IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; **C.A.**, a minor, by and through her parent and guardian, **N.A.**; **A.M.**, a minor, by and through her parents and guardians, **S.M.** and **R.M.**; **N.G.**, a minor, by and through her parent and guardian, **R.G.**; **A.V.**, a minor, by and through her parents and guardians, **T.V.** and **A.T.V.**; and **B.W.**, a minor, by and through his parents and guardians, **D.W.** and **V.W.**, Plaintiffs,	)	Case No. 16-cv-4945
v.	)	Judge Jorge L. Alonso
UNITED STATES DEPARTMENT OF EDUCATION; **JOHN B. KING, JR.**, in his official capacity as United States Secretary of Education; **UNITED STATES DEPARTMENT OF JUSTICE**; **LORETTA E. LYNCH**, in her official capacity as United States Attorney General, and **SCHOOL DIRECTORS OF TOWNSHIP HIGH SCHOOL DISTRICT 211, COUNTY OF COOK AND STATE OF ILLINOIS**, Defendants.	)	Magistrate Judge Jeffrey T. Gilbert

DEFENDANT BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 211'S MOTION AND MEMORANDUM TO STRIKE ALLEGATIONS IN PLAINTIFFS' REPLY MEMORANDUM

Defendant Board of Education of Township High School District 211, by its attorneys, requests that the Court strike certain factual allegations contained in Plaintiffs' Reply Memorandum in Support of their Motion for Preliminary Injunction. In support of this motion, the District states as follows.

Relevant Background

In response to the Board's Request to Conduct Fact Discovery, Plaintiffs declared that their claims were based on the mere "risk" that biological males may be present in the girls' locker room or bathroom without regard to any actual evidence or facts as to what has occurred

in District locker rooms or restrooms or how those events have impacted Plaintiffs. Dkt. 50, p. 3; Dkt. 78-2, at 9-10, 16-18. Plaintiffs described their claims as follows:

> Plaintiffs' preliminary injunction motion places before this Court two questions of law related to the activities of the District. First, does letting a biological male use the girls' locker rooms and restrooms, and so subjecting the Girl Plaintiffs to the risk of compelled exposure of their bodies to the opposite biological sex, violate the Girl Plaintiffs' constitutional right to privacy? Second, does letting a biological male use these private female facilities create a hostile environment for the Girl Plaintiffs, in violation of Title IX, and does offering the Girl Plaintiffs incomparable facilities as compared to boy students violate Title IX? These questions are not fact-intensive, but may be decided as matters of law. The few facts necessary to their disposition are pled in the Verified Complaint, and are not in dispute.

Dkt. 50, p. 3.

Based on this representation, the Court granted the Plaintiffs' motion for protective order and denied the District's request for discovery as to the broad, factual allegations in Plaintiffs' complaint. In their reply memorandum, Plaintiffs repeated that it did not need to rely on specific allegations because merely "[a]uthorizing a male to enter the girls' private locker rooms and restrooms. . . is offensive, sexually hostile conduct in itself." Dkt. 94, p. 23.

Yet, despite these assertions on how they are framing their claims, Plaintiffs' reply brief includes allegations that certainly are disputed and also violate their prior representations that their constitutional and Title IX hostile environment claims were based on the mere risk of Student A's presence in a locker room or restroom and were not based on any specific evidence or allegations of actual interactions or events occurring in the facilities. Because these disputed factual allegations are not supported by any evidence that would allow them to be admitted at the hearing on the preliminary injunction, the District asks that the allegations be struck.

Legal Standard and Analysis

A court may consider verified pleadings as evidence in support of a motion for preliminary injunction in some circumstances. *Hunter v. Atchison, T. & S.F. Ry. Co.*, 188 F.2d

294, 298 (7th Cir. 1951). However, in order for assertions in a verified complaint to be accepted as "evidence," the allegations must meet the requirements for summary judgment affidavits specified in Rule 56(e) - they "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Ford v. Wilson*, 90 F.3d 245, 247 (7th Cir. 1996); *see Lucas v. Chicago Transit Authority*, 367 F.3d 714, 726 (7th Cir. 2004) (Rule 56 requires affidavits that cite specific concrete facts establishing the existence of truth of the matter asserted). "[P]ersonal knowledge" may include inferences and, therefore, opinions, "[b]ut the inferences and opinions must be grounded in observation or other first-hand personal experience." *Visser v. Packer Eng'g Associates, Inc.*, 924 F.2d 655, 659 (7th Cir. 1991). They must not be "flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience." *Id.* Moreover, hearsay evidence must be disregarded. *Friedel v. City of Madison*, 832 F.2d 965, 970 (7th Cir.1987). *Eyler v. Babcox*, 582 F. Supp. 981, 986 (N.D. Ill. 1983) (issuance of preliminary injunction unwarranted where plaintiff filed unverified complaint and allegations contained in the complaint were found to be no more than hearsay).

The allegations from the verified complaint that Plaintiffs cite in their reply memorandum fail to meet these standards. First, the complaint is "verified" by the parents of five student plaintiffs and a representative of Students and Parents for Privacy, not by anyone who has personal knowledge of the cited assertion. Moreover, the allegations that generically refer to what unidentified students have experienced or observed in the school locker rooms or bathrooms lack even the minimal foundation required to render the allegations admissible in evidence. Finally, many of the assertions are exactly the sorts of "flights of fancy, speculations, and hunches" that are not admissible in evidence. *Visser* at 659.

In bringing this motion, the District is cognizant that "motions to strike" are often disfavored by courts in this circuit, particularly if they are used as a means of causing delay in the judicial process. *Heller Financial, Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir.1989). However, where motions to strike seek to "remove unnecessary clutter from the case, they serve to expedite, not delay." *Id*. Here, Plaintiffs' efforts to have "their cake and eat it to" by originally disclaiming reliance on disputed and unsupported facts in order to avoid discovery and then relying on the very same facts in their Reply, coupled with the somewhat ambiguous evidentiary standards applicable to motions for preliminary injunction,[1] necessitate clarification as to what factual assertions may properly be considered by the Court in ruling on the pending motion for preliminary injunction.

Based on Plaintiffs' prior representations regarding their theory of the case and the above evidentiary principles, the following factual assertions should be stricken from Plaintiffs' reply memorandum and disregarded by the Court:

Plaintiffs' Assertion #1: "The District, which fought to maintain sex-specific locker rooms, only entered the Resolution Agreement because the Federal Defendants threatened to revoke its federal funds if it refused." Dkt. 94, p. 6.

Response: There is no evidentiary support for the proposition that the District "fought to maintain sex specific locker rooms," as Plaintiffs' define sex. In fact, the District proposed providing Student A with some level of access to female locker rooms, and the dispute between the DOE and the Board was limited to whether "unrestricted" access would be allowed. Dkt. 21-4; Dkt. 21-5. The District brings this to the Court's attention as it may be relevant to the scope of any relief that this Court may enter.

[1] As contrasted with the well-settled evidentiary standards applicable to motions for summary judgment. Fed. Rul. Civ. Proc. 56(c).

Plaintiffs' Assertion #2: "The Rule gives Girl Plaintiffs an option which boils down to 'accept it or be silent.' Raising an objection is manifestly futile. If they challenge the male, they will likely be disciplined for improper 'discrimination.' If they leave, in many instances they will miss class time while searching for an alternate facility." Dkt. 94, p. 20.

Response: This assertion should be stricken because there is no evidence that anyone has requested privacy alternatives and been denied; no evidence that turning away a male student who enters a girls locker room or bathroom would result in a student being disciplined for or accused of discrimination; and no evidence that any student has missed class time or is likely to miss class time if he or she chooses to use alternative facilities. Plaintiffs' assertion is unquestionably disputed as the District submitted a declaration confirming that additional privacy options were offered to parents who inquired about privacy for their children. Dkt. 78-1, ¶¶16-17. Plaintiffs disclaimed reliance on this type of specific factual allegation in their memorandum opposing the District's request for discovery. Dkt. 50, p. 3.

Plaintiffs' Assertion #3: "Girl Plaintiffs have learned that the privacy stalls only invite a new attack—bullying by other students—if used." Dkt. 94, p. 22.

Response: This assertion should also be stricken because Plaintiffs disclaimed any reliance on specific factual allegations after the District sought disclosure of the bases for their allegation of "bullying" by other students. Plaintiffs denied the need for consideration of this type of specific fact. Dkt. 50, p. 3-4.

Plaintiffs' Assertion #4: "[T]he District and the speakers it presented communicated that those who object to Student A's presence in the girls' private areas are intolerant or bigots. Dkt. 94, pp. 22-23.

Response: As with the prior assertions, Plaintiffs disclaim any reliance on specific fact allegations and provide no evidentiary support for the proposition that students who have objected to Student A's presence have been accused of being intolerant or bigots. Dkt. 50, p. 3-4.

Plaintiffs' Assertion #5: "Even if the girls did not fear using the privacy stalls, there are not enough for all the girls: during a typical P.E. period at Fremd High School, 65 girls use the locker room, V. Compl. ¶ 119, but there are only five privacy stalls, id. ¶ 138." Dkt. 94, p. 23.

Response: The assertion directly conflicts with the District's declaration that there are 13 privacy stalls, a dedicated locker room supervisor who monitors the availability of stalls, and separate, private changing areas. Dkt. 78-1, ¶ 15. There is no evidence that the privacy measures offered by the District are insufficient to accommodate girls who have wanted to use privacy stalls or that any students have been denied the opportunity. There is no evidence supporting the proposition that all girls who might be present in the locker room want to use a privacy stall, regardless of Student A's presence.

Plaintiffs' Assertion #6: "At the end of the day—or rather, throughout the school day as well as at extracurricular events after school, nothing changes the fact that a male is present with them while they are using the toilets and changing their clothing." Dkt. 94, p. 23.

Response: There is no admissible evidence that Student A is present while Student Plaintiffs are using the toilets or changing their clothing, let alone throughout the school day and at extracurricular events after school. The District had sought discovery on the issues of exposure and contact, and the Plaintiffs' specifically disavowed this as relevant – "who saw who, when, where, and what state of undress were they in . . .is simply not going to be helpful to the Court." Dkt. 78-2, p.18.

Plaintiffs' Assertion #7: "Should an injunction issue, the District can provide Student A access to a number of alternative facilities for his needs. While this may impact Student A emotionally, he is provided by the school with a dedicated, full-time support team which should largely mitigate such concerns—an educational benefit not offered to Plaintiffs." Dkt. 94, p. 3.

Response: This statement should be disregarded because Plaintiffs cite no evidence to support their assertion that similar assistance would not be offered to Plaintiff students if requested. This is pure speculation devoid of any factual basis.

CONCLUSION

In their reply memorandum, Plaintiffs attempt to rely on disputed, unsupported factual allegations when they stated that they would not do so and stated that these disputed facts were not relevant to their motion for preliminary relief. Accordingly, the Court should disregard these allegations when ruling on the motion for preliminary relief.

Respectfully submitted,

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 211

By: /s/Jennifer A. Smith
One of Its Attorneys

Sally J. Scott
Michael A. Warner, Jr.
Jennifer A. Smith
Patrick M. DePoy
FRANCZEK RADELET P.C.
300 South Wacker Drive, Suite 3400
Chicago, IL 60606-6785
(312) 986-0300

Dated: July 29, 2016

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she caused a true and correct copy of the foregoing **DEFENDANT BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 211'S MOTION TO STRIKE ALLEGATIONS IN PLAINTIFFS' REPLY MEMORANDUM** to be filed with the Clerk of the Court using the CM/ECF system which will send notification to the following counsel of record this 29th day of July, 2016:

Thomas L. Brejcha
Peter Breen
Jocelyn Floyd
THOMAS MORE SOCIETY
19 S. LaSalle St., Suite 603
Chicago, IL 60603
Attorneys for Plaintiffs

Jeremy D. Tedesco
Joseph E. LaRue
ALLIANCE DEFENDING FREEDOM
15100 N. 90th St.
Scottsdale, AZ 85260
Attorneys for Plaintiffs

J. Matthew Sharp
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd., NE
Suite D-1100
Lawrenceville, GA 30043
Attorneys for Plaintiffs

Megan A. Crowley
Shiela Lieber
U.S. DEPARTMENT OF JUSTICE,
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
20 Massachusetts Ave., N.W.
Washington, DC 20001
Attorneys for U.S. Department of Education; John B. King, Jr., United States Department of Justice and Loretta E. Lynch

Benjamin L. Berwick
U.S. Department of Justice
Civil Division, Federal Programs Branch
1 Courthouse Way, Suite 9200
Boston, MA 02210
Attorneys for U.S. Department of Education; John B. King, Jr., United States Department of Justice and Loretta E. Lynch

Britt M. Miller
Laura R. Hammargren
Linda X. Shi
Timothy S. Bishop
MAYER BROWN LLP
71 S. Wacker Dr.
Chicago, IL 60606
Attorneys for Students A, B, and C, by and through their parents and legal guardians, and the Illinois Safe Schools Alliance

Catherine A. Bernard
MAYER BROWN LLP
1999 K St., N.W.
Washington, DC 20006-1101
Attorneys for Students A, B, and C, by and through their parents and legal guardians, and the Illinois Safe Schools Alliance

Megan A. Crowley
U.S. DEPARTMENT OF JUSTICE,
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
20 Massachusetts Ave., N.W.
Washington, DC 20001
Attorneys for U.S. Department of Education; John B. King, Jr., United States Department of Justice and Loretta E. Lynch

John A. Knight
ROGER BALDWIN FOUNDATION AT ACLU, INC.
180 N. Michigan Ave., Suite 2300
Chicago, IL 60601
Attorney for Intervenor Illinois Safe Schools Alliance

Ria Tabacco Mar
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 1004-2400
Attorneys for Students A, B, and C, by and through their parents and legal guardians, and the Illinois Safe Schools Alliance

/s/Jennifer A. Smith
Jennifer A. Smith