sexuality in particular." Appellant's Br. 53. For example, the court accepted the Board's "mating" concern by noting:

> There are only two instincts—two. Everything else is acquired—everything. That is, the brain only has two instincts. One is called self-preservation, and the other is procreation. And procreation is the highest instinct in individuals who are in the latter part of their teen-age years. All of that is accepted by all medical

> science, as far as I can determine in reading information.

J.A. 85–86.

The district court also expressed skepticism that medical science supported the proposition that one could develop a urinary tract infection from withholding urine for too long. J.A. 111–12. The district court characterized gender dysphoria as a "mental disorder" and resisted several attempts by counsel for G.G. to clarify that it only becomes a disorder when left untreated. *See* J.A. 88–91; 101–02. The district court also seemed to reject G.G.'s representation of what it meant to be transgender, repeatedly noting that G.G. "wants" to be a boy and not a girl, but that "he is biologically a female." J.A. 103–04; *see also* J.A. 104 ("It's his mind. It's not physical that causes that, it's what he believes."). The district court's memorandum opinion, however, included none of the extraneous remarks or suppositions that marred the hearing.

Reassignment is an unusual step at this early stage of litigation. Although the district court did express opinions about medical facts and skepticism of G.G.'s claims, the record does not clearly indicate that the district judge would refuse to consider and credit sound contrary evidence. Further, although the district court has a distinct way of proceeding in court, the hearing record and the district court's written order in the case do not raise in our minds a question about the fundamental fairness of the proceedings, however idiosyncratic. The conduct of the district judge does not at this point satisfy the *Guglielmi* standard. We deny G.G.'s request for reassignment to a different district judge on remand.

V.

***12** For the foregoing reasons, the judgment of the district court is

REVERSED IN PART, VACATED IN PART, AND REMANDED.

DAVIS, Senior Circuit Judge, concurring:

I concur in Judge Floyd's fine opinion. I write separately, however, to note that while I am happy to join in the remand of this matter to the district court so that it may consider G.G.'s evidence under proper legal standards in the first instance, *this Court* would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record.

I.

In order to obtain a preliminary injunction, G.G. must demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of an injunction, (3) the balance of hardships tips in his favor, and (4) the requested injunction is in the public interest. *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir.2013) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). The record before us establishes that G.G. has done so.

A.

G.G. alleges that by singling him out for different treatment because he is transgender, the Board's restroom policy discriminates against him "on the basis of sex" in violation of Title IX. In light of the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination "on the basis of sex" in the context of analogous statutes and our holding here that the Department's interpretation of 34 C.F.R. § 106.33 is to be given controlling weight, G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316–19 (11th Cir.2011); *Smith v. City of Salem*, 378 F.3d 566, 573–75 (6th Cir.2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir.2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir.2000).

B.

In support of his claim of irreparable harm, G.G. submitted an affidavit to the district court describing the psychological distress he experiences when he is forced to use the single-stall restrooms or the restroom in the nurse's office. *See* J.A. 32–33. His affidavit also indicates that he has "repeatedly developed painful urinary tract infections" as a result of holding his urine in order to avoid using the restroom at school. *Id.*

An expert declaration by Dr. Randi Ettner, a psychologist specializing in working with children and adolescents with gender dysphoria, provides further support for G.G.'s claim of irreparable harm. In her affidavit, Dr. Ettner indicates that treating a transgender boy as male in some situations but not in others is "inconsistent with evidence-based medical practice and detrimental to the health and well-being of the child" and explains why access to a restroom appropriate to one's gender identity is important for transgender youth. J.A. 39. With respect to G.G. in particular, Dr. Ettner states that in her professional opinion, the Board's restroom policy "is currently causing emotional distress to an extremely vulnerable youth and placing G.G. at risk for accruing lifelong psychological harm." J.A. 41. In particular, Dr. Ettner opines that

> ***13** [a]s a result of the School Board's restroom policy, ... G.G. is put in the humiliating position of having to use a separate facility, thereby accentuating his 'otherness,' undermining his identity formation, and impeding his medically necessary social transition process. The shame of being singled out and stigmatized in his daily life every time he needs to use the restroom is a devastating blow to G.G. and places him at extreme risk for immediate and long-term psychological harm.

J.A. 42.

The Board offers nothing to contradict any of the assertions concerning irreparable harm in G.G.'s or Dr. Ettner's affidavits. Instead, its arguments focus on what is purportedly lacking from G.G.'s presentation in support of his claim of irreparable harm, such as "evidence that [his feelings of dysphoria, anxiety, and distress] would be lessened by using the boy[s'] restroom," evidence from his treating psychologist, medical evidence, and an opinion from Dr. Ettner "differentiating between the distress that G.G. may suffer by not using the boy[s'] bathroom during the course of this litigation and the distress that he has apparently been living with since age 12." Br. Appellee 42–43. As to the alleged deficiency concerning Dr. Ettner's opinion, the Board's argument is belied by Dr. Ettner's affidavit itself, which, as quoted above, provides her opinion about the psychological harm that G.G. is experiencing "[a]s a result of the School Board's restroom policy." J.A. 42. With respect to the other purported inadequacies, the absence of such evidence does nothing to undermine the uncontroverted statements concerning the daily psychological harm G.G. experiences as a result of the Board's policy or Dr. Ettner's unchallenged opinion concerning the significant long-term consequences of that harm. Moreover, the Board offers no argument to counter G.G.'s averment that he has repeatedly contracted a urinary tract infection as a result of holding his urine to avoid using the restroom at school.

The uncontroverted facts before the district court demonstrate that as a result of the Board's restroom policy, G.G. experiences daily psychological harm that puts him at risk for long-term psychological harm, and his avoidance of the restroom as a result of the Board's policy puts him at risk for developing a urinary tract infection as he has repeatedly in the past. G.G. has thus demonstrated that he will suffer irreparable harm in the absence of an injunction.

C.

Turning to the balance of the hardships, G.G. has shown that he will suffer irreparable harm without the requested injunction. On the other end of the scale, the Board contends that other students' constitutional right to privacy will be imperiled by G.G.'s presence in the boys' restroom.

As the majority opinion points out, G.G.'s use of the restroom does not implicate the unconstitutional actions involved in the cases cited by the dissent. Moreover, students' unintentional exposure of their genitals to others using the restroom has already been largely, if not entirely, remedied by the alterations to the school's restrooms already undertaken by the Board. To the extent that a student simply objects to using the restroom in the presence of a transgender student even where there is no possibility that either student's genitals will be exposed, all students have access to the single-stall restrooms. For other students, using the single-stall restrooms carries no stigma whatsoever, whereas for G.G., using those same restrooms is tantamount to humiliation and a continuing mark of difference among his fellow students. The minimal or non-existent hardship to other students of using the single-stall restrooms if they object to G.G.'s presence in the communal restroom thus does not tip the scale in the Board's favor. The balance of hardships weighs heavily toward G.G.

D.

***14** Finally, consideration of the public interest in granting or denying the preliminary injunction favors G.G. Having concluded that G.G. has demonstrated a likelihood of success on the merits of his Title IX claim, denying the requested injunction would permit the Board to continue violating G.G.'s rights under Title IX for the pendency of this case. Enforcing G.G.'s right to be free from discrimination on the basis of sex in an educational institution is plainly in the public interest. *Cf. Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir.2002) (citation omitted) (observing that upholding constitutional rights is in the public interest).

The Board contends that the public interest lies in allowing this issue to be determined by the legislature, citing pending legislation before Congress addressing the issue before the Court. But, as discussed above, the weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes, as interpreted by the Supreme Court. The existence of proposed legislation that, if passed, would address the question before us does not justify forcing G.G. to suffer irreparable harm when he has demonstrated that he is likely to succeed on the merits of his claims under current federal law.

II.

Based on the evidence presented to the district court, G.G. has satisfied all four prongs of the preliminary injunction inquiry. When the record before us supports entry of a preliminary injunction—as it amply does here—we have not hesitated to act to prevent irreparable injury to a litigant before us. *See, e.g., League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 248 (4th Cir.2014) (expressly observing that appellate courts have the power to vacate a denial of a preliminary injunction and direct entry of an injunction); *Eisenberg ex rel. Eisenberg v. Montgomery Cty. Pub. Schs.*, 197 F.3d 123, 134 (4th Cir.1999) (directing entry of injunction "because the record clearly establishes the plaintiff's right to an injunction and [an evidentiary] hearing would not have altered the result").

Nevertheless, it is right and proper that we defer to the district court in this instance. It is to be hoped that the district court will turn its attention to this matter with the urgency the case poses. Under the circumstances here, the appropriateness and necessity of such prompt action is plain. By the time the district court issues its decision, G.G. will have suffered the psychological harm the injunction sought to prevent for an entire school year.

With these additional observations, I concur fully in Judge Floyd's thoughtful and thorough opinion for the panel.

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in Part IV of the court's opinion. With respect to whether G.G. stated a claim under Title IX and whether the district court abused its discretion in denying G.G's motion for a preliminary injunction, I would affirm the ruling of the district court dismissing G.G.'s Title IX claim and denying his motion for a preliminary injunction. I therefore dissent from the majority's decision on those issues.

***15** G.G., a transgender boy who is 16, challenges as discriminatory, under the Equal Protection Clause and Title IX of the Education Amendments of 1972, his high school's policy for assigning students to restrooms and locker rooms based on biological sex. The school's policy provides: (1) that the girls' restrooms and locker rooms are designated for use by students who are biologically female; (2) that the boys' restrooms and locker rooms are designated for use by students who are biologically male; and (3) that all students, regardless of their sex, are authorized to use the school's three single-stall unisex restrooms, which the school created to accommodate transgender students. Under this policy, G.G., who is biologically female but who identifies as male, is authorized to use the girls' restrooms and locker rooms and the unisex restrooms. He contends, however, that the policy discriminates against him because it denies him, as one who identifies as male, the use of the boys' restrooms, and he seeks an injunction compelling the high school to allow him to use the boys' restrooms.

The district court dismissed G.G.'s Title IX claim, explaining that the school complied with Title IX and its regulations, which permit schools to provide separate living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex," so long as the facilities are "comparable." 20 U.S.C. § 1686; 34 C.F.R. §§ 106.32(b), 106.33.

Strikingly, the majority now reverses the district court's ruling, without any supporting case law, and concludes that when Title IX and its regulations provide for separate living

facilities, restrooms, locker rooms, and shower facilities on the basis of sex, the statute's and regulations' use of the term "sex" means a person's gender identity, not the person's biological status as male or female. To accomplish its goal, the majority relies entirely on a 2015 letter sent by the Department of Education's Office for Civil Rights to G.G., in which the Office for Civil Rights stated, "When a school elects to separate or treat students differently on the basis of sex [when providing restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes], a school generally *must treat transgender students consistent with their gender identity*." (Emphasis added). Accepting that new definition of the statutory term "sex," the majority's opinion, for the first time ever, holds that a public high school may not provide separate restrooms and locker rooms on the basis of biological sex. Rather, it must now allow a biological male student who identifies as female to use the girls' restrooms and locker rooms and, likewise, must allow a biological female student who identifies as male to use the boys' restrooms and locker rooms. This holding completely tramples on all universally accepted protections of privacy and safety that are based on the anatomical differences between the sexes. And, unwittingly, it also tramples on the very concerns expressed by G.G., who said that he should not be forced to go to the girls' restrooms because of the "severe psychological distress" it would inflict on him and because female students had "reacted negatively" to his presence in girls' restrooms. Surely biological males who identify as females would encounter similar reactions in the girls' restroom, just as students physically exposed to students of the opposite biological sex would be likely to experience psychological distress. As a result, schools would no longer be able to protect physiological privacy as between students of the opposite biological sex.

***16** This unprecedented holding overrules custom, culture, and the very demands inherent in human nature for privacy and safety, which the separation of such facilities is designed to protect. More particularly, it also misconstrues the clear language of Title IX and its regulations. And finally, it reaches an unworkable and illogical result.

The recent Office for Civil Rights letter, moreover, which is *not* law but which is the only authority on which the majority relies, states more than the majority acknowledges. In the sentence following the sentence on which the majority relies, the letter states that, to accommodate transgender students, schools are encouraged "to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities [as permitted by Title IX's regulations]." This appears to approve the course that G.G.'s school followed when it created unisex restrooms in addition to the boys' and girls' restrooms it already had.

Title IX and its implementing regulations are not ambiguous. In recognition of physiological privacy and safety concerns, they allow schools to provide "separate living facilities for the different sexes," 20 U.S.C. § 1686, provided that the facilities are "proportionate" and "comparable," 34 C.F.R. § 106.32(b), and to provide "separate toilet, locker room, and shower facilities on the basis of sex," again provided that the facilities are "comparable," 34 C.F.R. § 106.33. Because the school's policy that G.G. challenges in this action comports with Title IX and its regulations, I would affirm the district court's dismissal of G.G.'s Title IX claim.

I

The relevant facts are not in dispute. G.G. is a 16 year-old who attends Gloucester High School in Gloucester County, Virginia. He is biologically female, but "did not feel like a girl" from an early age. Still, he enrolled at Gloucester High School for his freshman year as a female.

During his freshman year, however, G.G. told his parents that he considered himself to be transgender, and shortly thereafter, at his request, he began therapy with a psychologist, who diagnosed him with gender dysphoria, a condition of distress brought about by the incongruence of one's biological sex and gender identity.

In August 2014, before beginning his sophomore year, G.G. and his mother met with the principal and guidance counselor at Gloucester High School to discuss his need, as part of his treatment, to socially transition at school. The school accommodated all of his requests. Officials changed school records to reflect G.G.'s new male name; the guidance counselor supported G.G.'s sending an email to teachers explaining that he was to be addressed using his new name and to be referred to using male pronouns; G.G. was permitted to fulfill his physical education requirement through a home-bound program, as he preferred not to use the school's locker rooms; and the school allowed G.G. to use a restroom in the nurse's office "because [he] was unsure how other students would react to [his] transition." G.G. was grateful for the school's "welcoming environment." As he stated, "no teachers, administrators, or staff at Gloucester High School

expressed any resistance to calling [him] by [his] legal name or referring to [him] using male pronouns." And he was "pleased to discover that [his] teachers and the vast majority of [his] peers respected the fact that [he is] a boy."

***17** As the school year began, however, G.G. found it "stigmatizing" to continue using the nurse's restroom, and he requested to use the boys' restrooms. The principal also accommodated this request. But the very next day, the School Board began receiving "numerous complaints from parents and students about [G.G.'s] use of the boys' restrooms." The School Board thus faced a dilemma. It recognized G.G.'s feelings, as he expressed them, that "[u]sing the girls' restroom[s][was] not possible" because of the "severe psychological distress" it would inflict on him and because female students had previously "reacted negatively" to his presence in the girls' restrooms. It now also had to recognize that boys had similar feelings caused by G.G.'s use of the boys' restrooms, although G.G. stated that he continued using the boys' restrooms for some seven weeks without personally receiving complaints from fellow students.

The Gloucester County School Board considered the problem and, after two public meetings, adopted a compromise policy, as follows:

> Whereas the GCPS recognizes that some students question their gender identities, and
>
> Whereas the GCPS encourages such students to seek support, advice, and guidance from parents, professionals and other trusted adults, and
>
> Whereas the GCPS seeks to provide a safe learning environment for all students and to protect the privacy of all students, therefore
>
> It shall be the practice of the GCPS to provide male and female restroom and locker room facilities in its schools, and the use of said facilities shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.

Gloucester High School promptly implemented the policy and created three single-stall unisex restrooms for use by all students, regardless of their biological sex or gender identity.

In December 2014, G.G. sought an opinion letter about his situation from the U.S. Department of Education's Office for Civil Rights, and on January 15, 2015, the Office responded, stating, as relevant here:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity. [The Office for Civil Rights] also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities.

G.G. commenced this action in June 2015, alleging that the Gloucester County School Board's policy was discriminatory, in violation of the U.S. Constitution's Equal Protection Clause and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* He sought declaratory relief, injunctive relief, and damages. With his complaint, G.G. also filed a motion for a preliminary injunction "requiring the School Board to allow [him] to use the boys' restrooms at school."

***18** The district court dismissed G.G.'s Title IX claim because Title IX's implementing regulations permit schools to provide separate restrooms "on the basis of sex." The court also denied G.G.'s motion for a preliminary injunction. As to the Equal Protection claim, the court has not yet ruled on whether G.G. failed to state a claim, but, at the hearing on the motion for a preliminary injunction, it indicated that it "will hear evidence" and "get a date set" for trial to better assess the claim.

From the district court's order denying G.G.'s motion for a preliminary injunction, G.G. filed this appeal, in which he also challenges the district court's Title IX ruling as inextricably intertwined with the district court's denial of the motion for a preliminary injunction.

II

G.G. recognizes that persons who are born biologically female "typically" identify psychologically as female, and likewise, that persons who are born biologically male "typically" identify as male. Because G.G. was born biologically female but identifies as male, he characterizes himself as a transgender male. He contends that because he is transgender, the School Board singled him out for "different and unequal treatment," "discriminat[ing] against him based on sex [by denying him use of the boys' restrooms], in violation of Title IX." He argues, "discrimination against transgender people is necessarily discrimination based on sex because it is impossible to treat people differently based on their transgender status without taking their sex into account." He concludes that the School Board's policy addressing restrooms and locker rooms thus illegally fails to include transgender persons on the basis of their gender identity. In particular, he concludes that he is "prevent [ed] ... from using the same restrooms as other students and relegat[ed] ... to separate, single-stall facilities."

As noted, the School Board's policy designates the use of restrooms and locker rooms based on the student's biological sex—biological females are assigned to the girls' restrooms and unisex restrooms; biological males are assigned to the boys' restrooms and unisex restrooms. G.G. is thus assigned to the girls' restrooms and the unisex restrooms, but is denied the use of the boys' restrooms. He asserts, however, that because neither he nor the girls would accept his use of the girls' restroom, he is relegated to the unisex restrooms, which is stigmatizing.

The School Board contends that it is treating all students the same way, as it explains:

> The School Board's policy does not discriminate against any class of students. Instead, the policy was developed to treat all students and situations the same. To respect the safety and privacy of all students, the School Board has had a long-standing practice of limiting the use of restroom and locker room facilities to the corresponding biological sex of the students. The School Board also provides three single-stall bathrooms for any student to use regardless of his or her biological sex. Under the School Board's restroom policy, G.G. is being treated like every other student in the Gloucester Schools. All students have two choices. Every student can use a restroom associated with their anatomical sex, whether they are boys or girls. If students choose not to use the restroom associated with their anatomical sex, the students can use a private, single-stall restroom. No student is permitted to use the restroom of the opposite sex. As a result, all students, including female to male transgender and male to female transgender students, are treated the same.

***19** While G.G. has pending a claim under the Equal Protection Clause (on which the district court has not yet ruled), only his preliminary injunction challenge and Title IX claim are before us at this time.

Title IX provides:

> No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ....

20 U.S.C. § 1681(a) (emphasis added). The Act, however, provides, "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities *for the different sexes*." *Id.* § 1686 (emphasis added); *see also* 34 C.F.R. § 106.32(b) (permitting schools to provide "separate housing *on the basis of sex* " as long as the housing is "proportionate" and "comparable" (emphasis added)). Similarly, implementing Regulation 106.33 provides for particular separate facilities, as follows:

> A recipient may provide separate toilet, locker room, and shower facilities *on the basis of sex*, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

34 C.F.R. § 106.33 (emphasis added). Thus, although Title IX and its regulations provide generally that a school receiving federal funds may not discriminate on the basis of sex, they also specify that a school does not violate the Act by providing, on the basis of sex, separate living facilities, restrooms, locker rooms, and shower facilities.

While G.G. only challenges the definition and application of the term "sex" with respect to separate restrooms, acceptance of his argument would necessarily change the definition of "sex" for purposes of assigning separate living facilities, locker rooms, and shower facilities as well. All are based on "sex," a term that must be construed uniformly throughout Title IX and its implementing regulations. *See Sullivan v. Stroop*, 496 U.S. 478, 484, 110 S.Ct. 2499, 110 L.Ed.2d 438 (1990) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks and citations omitted)); *In re Total Realty Mgmt., LLC*, 706 F.3d 245, 251 (4th Cir.2013) ("Canons of construction ... require that, to the extent possible, identical terms or phrases used in different parts of the same statute be interpreted as having the same meaning. This presumption of consistent usage ... ensure[s] that the statutory scheme is coherent and consistent" (alterations in original) (internal quotation marks and citations omitted)); *see also Kentuckians for Commonwealth Inc. v. Riverburgh*, 317 F.3d 425, 440 (4th Cir.2003) ("[B]ecause a regulation must be consistent with the statute it implements, any interpretation of a regulation naturally must accord with the statute as well" (quoting John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L.Rev. 612, 627 n. 78 (1996))).

***20** Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females. An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not exposed to persons of the opposite biological sex. Indeed, courts have consistently recognized that the need for such privacy is inherent in the nature and dignity of humankind. *See, e.g., Doe v. Luzerne Cnty.*, 660 F.3d 169, 176–77 (3d Cir.2011) (recognizing that an individual has "a constitutionally protected privacy interest in his or her partially clothed body" and that this "reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir.2008) (explaining that "the constitutional right to privacy ... includes the right to shield one's body from exposure to viewing by the opposite sex"); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir.2005) ("Students of course have a significant privacy interest in their unclothed bodies"); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir.1992) (explaining that "[t]he right to bodily privacy is fundamental" and that "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir.1989) (recognizing that, even though inmates in prison "surrender many rights of privacy," their "special sense of privacy in their genitals" should not be violated through exposure unless "reasonably necessary" and explaining that the "involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating").

Moreover, we have explained that separating restrooms based on "acknowledged differences" between the biological sexes serves to protect this important privacy interest. *See Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir.1993) (noting "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns"). Indeed, the Supreme Court recognized, when ordering an all-male Virginia college to admit female students, that such a remedy "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex." *United States v. Virginia*, 518 U.S. 515, 550 n. 19, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). Such privacy was and remains necessary because of the inherent "[p]hysical differences between men and women," which, as the Supreme Court explained, are "enduring" and render "the two sexes ... not fungible," *id.* at 533 (distinguishing sex from race and national origin), not because of "one's sense of oneself as belonging to a particular gender," as G.G. and the government as amicus contend.

***21** Thus, Title IX's allowance for the separation, based on sex, of living facilities, restrooms, locker rooms, and shower facilities rests on the universally accepted concern for bodily privacy that is founded on the biological differences between the sexes. This privacy concern is also linked to safety concerns that could arise from sexual responses prompted by students' exposure to the private body parts of students of the other biological sex. Indeed, the School Board cited

these very reasons for its adoption of the policy, explaining that it separates restrooms and locker rooms to promote *the privacy and safety* of minor children, pursuant to its "responsibility to its students to ensure their privacy while engaging in personal bathroom functions, disrobing, dressing, and showering outside of the presence of members of the opposite sex. [That the school has this responsibility] is particularly true in an environment where children are still developing, both emotionally and physically."

The need to protect privacy and safety between the sexes based on physical exposure would not be present in the same quality and degree if the term "sex" were to encompass only a person's gender identity. Indeed, separation on this basis would function nonsensically. A biological male identifying as female could hardly live in a girls' dorm or shower in a girls' shower without invading physiological privacy needs, and the same would hold true for a biological female identifying as male in a boys' dorm or shower. G.G.'s answer, of course, is that he is not challenging the separation, on the basis of sex, of living facilities, locker rooms, and shower facilities, but only of restrooms, where the risks to privacy and safety are far reduced. This effort to limit the scope of the issue apparently sways the majority, as it cabins its entire discussion to "restroom access by transgender individuals." *Ante* at 26. But this effort to restrict the effect of G.G.'s argument hardly matters when the term "sex" would have to be applied uniformly throughout the statute and regulations, as noted above and, indeed, as agreed to by the majority. *See ante* at 26.

The realities underpinning Title IX's recognition of separate living facilities, restrooms, locker rooms, and shower facilities are reflected in the plain language of the statute and regulations, which is not ambiguous. The text of Title IX and its regulations allowing for separation of each facility "on the basis of sex" employs the term "sex" as was generally understood at the time of enactment. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (explaining that courts should not defer to an agency's interpretation of its own regulation if an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent *at the time of the regulation's promulgation* " (emphasis added) (internal quotation marks and citation omitted)); *see also Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (discussing dictionary definitions of the regulation's "critical phrase" to help determine whether the agency's interpretation was "plainly erroneous or inconsistent with the regulation" (internal quotation marks and citation omitted)). Title IX was enacted in 1972 and the regulations were promulgated in 1975 and readopted in 1980, and during that time period, virtually every dictionary definition of "sex" referred to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions. *See, e.g.*, *The Random House College Dictionary* 1206 (rev. ed.1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *Webster's New Collegiate Dictionary* 1054 (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); *American Heritage Dictionary* 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions"); *Webster's Third New International Dictionary* 2081 (1971) ("the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change ..."); *The American College Dictionary* 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished ..."). Indeed, although the contemporaneous meaning controls our analysis, it is notable that, *even today*, the term "sex" continues to be defined based on the physiological distinctions between males and females. *See, e.g.*, *Webster's New World College Dictionary* 1331 (5th ed.2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); *The American Heritage Dictionary* 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); *Merriam–Webster's Collegiate Dictionary* 1140 (11th ed.2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures"). Any new definition of sex that excludes reference to physiological differences, as the majority now attempts to introduce, is simply an unsupported reach to rationalize a desired outcome.

***22** Thus, when the School Board assigned restrooms and locker rooms on the basis of biological sex, it was clearly complying precisely with the unambiguous language of Title IX and its regulations.

Despite the fact that the majority offers no case to support the definition of "sex" as advanced by G.G. and supported by the government as amicus, the majority nonetheless accepts that the meaning of the term "sex" in Title IX and its regulations refers to a person's "gender identity" simply to accommodate G.G.'s wish to use the boys' restrooms. But, it is not immediately apparent whether G.G., the government, and the majority contend that the term "sex" as used in Title IX and its regulations refers (1) to *both* biological sex *and* gender identity; (2) to *either* biological sex *or* gender identity; or (3) to *only* "gender identity." In his brief, G.G. seems to take the position that the term "sex" *at least* includes a reference to gender identity. This is the position taken in his complaint when he alleges, "Under Title IX, discrimination 'on the basis of sex' encompasses both discrimination based on biological differences between men and women and discrimination based on gender nonconformity." The government seems to be taking the same position, contending that the term "sex" "encompasses both sex—that is, the biological differences between men and women—*and* gender [identity]." (Emphasis in original). The majority, however, seems to suggest that the term "sex" refers only to gender identity, as it relies solely on the statement in the Office for Civil Rights' letter of January 7, 2015, which said, "When a school elects to separate or treat students differently on the basis of sex [for the purpose of providing restrooms, locker rooms, and other facilities], a school generally must treat transgender students consistent with *their gender identity*." (Emphasis added). But, regardless of where G.G., the government, and the majority purport to stand on this question, the clear effect of their new definition of sex not only tramples the relevant statutory and regulatory language and disregards the privacy concerns animating that text, it is also illogical and unworkable.

If the term "sex" as used in the statute and regulations refers to *both* biological sex *and* gender identity, then, while the School Board's policy is in compliance with respect to most students, whose biological sex aligns with their gender identity, for students whose biological sex and gender identity do not align, no restroom or locker room separation could ever be accomplished consistent with the regulation because a transgender student's use of a boys' or girls' restroom or locker room could not satisfy the conjunctive criteria. Given that G.G. and the government do not challenge schools' ability to separate restrooms and locker rooms for male and female students, surely they cannot be advocating an interpretation that places schools in an impossible position. Moreover, such an interpretation would deny G.G. the right to use either the boys' or girls' restrooms, a position that G.G. does not advocate.

***23** If the position of G.G., the government, and the majority is that the term "sex" means *either* biological sex *or* gender identity, then the School Board's policy is in compliance because it segregates the facilities on the basis of biological sex, a satisfactory component of the disjunctive.

Therefore, when asserting that G.G. must be allowed to use the boys' restrooms and locker rooms as consistent with his gender identity, G.G., the government, and the majority must be arguing that "sex" as used in Title IX and its regulations means *only* gender identity. But this construction would, in the end, mean that a school could never meaningfully provide separate restrooms and locker rooms on the basis of sex. Biological males and females whose gender identity aligned would be required to use the same restrooms and locker rooms as persons of the opposite biological sex whose gender identity did not align. With such mixed use of separate facilities, no purpose would be gained by designating a *separate* use "on the basis of sex," and privacy concerns would be left unaddressed.

Moreover, enforcement of any separation would be virtually impossible. Basing restroom access on gender identity would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity, which the government concedes would render Title IX and its regulations nonsensical:

> Certainly a school that has created separate restrooms for boys and girls could not decide that only students who dress, speak, and act sufficiently masculine count as boys entitled to use the boys' restroom, or that only students who wear dresses, have long hair, and act sufficiently feminine may use the girls' restroom.

Yet, by interpreting Title IX and the regulations as "requiring schools to treat students consistent with their gender identity," and by disallowing schools from treating students based on their biological sex, the government's position would have precisely the effect the government finds to be at odds with common sense.

Finally, in arguing that he should not be assigned to the girls' restrooms, G.G. states that "it makes no sense to place

a transgender boy in the girls' restroom in the name of protecting student privacy" because "girls objected to his presence in the girls' restrooms because they perceived him as male." But the same argument applies to his use of the boys' restrooms, where boys felt uncomfortable because they perceived him as female. In any scenario based on gender identity, moreover, there would be no accommodation for the recognized need for physiological privacy.

In short, it is impossible to determine how G.G., the government, and the majority would apply the provisions of Title IX and the implementing regulations that allow for the separation of living facilities, restrooms, locker rooms, and shower facilities "on the basis of sex" if "sex" means gender identity.

***24** The Office for Civil Rights letter, on which the majority exclusively relies, hardly provides an answer. In one sentence it states that schools "generally must treat transgender students consistent with their gender identity," whatever that means, and in the next sentence, it encourages schools to provide "gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities." While the first sentence might be impossible to enforce without destroying all privacy-serving separation, the second sentence encourages schools, such as Gloucester High School, to provide unisex single-stall restrooms for any students who are uncomfortable with sex-separated facilities, as the school in fact provided.

As it stands, Title IX and its implementing regulations authorize schools to separate, *on the basis of sex*, living facilities, restrooms, locker rooms, and shower facilities, which must allow for separation on the basis of biological sex. Gloucester High School thus clearly complied with the statute and regulations. But, as it did so, it was nonetheless sensitive to G.G.'s gender transition, accommodating virtually every wish that he had. Indeed, he initially requested and was granted the use of the nurse's restroom. And, after both girls and boys objected to his using the girls' and boys' restrooms, the school provided individual unisex restrooms, as encouraged by the letter from the Office for Civil Rights. Thus, while Gloucester High School made a good-faith effort to accommodate G.G. and help him in his transition, balancing its concern for him with its responsibilities to all students, it still acted legally in maintaining a policy that provided all students with physiological privacy and safety in restrooms and locker rooms.

Because the Gloucester County School Board did not violate Title IX and Regulation 106.33 in adopting the policy for separate restrooms and locker rooms, I would affirm the district court's decision dismissing G.G.'s Title IX claim and therefore dissent.

I also dissent from the majority's decision to vacate the district court's denial of G.G.'s motion for a preliminary injunction. As the Supreme Court has consistently explained, "[a] preliminary injunction is an extraordinary remedy" that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief," and " '[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy.' " *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22–24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (quoting *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982)). Given the facts that the district court fully and fairly summarized in its opinion, including the hardships expressed both by G.G. and by other students, I cannot conclude that we can "form a definite and firm conviction that the court below committed a clear error of judgment," *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 277 (4th Cir.2006) (quotation marks and citation omitted), particularly when we are only now expressing as binding law an evidentiary standard that the majority asserts the district court violated.

***25** As noted, however, I concur in Part IV of the court's opinion.

All Citations

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Footnotes

1 The World Professional Association for Transgender Health (WPATH) has established Standards of Care for individuals with gender dysphoria. J.A. 37. These Standards of Care are accepted as authoritative by organizations such as the American Medical Association and the American Psychological Association. *Id.* The WPATH Standards of Care do not permit sex reassignment surgery for persons who are under the legal age of majority. J.A. 38.

2 G.G. does not participate in the school's physical education programs. He does not seek here, and never has sought, use of the boys' locker room. Only restroom use is at issue in this case.

3 We decline the Board's invitation to preemptively dismiss G.G.'s equal protection claim before it has been fully considered by the district court. "[W]e are a court of review, not of first view." *Decker v. Nw. Envtl. Def. Ctr.*, —— U.S. ——, ——, 133 S.Ct. 1326, 1335, 185 L.Ed.2d 447 (2013) (citation and quotation marks omitted). We will not proceed to the merits of G.G.'s equal protection claim on appeal without the benefit of the district court's prior consideration.

4 The Board suggests that a restroom may not be educational in nature and thus is not an educational program covered by Title IX. Appellee's Br. 35 (quoting *Johnston v. Univ. of Pittsburgh*, 97 F.Supp.3d 657, 682 (W.D.Pa.2015)). The Department's regulation pertaining to "Education programs or activities" provides:

> Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:
>
> (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
>
> (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
>
> (3) Deny any person any such aid, benefit, or service;
>
> ...
>
> (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31(b). We have little difficulty concluding that access to a restroom at a school, under this regulation, can be considered either an "aid, benefit, or service" or a "right, privilege, advantage, or opportunity," which, when offered by a recipient institution, falls within the meaning of "educational program" as used in Title IX and defined by the Department's implementing regulations.

5 The opinion letter cites to OCR's December 2014 "Questions and Answers on Title IX and Single–Sex Elementary and Secondary Classes and Extracurricular Activities." This document, denoted a "significant guidance document" per Office of Management and Budget regulations, states: "All students, including transgender students and students who do not conform to sex stereotypes, are protected from sex-based discrimination under Title IX. Under Title IX, a recipient generally must treat transgender students consistent with their gender identity in all aspects of the planning, implementation, enrollment, operation, and evaluation of single-sex classes." Office of Civil Rights, Dept. of Educ., Questions and Answers on Title IX and Single–Sex Elementary and Secondary Classes and Extracurricular Activities 25 (2014) *available at* http://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf.

The dissent suggests that we ignore the part of OCR's opinion letter in which the agency "also encourages schools to offer the use of gender-neutral, individual-user facilities to any student who does not want to use shared sex-segregated facilities," as the Board did here. Post at 66. However, because G.G. *does* want to use shared sex-segregated facilities, the agency's suggestion regarding students who *do not* want to use such shared sex-segregated facilities is immaterial to the resolution of G.G.'s claim. Nothing in today's opinion restricts any school's ability to provide individual-user facilities.

6 For example, § 106.32(b)(2) provides that "[h]ousing provided ... to students of one sex, when compared to that provided to students of the other sex, shall be as a whole: proportionate in quantity ... and [c]omparable in quality and cost to the student"; § 106.37(a)(3) provides that an institution generally cannot "[a]pply any rule ... concerning eligibility [for financial assistance] which treats persons of one sex differently from persons of the other sex with regard to marital or parental status"; and § 106.41(b) provides that "where [an institution] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex ... members of the excluded sex must be allowed to try-out for the team offered ...."

7 Modern definitions of "sex" also implicitly recognize the limitations of a nonmalleable, binary conception of sex. For example, Black's Law Dictionary defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender." *Black's Law Dictionary* 1583 (10th ed.2014). The American Heritage Dictionary includes in the definition of "sex" "[o]ne's identity as either female or male." *American Heritage Dictionary* 1605 (5th ed.2011).

8 We disagree with the dissent's suggestion that the result we reach today renders the enforcement of separate restroom facilities impossible because it "would require schools to assume gender identity based on appearances, social expectations, or explicit declarations of identity." Post at 65. Accepting the Board's position would equally require the school to assume "biological sex" based on "appearances, social expectations, or explicit declarations of [biological sex]." Certainly, no one is suggesting mandatory verification of the "correct" genitalia before admittance to a restroom. The

Department's vision of sex-segregated restrooms which takes account of gender identity presents no greater "impossibility of enforcement" problem than does the Board's "biological gender" vision of sex-segregated restrooms.

9 The Board urges us to reach a contrary conclusion regarding the validity of the Department's interpretation, citing *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.,* 97 F.Supp. 657 (W.D.Pa.2015). Although we recognize that the *Johnston* court confronted a case similar in most material facts to the one before us, that court did not consider the Department's interpretation of § 106.33. Because the *Johnston* court did not grapple with the questions of administrative law implicated here, we find the Title IX analysis in *Johnston* to be unpersuasive.

10 We doubt that G.G.'s use of the communal restroom of his choice threatens the type of constitutional abuses present in the cases cited by the dissent. For example, G.G.'s use—or for that matter any individual's appropriate use—of a restroom will not involve the type of intrusion present in *Brannum v. Overton Cty. Sch. Bd.,* 516 F.3d 489, 494 (6th Cir.2008) (involving the videotaping of students dressing and undressing in school locker rooms), *Beard v. Whitmore Lake Sch. Dist.,* 402 F.3d 598, 604 (6th Cir.2005) (involving the indiscriminate strip searching of twenty male and five female students), or *Supelveda v. Ramirez,* 967 F.2d 1413, 1416 (9th Cir.1992) (involving a male parole officer forcibly entering a bathroom stall with a female parolee to supervise the provision of a urine sample).

11 The dissent accepts the Board's invocation of amorphous safety concerns as a reason for refusing deference to the Department's interpretation. We note that the record is devoid of any evidence tending to show that G.G.'s use of the boys' restroom creates a safety issue. We also note that the Board has been, perhaps deliberately, vague as to the nature of the safety concerns it has—whether it fears that it cannot ensure G.G.'s safety while in the restroom or whether it fears G.G. himself is a threat to the safety of others in the restroom. We are unconvinced of the existence of danger caused by "sexual responses prompted by students' exposure to the private body parts of students of the other biological sex." Post at 58. The same safety concern would seem to require segregated restrooms for gay boys and girls who would, under the dissent's formulation, present a safety risk because of the "sexual responses prompted" by their exposure to the private body parts of other students of the same sex in sex-segregated restrooms.

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