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.**,	)	Case No. 16-cv-4945
Plaintiffs,	)	Judge Jorge L. Alonso
v.	)	Magistrate Judge Jeffrey T. Gilbert
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.	)	

DEFENDANT BOARD OF EDUCATION OF
TOWNSHIP HIGH SCHOOL DISTRICT NO. 211'S
RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Page(s)

Page(s)

Statutes

Other Authorities

INTRODUCTION

Township High School District 211's mission is to develop and implement quality education programs which challenge students to achieve their potential to become contributing, informed citizens capable of meeting the demands of a changing world. To do so, the District must provide an environment conducive to learning for all of its 12,000 students. And as part of that environment, the District has a compelling interest in ensuring that all of its students – including transgender students – have safe access to restroom and locker room facilities. The District balances appropriate facility access for transgender students with privacy safeguards for all students by guaranteeing private changing stations and the availability of other privacy options upon request. The District has always focused on safeguarding student privacy and upholding dignity for all students in the District.

FACTS

Since enrolling as a high school freshman at the beginning of the 2013-2014 school year, Student A has presented a uniform and consistent female gender identity by using a traditionally female name, female pronouns, and having a traditionally female hair style, clothing style, and overall appearance. Kovack Decl., ¶ 6-7. The District allowed her to use girls' restrooms, which have stalls protecting individuals using the toilet from view. *Id.* ¶ 8-9. Student A also has access to single-user restrooms in the nurse's office, which is where she uses the toilet at school. *Id.* ¶ 9. Initially, the District granted Student A access only to the restroom portion of the girls' locker room where she and other students had access to the toilet stalls for privacy. *Id.* ¶ 11. Instead of using the restroom stall area in the girls' locker room, Student A selected a separate, single-user locker room. *Id.* ¶ 12.

In the fall of 2013, Student A filed a complaint with the United States Department of Education Office for Civil Rights (OCR) alleging that the District's locker room limitations

violated Title IX. *Id.* ¶ 13. In December 2015, the District entered into a Resolution Agreement with the OCR that allowed Student A to access the communal girls' locker room based on her representation that she would change in private changing stations. *Id.* ¶ 14. The District also agreed that it would install sufficient private changing stations within the girls' locker room to accommodate Student A and any other students seeking privacy. *Id.* The District agreed to provide a reasonable alternative, such as a different locker assignment, use of a nearby separate locker room, or a different time to use the locker room, for any student requesting additional privacy. *Id.*

The Resolution Agreement applies only to Student A and took effect in January 2016 for the second semester. *Id.* ¶ 19. The District does not have a Board policy specific to facility access for transgender students. *Id.* ¶¶ 22-25. The District makes decisions regarding facility access for transgender students based on the individual needs of every student and family. *Id.* ¶ 25.

Student A's second semester physical education ("PE") course met every day, but the class only participated in physical activities that required sportswear on Tuesdays and Thursdays. *Id.* ¶ 20. For that PE course on Tuesday and Thursdays, students are not required to wear a designated uniform; they may wear any appropriate athletic apparel, such as yoga pants or running gear. *Id.* Some students choose not to change for PE and instead wear their sportswear throughout the day. *Id.* ¶ 20. Student A only rarely changed clothes in the locker room, and when she did, she used a stall in the locker room for privacy. *Id.* ¶ 21. More often, Student A instead wore sportswear to school to avoid changing clothes in the locker room. *Id.*

ARGUMENT

I. Legal Standard

Preliminary injunctions are an "exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Girl Scouts of Manitou Council Inc. v. Girl*

Scouts of USA, Inc., 549 F.3d 1079, 1085 (7th Cir. 2008). Because a preliminary injunction is an "extraordinary and drastic remedy," the moving party bears the burden of making a clear showing that it is entitled to the relief it seeks. *Goodman v. Illinois Dep't of Fin. & Prof'l. Reg.*, 430 F.3d 432, 437 (7th Cir. 2005). A court analyzes a request for injunctive relief in two distinct phases: a threshold phase and a balancing phase. *Girl Scouts*, 549 F.3d at 1085-86. To survive the threshold phase, the party seeking injunctive relief must prove a likelihood of success on the merits, irreparable harm, and the absence of an adequate remedy at law. *Id.* at 1086. In the balancing phase, the moving party must demonstrate that its harm in the absence of such relief outweighs any harm that may be suffered by the non-moving party if the injunction is granted. *Id.* If the party fails to establish these requirements, the court must deny its request. *Id.*

II. Plaintiffs Are Unlikely to Succeed On The Merits

A. Plaintiffs Cannot Prevail On Their Constitutional Claim

Plaintiffs will not succeed on the merits of their claim that the District is violating the Student Plaintiffs' constitutional right to privacy. Plaintiffs posit the issue as whether a transgender girl's use of the girls' locker rooms and restrooms, subjecting the Girl Plaintiffs to the risk of compelled exposure of their bodies to the opposite "biological" sex, violates their constitutional right to privacy. Dkt. No. 50 at 6. The allegations on which Plaintiffs rely include: the District's policies allow Student A access to the girls' facilities; Student A has used the girls' facilities while some Girl Plaintiffs were present; and Girl Plaintiffs know that any time they use the restroom or locker room, Student A has the right to be present with them. Dkt. No. 50 at 6.[1]

[1] The District does not concede that Student A has used the girls' facilities while Plaintiffs were present. The District sought discovery on this issue, which was denied based on Plaintiffs' representation that issues of "who saw who in the state of undress or naked" are not relevant to their claims. Ex. B at 18:11-24. Should such facts be material to the outcome, the District will renew its request for discovery.

If the Court upholds the OCR's determination that the term "sex" in Title IX encompasses a person's gender identity, Plaintiffs' constitutional claim fails because they do not have even a "risk" of sharing a restroom or locker room with a person of the opposite sex. If the OCR's determination is not entitled to deference, Plaintiffs' constitutional claim still fails, because the District's practices, which allow Student A to use restrooms and locker rooms consistent with her gender identity and which provide privacy accommodations to any student who requests it, violate no recognized constitutional right of the Plaintiffs.

1. The Supreme Court Recognizes Only Limited Privacy Rights

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court acknowledged that the Constitution did not specifically grant a "right of privacy," but nevertheless reasoned that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. Accordingly, the Court held that substantive due process under the Fourteenth Amendment confers a right to privacy in one's marital relations and use of contraceptives. *Id.* at 485-86.

Since *Griswold*, the Supreme Court has granted constitutional protection to "privacy" interests in limited circumstances. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court acknowledged the Constitution protected "certain areas or zones of privacy," but "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'… are included in this guarantee of personal privacy." *Id.* at 152. The Court held that the right to privacy "found in the Fourteenth Amendment's concept of personal liberty…is broad enough to encompass a woman's decision" to terminate a pregnancy. *Id.* at 153. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down a law criminalizing sodomy and held that "individual decisions. . . concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a

form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Id*. at 578, (citing *Bowers v. Hardwick*, 478 U.S. 185, 216 (1986) (Stevens, J. dissenting)). The Court reaffirmed "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id*. at 573-74 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

In *Whalen v. Roe*, 429 U.S. 589 (1977), the Supreme Court observed that "cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id*. at 599-600. In *Whalen*, the Court held that a New York law, which established a database of names and addresses of persons who received prescriptions for certain drugs sold on the black market, did not pose an unconstitutional invasion of privacy under either prong. *Id*. at 600.

In *Katz v. United States*, 389 U.S. 347 (1967), the Court made clear that although the Constitution affords protection against certain kinds of government intrusions into personal and private matters, there is no "general constitutional 'right to privacy.'" *Id*. at 350. Only certain, clearly established rights have been recognized by the Supreme Court as fundamental, and the Court has "always been reluctant to expand the concept of substantive due process because guide posts for responsible decision making in this area are scarce and open-ended." *Washington v. Glucskberg*, 521 U.S. 702, 720 (1997) (citing *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992)). '"Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires [courts] to exercise the utmost care whenever [they] are asked to break new ground in this field.'" *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citing *Collins*, 503 U.S. at 125). Accordingly, the Seventh Circuit has

observed that the "Supreme Court of the United States has made clear, and this court similarly cautioned, that the scope of substantive due process is very limited." *Belcher v. Norton*, 497 F.3d 742, 753 (7th Cir. 2007). The court further described that "substantive due process, at its essence, protects an individual from the exercise of governmental power without a reasonable justification. . . . and . . . affords protection of the individual against arbitrary action of the government." *Id*.

2. The Constitution Does Not Protect Against The "Risk" That A Transgender Girl May Be Present In A Female Facility

Plaintiffs contend that their "constitutional privacy rights are violated every time the government compels them to endure the risk that biological males may be present in their private facilities while they change clothing or attend to intimate bodily needs." Dkt. No. 50 at 2. They are both factually and legally wrong. They are factually wrong because the District does not allow males in the girls' locker room or restrooms. It allows Student A, who identifies and presents as a girl, conditional access to the girls' locker room and access to girls' restrooms. This is not the same as allowing males in the girls' facilities; and it is disingenuous and hyperbolic to suggest so. Additionally, all Girl Plaintiffs have the option to use a private changing area within the locker room, a separate changing area, or a private restroom. Ex. A, Kovack Decl., ¶¶ 14-15. No girl is "require[d] to undress, and attend to feminine hygiene needs, in locker rooms with a biological male present" nor are they "require[d] to risk being exposed to the opposite sex when they use the restroom" as Plaintiffs claim. Dkt. No. 23 at 24.

Plaintiffs are also legally wrong. Plaintiffs cite to no case in which a court has held that the Constitution is violated because of a mere "risk" of an intrusion into someone's privacy, and the Supreme Court has observed that the risk of a privacy intrusion does not create a constitutional violation. *See Whalen* at 605-06 (Supreme Court declined to find privacy violation

based on speculative future release of confidential data). None of the cases cited by Plaintiffs stand for the proposition that the risk of exposure to a transgender person in a locker room or restroom violates the Constitution. Given the caution about expanding constitutionally based privacy claims as noted above, Plaintiffs have no likelihood of success on the merits.

Plaintiffs rely on a number of lower court cases holding that forced bodily exposure to members of the opposite sex by government actors, such as school administrators and prison guards, may violate the Fourth Amendment's prohibition against unreasonable searches and seizures. Dkt. No. 23 at 13-14. However, those cases are inapposite because no "search or seizure" is at issue in this case. As the Supreme Court noted in *Whalen*, the Fourth Amendment cases "involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations." 429 U.S. at 604 fn. 32. Plaintiffs do not allege, nor can they, that the District's practice of allowing a transgender student to use the restroom and locker room of her identified gender constitutes a "search." Moreover, they cannot allege any "forced" exposure given the privacy options in place.

The cases cited by Plaintiffs each involved actual, unjustified and unwarranted viewing or touching of unclothed body parts by the opposite sex, not the mere "risk" that a person could be in the presence of a transgender person when undressing or using the restroom. Student A's appropriate use of a restroom or locker room does not involve the sort of intrusion at issue in *Safford Unified Sch. District #1 v. Redding*, 557 U.S. 364 (2009) (13 year old girl subjected to a search of her bra and underpants over suspicion she brought ibuprofen and naproxen to school) or *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981) (forceful removal of plaintiff's underwear in presence of male guards held unreasonable; though later search of vagina by female nurse in the presence of male guards was reasonable).

As recently noted by the Fourth Circuit, a transgender student's use of the restroom of his choice does not threaten the type of constitutional abuses present in these forced exposure cases:

> 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 *Sepulveda 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).

G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., No. 15-2056, 2016 WL 1567467, at fn. 10 (4th Cir. Apr. 19, 2016).

Plaintiffs also rely on cases in which prisoners were forced to shower or otherwise be in a state of nudity in front of members of the opposite sex, but these cases are contrary to binding Seventh Circuit authority. Dkt. No. 23 at 15. In *Johnson v. Phelan*, 69 F.3d 144 (7th Cir. 1995), the Seventh Circuit expressly held that the court's prior decision in *Torres v. Wisconsin Dep't of Health & Soc. Servs.*, 859 F.2d 1523 (7th Cir. 1988) *(en banc)*, cited by Plaintiffs, did not create or acknowledge any constitutionally protected right to privacy that was violated by allowing opposite-sex monitoring and searching of prisoners.[2] In *Johnson*, a male detainee alleged that female guards' ability to view men in their cells, the shower, and the toilet violated his constitutional privacy rights. *Id.* at 145. The court disagreed, reasoning that female guards "are bound to see the male prisoners in states of undress. Frequently. Deliberately. Otherwise they are not doing their jobs." *Id.* at 146. More importantly, the court rejected the idea that the Constitution compels single-sex monitoring under substantive due process, holding that "*Torres* did not say that the Constitution requires [excluding male guards from a women's prison];

[2] The Court distinguished *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994) which addressed tactile inspections and held that a right of privacy limits (but did not eliminate) the ability of prisons to subject men to body searches by women. Plaintiffs' reliance on *Canedy* has no relevance to this case.

instead we deferred to the judgment of prison administrators that they needed to limit cross-sex monitoring to achieve penological objectives…" *Id.* at 147.[3] Similarly, in this case, the court should defer to the District's judgement on how best to balance the needs and interests of all students, including Plaintiffs, Student A, and other transgender students.

The District acknowledges that students have an interest in maintaining a level of privacy and students do not surrender all of their constitutional rights upon entering a school. *See New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). Restrooms and locker rooms are often segregated by sex and have been for many years. Plaintiffs complain about the "risk" of being in the same restroom or locker room with someone whom the Plaintiffs contend is a member of the opposite sex, but who presents and identifies herself as a female. They also acknowledge that biological sex and gender identity are not the same. Dkt. No. 23 at 2, 13. Plaintiffs have not identified any binding precedent or persuasive authority that holds privacy rights are violated when a transgender student has access to facilities that conform to her gender identity.

3. The District Has Not Violated Any Constitutional Right To Privacy

In determining whether Plaintiffs are likely to succeed on the merits of their constitutional claim, this court must balance the Plaintiffs' asserted privacy interests with the District's legitimate need to protect the interests of Student A and other transgender students. Privacy claims under the Fourteenth Amendment "necessarily require fact-intensive and context-

[3] Plaintiffs repeatedly and incorrectly confuse statutory permissibility with a constitutional mandate. *See Norwood v. Dale Maint. Sys., Inc*., 590 F. Supp. 1410 (N.D. Ill. 1984) (janitors' sex may constitute bona fide occupational qualification under Title VII for cleaning restrooms); *see also Ulane v. E. Airlines, Inc*., 742 F.2d 1081 (7th Cir. 1984) (discrimination against "transsexuals" not prohibited by Title VII). In a recent case, *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ*., 97 F. Supp. 3d 657 (W.D. Pa. 2015), a transgender male student brought discrimination claims against the University when he was denied access to the men's locker rooms and restrooms. The court only held that the University's policy of separating bathrooms and locker rooms on the basis of birth sex is permissible under Title IX and the Constitution, not that such a policy is necessary under substantive due process to protect fundamental bodily privacy rights. *Id.* at 678.

specific analyses, and . . . bright lines generally cannot be drawn." *Doe v. Luzerne Cty.*, 660 F.3d 169, 176 (3rd Cir. 2011). In determining whether a potential intrusion on a private matter rises to the level of a constitutional violation, the Supreme Court has stressed that government action "which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Whalen*, 429 U.S. at 597. Further, the Court has acknowledged that students within the school environment have a less robust expectation of privacy than is afforded the general population. *T.L.O.*, 469 U.S. at 348, 105 S.Ct. 733 (Powell, J., concurring). This expectation is even less for students in locker rooms, which the Court has observed are "not notable for the privacy they afford." *Vernonia School Dist. 47 v. Acton*, 515 U.S. 646, 657 (1995).

As explained above, even under Plaintiffs' assertion that Student A is biologically male, any invasion of privacy is minimal to non-existent because of the privacy stalls and other privacy alternatives offered by the District. *See Whalen*, 429 U.S. at 607 (Brennan, J., concurring) (no constitutional violation where procedural safeguards ensured risk of privacy violation was minimal). This minimal risk must be balanced against the District's "responsibility to provide an environment conducive to learning for all its 12,000+ students." Dkt. No. 21, Ex. 3. The District has a compelling interest in ensuring that all of its students – including transgender students – have safe access to restroom and locker room facilities.[4] The goal of the District is to protect the privacy rights of all students while also providing reasonable accommodations to meet the

[4] Plaintiffs assert, without support, that allowing a transgender student to use her preferred locker room and restroom "infringe fundamental rights" and "must survive strict scrutiny." Dkt. No. 23 at p. 18. They do so without any support for either assertion, and, as demonstrated above, they have not established a fundamental right to a restroom or locker room free of transgender students.

unique needs of individual students. As a transgender girl, Student A should be able to use toilets and have access to changing facilities that conform to her gender identity. In addition to the need to accommodate Student A, in balancing the interests, this Court should also take into account that the District faced a loss of millions of dollars in federal funds from the DOE if it failed to enter into the Resolution Agreement which Plaintiffs now challenge. *See Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 639 (1999) (noting federal agencies may terminate federal funding to enforce Title IX); Ex A., ¶25.

In short, the District has struck a reasonable balance between Student A's needs and other girls' privacy concerns, and Plaintiffs have identified no reason why the Constitution either allows or compels this Court to disrupt this balance by entering a preliminary injunction.

B. Plaintiffs Cannot Prevail On Their Title IX Claims

Plaintiffs have narrowed their argument for preliminary relief under Title IX to two issues: (1) whether the District's decision to allow a transgender girl conditional access to the girls' locker room creates a hostile environment for the Girl Plaintiffs in violation of Title IX; and (2) whether the District's provision of optional, alternative facilities for Girl Plaintiffs seeking additional privacy violates the Title IX regulation's requirement that sex-separated facilities be comparable. Dkt. Nos. 23 at 18, 50 at 3. Plaintiffs do not allege or rely on any actual exposure, nudity, or any allegations of sexually harassing conduct. Dkt. No. 50 at 1-2.

If the Court upholds the DOE's determination that the term "sex" in Title IX encompasses gender identity, then the underlying premise of Plaintiffs' claim falls apart because under no circumstances are Plaintiffs required to share facilities with a person of the opposite sex. Additionally, regardless of whether the DOE's determination is adopted, Plaintiffs have no likelihood of success on their Title IX claims.

1. Plaintiffs Cannot Show That A Transgender Student's Conditional Access To The Locker Room Creates A Hostile Environment

Plaintiffs cannot show a likelihood of success on their claim that the District has created a hostile environment based on sex by granting Student A conditional access to the locker room consistent with her gender identity. To state a claim for sex discrimination under Title IX, plaintiffs must allege that they were "excluded from participation" in an education program "because of [their] sex." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 680 (1979). Deliberate indifference to student interactions that create a hostile environment may constitute sex discrimination for purposes of Title IX, but it is a high burden to prove. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999). In order to prevail on a hostile environment claim under Title IX, plaintiffs must show that "the harassment was 'so severe, pervasive, and objectively offensive that it ... deprive[s] the victims of access to educational opportunities,' and officials were 'deliberately indifferent' to the harassment." *Doe v. Galster*, 768 F.3d 611, 617 (7th Cir. 2014) (citing *Davis*, 526 U.S. at 650).

a. Plaintiffs Have Not Been Subjected to Severe, Pervasive and Objectively Offensive Conduct Based on Sex

Plaintiffs present no evidence of actual offensive conduct by Student A or any other student that has created a hostile environment. Rather, Plaintiffs argue that the mere possibility of a transgender student being in the girls' locker room or restroom, even where the transgender student must use private stalls for changing and all girls have the option of changing in private stalls or an alternative, private location, creates a hostile environment based on sex. This argument fails both because the challenged conduct is not discrimination based on the Plaintiffs' sex and because the mere presence of a transgender girl in a girls' locker room or restroom cannot establish a hostile environment under Title IX.

i. Plaintiffs have not alleged a Hostile Environment Based on Sex

Plaintiffs cannot establish that they have been subjected to a hostile environment because of their sex. As the Supreme Court noted in *Oncale v. Sundowner Offshore Serv., Inc.*, "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] . . . because of . . . sex.'" 523 U.S. 75, 80 (1998). The Seventh Circuit has described that a hostile environment can be shown through either severe and pervasive unwelcome sexual advances or conduct that demonstrates an anti-female animus, stating that "a plaintiff can proceed on a claim when the work environment is hostile because it is 'sexist rather than sexual.'" *Passananti v. Cook Cnty.*, 689 F.3d 655, 664 (7th Cir. 2012). Courts have applied this same analysis under Title IX. *See Burwell v. Pekin Cmty. High Sch. Dist.*, 213 F. Supp. 2d 917, 930 (C.D. Ill. 2002). Without a particularized allegation that the restroom and locker room access was sexist or sexual and discriminated against them because of their sex, Plaintiffs fail to state a claim for sex discrimination. *Ludlow v. Northwestern Univ.*, 79 F. Supp. 3d 824, 835 (N.D. Ill. 2015) (finding an allegation that plaintiff professor was falsely accused of sexual harassment did not support his claim that he was discriminated because of sex in violation of Title IX).

For example, in *Frazier v. Fairhaven School Committee*, 122 F. Supp. 2d 104, 112 (D. Mass. 2000), the plaintiff complained that a school employee "did peek, leer, and stair (sic) through out (sic) the performance of [the student's] bodily function" and that this violated Title IX. The court held that this alleged conduct did not violate Title IX, notwithstanding the plaintiff's discomfort. The court reasoned that the employee was a "discipline matron" and the plaintiff provided no "allegation showing that [the employee] looked into the plaintiff's stall

because she was a female rather than because it was her job to inspect the girl's rooms." *Id.* Accordingly, "no claim for harassment lies under Title IX." *Id.*

Here, Plaintiffs complain that allowing a transgender girl conditional access to the girls' locker room and restroom creates a hostile environment, but the alleged hostility that Plaintiffs claim to experience is not because of Plaintiffs' sex. Any discomfort that Plaintiffs allege is not the result of conduct that is directed at them because they are female. There is no allegation Student A seeks access to the girls' facilities out of an animus against females or that the District's decision to allow limited access was motivated by an animus against females. Nor is there an allegation that Student A seeks to access the girls' facilities in order to engage in inappropriate sexual advances or that she is engaging in any conduct that is harassing or offensive to female students. Rather, Plaintiffs' own allegations confirm that their alleged discomfort is exclusively a function of what Plaintiffs believe to be the sex of Student A and other transgender students, not because of any hostility directed at them because of their own sex.[5] Because they do not allege any discrimination or hostile environment directed at them because of their own sex, Plaintiffs are unlikely to succeed on their Title IX claims.

ii. The Alleged Harassment Was Not Severe, Pervasive and Objectively Offensive

Under Title IX an action "will lie only for [sexual] harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to educational opportunity or benefit." *Davis*, 526 U.S. at 633. Plaintiffs cannot meet this high standard.

[5] Moreover, Plaintiffs' cannot show any discriminatory policy or practice resulting from allowing transgender access to restrooms or locker rooms consistent with their gender identity because the OCR requires that schools allow male transgender students access to male facilities and there is no evidence that the District would treat male students any differently in this scenario.

a) A Transgender Student's Use of School Facilities Is Not Objectively Offensive

Plaintiffs make no allegations that they were subjected to conduct that rises to the level of objectively offensive. The possible presence of a transgender student in the locker room certainly does not rise to the level of objectively offensive conduct found in other cases. *See, e.g.*, *Davis*, 526 U.S. at 653 (describing the plaintiff's allegations of touching which included sexually suggestive rubbing as objectively offensive); *Galster*, 768 F.3d at 618 (finding attacks including a punch in the face, repeated hits with metal track spikes, and hitting with a stick qualify as objectively offensive); *Bruning ex rel. v. Carrol Cmty.. Sch. Dist.*, 486 F. Supp. 2d 892, 917 (N.D. Iowa 2007) (repeated acts of touching and sexual groping were objectively offensive).

The OCR has opined that "[a] school may not require transgender students to use facilities inconsistent with their gender identity." Catherine E. Lhamon & Vanita Gupta, *Joint Dear Colleague Letter on Transgender Students*, U.S. Dep't of Just. & U.S. Dep't of Educ. (May 13, 2016) at p. 3.[6] The Fourth Circuit Court of Appeals gave the OCR's guidance regarding transgender students' access to restrooms deference in *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 2016 WL 1567467, at *8. Regardless of the arguments Plaintiffs present on whether the OCR complied with the Administrative Procedures Act, the OCR's transgender guidance and the *G.G.* decision deferring to such guidance is instructive for evaluating whether the practice is objectively offensive. An educational practice that complies with the OCR's guidance cannot be deemed objectively offensive.

Further, regardless of how the OCR defines "sex," the mere presence of an individual in the girls' locker room who presents and lives as a girl cannot be "objectively" offensive within the meaning of Title IX, even if the individual fits Plaintiffs' definition of a "biological male."

[6] Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.

Plaintiffs' offense at Student A's mere presence is inherently subjective because it is based solely on what the Plaintiffs and their parents believe about Student A's sex. Student A considers herself a female and has committed to living her life as a female; and the OCR and District appropriately have deferred to this determination. Plaintiffs' alleged discomfort with Student A's presence in restrooms and locker rooms is based solely on their (and their parents) belief that sex is immutable and can only be based on biological markers that are present at birth. Deferring to Student A's gender identity and decision to live life as a female under these circumstances cannot create an objectively hostile environment for Plaintiffs.

b) Plaintiffs Were Not Subjected To Severe or Pervasive Harassment

Here, Plaintiffs argue that the mere possibility of Student A being in the locker room establishes severe and pervasive conduct under Title IX and should be enjoined. There is no authority supporting Plaintiffs claim that they are entitled to relief based on their own subjective beliefs about Student A's sex and speculation about potential conduct that may result from her presence in the locker room or restroom. General accusations are insufficient to establish a Title IX violation. *Gabrielle M. v. Park Forest-Chicago Heights, Il. Sch. Dist. 163*, 315 F.3d 817, 822 (7th Cir. 2003) (finding accusation that a student did "nasty stuff" is insufficient to state a Title IX); *Trentadue v. Redmon*, 619 F.3d 648, 654 (7th Cir. 2010) (finding undeveloped allegations of student-on-student harassment cannot establish a Title IX claim). Plaintiffs' concession that they were not relying on or presenting any evidence of actual offensive conduct occurring in the locker room precludes them from establishing a likelihood of success on the merits of their Title IX claim. Transcript of Oral Argument at 9:6-11; 18:11-24 (June 9, 2016) (attached as Ex. B).

The cases relied upon by the Plaintiffs to support their hostile environment claim are so far removed from the situation presented here that, at best, they confirm the lack of any potential

Title IX violation and, at worst, offensively equate transgender students to sexual predators. For example, Plaintiffs rely on *People v. Grunau*, 2009 WL 5149857 (Cal. Ct. App. Dec. 29, 2009),[7] a criminal case where a man with two previous convictions for sexually molesting a 5-year-old girl and a 10-year-old girl was caught staring at a teenager showering in a locker room. Plaintiffs cite *New Jersey Div. of Youth & Family Servs. v. M.R.*, 2014 WL 1977014 (N.J. Super. Ct. App. Div. Feb. 25, 2014) for the proposition that "allowing teen girl to be unclothed and shower with a biological male risked mental and emotional injury." Dkt. No. 23 p. 22. They omit, however, that the "biological" male who showered with the girl was her father who was also accused of having sexual relations with his under-aged niece. *Id.* In *City of Philadelphia v. Pennsylvania Human Relations Commission*, 300 A.2d 97 (1973), the court found that the City of Philadelphia had established a BFOQ defense to allow for same-sex youth center workers, out of a concern of having opposite sex workers inspecting nude children housed at the center. *Id*. at 511-12.

Plaintiffs' Title VII cases are similarly inapposite and improperly equate allowing a transgender girl to use a girls' locker room to sexual deviancy. They describe *Lewis v. Triborough Bridge and Tunnel Authority*, 31 F.App'x 746 (2nd Cir. 2002)[8] as holding that a company created a hostile environment when it allowed male cleaners inside the women's locker room while female employees were changing clothes. Plaintiffs conspicuously omit that the cleaning service employees were leering at the female plaintiff and would crowd the entrance of the locker room, forcing her to "run the gauntlet" and brush up against them; the supervisor referred to the employees who complained of the conduct as "cunts" and "fucking crybabies;" and the supervisor said "boss man don't want no women with tiny hinnies [sic] on this job." *Lewis v. Triborough Bridge and Tunnel Authority*, 77 F. Supp. 2d 376, 378 (S.D.N.Y. 1999).

[7] This is an unpublished opinion that is not to be cited under the California Rules of Court.
[8] This decision also is unpublished and does not have precedential effect.

They similarly omit from the description of facts in *Schonauer v. DCR Entertainment Inc.*, 905 P.2d 392, 400-401 (Wash. Ct. App. 1995) that the defendant "pressured [plaintiff], repeatedly and intentionally, to provide fantasized sexual information and to dance on stage in sexually provocative ways" and that she was fired for refusing to dance nude on stage.

Plaintiffs' implication – that Student A's use of girls' restrooms and locker rooms is a ploy to achieve sexual gratification similar to a "Peeping Tom" or convicted sex offender – is wrong and demonstrates the total lack of merit in their Title IX claim.

c) Plaintiffs Cannot Show A Concrete, Negative Effect On Their Education

Plaintiffs cannot establish that the District's practice of allowing Student A conditional locker room access and restroom access negatively impacts Plaintiffs' education. Plaintiffs must demonstrate a "'concrete, negative effect' on their education." *Gabrielle M.*, 315 F.3d at 823. "Examples of a negative impact on access to education may include dropping grades, becoming homebound or hospitalized due to harassment, or physical violence." *Id.* In *Trentadue*, the Seventh Circuit noted that where "[plaintiff's] grades did not suffer, she was not extensively absent from school, she graduated with a class rank of 27 out of over 500, and thereafter enrolled in college," the record "simply does not suggest that she was subjected to student-on-student sexual harassment that was so pervasive, severe, and objectively offensive as to deny her equal access to education in violation of Title IX." 619 F.3d at 654.

Plaintiffs argue that they need not establish a concrete, negative effect on the Girl Plaintiffs' education by citing to *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220 (7th Cir. 1997), *N.K. v. St. Mary's Springs Acad. of Fond Du Lac Wis., Inc.*, 965 F. Supp. 2d 1025 (E.D. Wis. 2013), and *Dauven v. George Fox Univ.*, No. CV.09-305-PK, 2010 WL 6089077 (D.

Or. Dec. 3, 2010). None of these cases relieve Plaintiffs of the requirement that they demonstrate a concrete, negative effect on education to establish their Title IX claim.

Plaintiffs cite to *Mary M. v. N. Lawrence Cmty. Sch. Corp.* for the proposition that students need not withdraw from school or have their grades suffer for altered conditions to exist. Dkt. No. 23 at 22. *Mary M.* does not address this issue. Rather, the decision notes that it is virtually impossible for children to leave their assigned school in the context of distinguishing Title VII employment discrimination cases from Title IX student-student harassment cases. *Mary M.*, 131 F.3d at 1226.

Plaintiffs' reliance on *N.K.* is misplaced. Plaintiffs' contention that students need not "have their grades suffer" for altered conditions to exist is an incorrect reading. Rather, the court found that whether the plaintiff's grades suffered was an issue for trial and offered that "while N.K. succeeded in school, he perhaps could have *excelled* were it not for the alleged harassment." *N.K.*, 965 F. Supp. 2d at 1034 (emphasis in the original). Plaintiffs in this case have specifically declined to offer any evidence or allow any inquiry into their academic status or achievement. *See* Dkt. No. 50. Considering the complete lack of such evidence, they cannot establish a likelihood of success on the merits if this case were tried.

Plaintiffs' reliance on *Dauven* is similarly misplaced. The court in *Dauven* did not find that mere "tension" satisfies Title IX's requirement of showing a concrete, negative effect. Rather, the court cites one incident in which the plaintiff described tension in a long series of incidents that "[o]verall . . . portrays a hostile classroom environment." *Dauven*, 2010 WL 6089077, at *14 (D. Or. Dec. 3, 2010), *report and recommendation adopted*, No. 09-CV-305-PK, 2011 WL 901026 (D. Or. Mar. 15, 2011). Because Plaintiffs have offered no evidence

suggesting a concrete, negative impact on their education resulting from Student A's use of the girls' locker and restrooms, Plaintiffs cannot satisfy this element of their claim.

b. The District Did Not Have Actual Knowledge Of Peer Harassment

Plaintiffs argue that the District had knowledge of a hostile environment because of the decision to grant Student A restroom access and adopt a Resolution Agreement providing Student A conditional locker room access. Dkt. No. 23 at 23. As the Seventh Circuit has held, to demonstrate actual knowledge, a plaintiff must show that "an official of the school who at a minimum has authority to institute corrective measures ... has actual notice of, and is deliberately indifferent to, the misconduct." *Doe v. St. Francis Sch. Dist.*, 694 F.3d 869, 871 (7th Cir. 2012). Moreover, "actual knowledge" means "actual knowledge of misconduct, not just actual knowledge of the risk of misconduct." *Id.* (internal citations omitted). "[T]o know that someone suspects something is not to know the something and does not mean the something is obvious." *Id.* at 872. The information set forth in Plaintiffs' motion falls far short of establishing actual knowledge of any harassing conduct by Student A.

The District's practice of allowing Student A access to restroom and locker room facilities is not the same as knowledge of a severe and pervasive sexually hostile environment for all the reasons explained above. Among other things, Student A's use of girls' facilities is not directed at Plaintiffs because of their sex, and the mere use of a girls' locker room or restroom by a transgender girl does not create an objectively hostile education environment. Further, the District has ensured that all students have access to several reasonable alternatives granted upon request. Students have access to thirteen private changing areas within the locker room in a variety of configurations and access to entirely separate locker room facilities. Ex. A, ¶15. In Student A's physical education course, students are not required to change clothes in front of

Student A and any student could participate in any sportswear. *Id.* at ¶15. The District offered privacy options to any parent or student who inquired and was not aware of any student whose privacy needs were not accommodated. *Id.* at ¶¶ 16-17. Thus, Plaintiffs cannot establish the District had knowledge of severe, pervasive, and objectively offensive conduct as defined by established case law.

c. The District Was Not Deliberately Indifferent To Harassment

Plaintiffs fail to address the final element, which requires Plaintiffs to establish that the District was deliberately indifferent to sex discrimination. To constitute deliberate indifference, the institution's response must amount to an "official decision . . . not to remedy" the situation. *Id.* at 290. In addition, the institution's actions must be "clearly unreasonable" and, "at a minimum, cause students to undergo harassment or make them liable or vulnerable to it." *Davis*, 526 U.S. at 645. An institution's liability is therefore limited "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known [sexual] harassment occurs." *Id.* at 645. As the Supreme Court has expressly recognized, dismissal of a Title IX claim is appropriate when an institution's alleged response is "not clearly unreasonable as a matter of law." *Id.* at 649 (internal quotations omitted).

Based on the circumstances known to the District, that Student A was a transgender student who agreed to use the privacy stalls in the girls' facilities, the District made a reasonable decision to allow Student A access to the girls' facilities. In order to accommodate the interests and rights of all students, the District constructed privacy stalls in both male and female locker rooms. Ex. A, ¶15. The District also provided alternatives to students who were uncomfortable using the girls' facilities. *Id.* at ¶17. It is overwhelmingly clear that the District acted reasonably in granting Student A access to the girls' facilities while providing privacy alternatives.

2. The Locker Room Facilities Do Not Violate Title IX

Plaintiffs argue that the District, by allowing Student A to use the girls' locker room, subjects the Girl Plaintiffs to inferior locker rooms in two ways: 1) girls may share a locker room with a biologically male student while boys do not share a locker room with biologically female students; and 2) the alternate private facilities are inferior to the boys' locker room. Under Title IX, schools may provide sex-separated, comparable restrooms and locker rooms. 34 C.F.R. § 106.33. Here, there is no dispute that the structural facilities are comparable, and so Plaintiffs' claim fails. Ex. A., ¶18. Likewise, the alternative private facilities are the same for both male and female students, so there is no basis for this claim either. *Id.* at ¶17.

Plaintiffs argue that the conditional access of the locker room by a transgender student makes the facility inferior, but that is not a sex-based distinction. Indeed, the OCR explicitly requires the same treatment of male and female transgender students, and Plaintiffs make no allegation that the District would not grant a male transgender student conditional access to male facilities if and when the situation presents itself.[9] Moreover, Plaintiffs themselves anticipate this scenario by including a male student and his parents as Plaintiffs, which undercuts their contention that female students are being discriminated against because of their sex. *See* Dkt. No. 1 at ¶ 35.

Finally, the presence of a transgender student in a facility does not make the facility inferior and any claim to the contrary is offensive and must fail.

III. Irreparable Harm

Plaintiffs do not rely on evidence of *actual* harm suffered by Plaintiffs, but rather rely solely on an alleged *risk* of harm for their motion. As framed by Plaintiffs:

[9] As it undoubtedly will when Intervening Defendants B and C matriculate. *See* Dkt. No. 32, pp. 5-6.

- "Plaintiffs constitutional privacy rights are violated every time government compels them to endure the *risk* that biological males may be present in their private facilities while they change clothing or attend to intimate bodily needs."

- "Forcing them to endure that *risk* creates an impermissible hostile environment in violation of Title IX."

Dkt. No. 50, pp. 1-2.

In response to the Board's Request to Conduct Fact Discovery, Plaintiffs confirmed that their claims were based on this mere "risk," 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. *Id.*; *see also* Ex. B at 8-9, 16-17. The threat of irreparable injury necessary to justify the extraordinary remedy of preliminary injunctive relief must be "real," "substantial," and "immediate," and not simply speculative as it is here. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). The mere "risk" of harm alleged by Plaintiffs does not come close to meeting their evidentiary burden of establishing "that irreparable injury is *likely* in the absence of an injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

Moreover, the District has installed privacy curtains and provided all students with privacy alternatives that ensure that no student will be forced to be in a state of undress in front of any other student if they feel uncomfortable. Ex. A, ¶15. Plaintiffs' assertions that these alternatives are less convenient than changing in the open locker rooms or may expose them to taunts from fellow students does not rise to the level of irreparable harm that justifies an injunction. *See, e.g., Hall v. Nat'l Collegiate Athletic Ass'n*, 985 F. Supp. 782, 800-01 (N.D. Ill. 1997) (basketball player missing a year of play, though inconvenient, was not irreparable).

IV. Balance of Harms

To obtain an injunction, Plaintiffs must demonstrate that the balance of harms weighs heavily in their favor**.** *Girl Scouts,* 549 F.3d at 1086 (balance of harms is a sliding-scale

analysis). For reasons explained above, Plaintiffs cannot make this showing because all they have presented are speculative and unsupported generalized concerns about sharing a restroom and locker room with a transgender girl. In contrast, the harm to the District and other students, such as Student A, resulting from an injunction is tangible, real and unquestionable. The District's ability to balance the privacy rights of all students with meeting the unique needs of individual students will be undermined. Dkt. No. 21, Ex. 3. Additionally, unless the Court also enjoins the DOE's enforcement of the Resolution Agreement, the District would be in the untenable position of either violating the OCR Resolution Agreement or an injunction issued by the Court.

Moreover, the Intervenor Defendants assert that Student A and other similarly situated students will be harmed if the District is forced to require transgender students to use restrooms and locker rooms consistent with their biological sex, rather than gender identity. In contrast to Plaintiffs' lack of evidence showing harm, Student A's parent submitted a signed declaration that sets out the harm that Student A suffers when she does not have access to girls' facilities. Dkt. No. 32-1 at ¶¶ 8-12. The District, in negotiating the Agreement reached with OCR, struck a reasonable balance between these competing interests. Specifically, the District has agreed, within the parameters set out in the Resolution Agreement, to allow Student A to use the facilities that are consistent with her gender identity while also offering additional privacy options that are equally available to all students who choose to use them. Ex A., ¶15. Plaintiffs cannot establish that the District has failed to strike an appropriate balance here and that the resolution reached with the OCR is violating Plaintiffs' legal rights or causing them irreparable harm. Accordingly, Plaintiffs' motion for preliminary injunction should be denied.

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
Erin Fowler
FRANCZEK RADELET P.C.
300 South Wacker Drive, Suite 3400
Chicago, IL 60606-6785
(312) 986-0300

Dated: July 8, 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 NO. 211'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** 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 8th 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
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
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

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

EXHIBIT A

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.**,	)	Case No. 16-cv-4945
Plaintiffs,	)	Judge Jorge L. Alonso
v.	)	Magistrate Judge Jeffrey T. Gilbert
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.	)	

DECLARATION OF MARK J. KOVACK

I, Mark J. Kovack, state the following under oath or affirmation:

1. I am employed by the Board of Education of Township High School District 211 ("District"). The District is a high school district located in Cook County, Illinois comprised of five high schools.

2. My official title is Associate Superintendent for Student Services.

3. I am responsible for supporting the efforts of the building administrators for student services, which includes services for students seeking support for issues related to gender identity.

4. I am familiar with Student A, who is a student attending school in the District.

5. I have served as a member of Student A's student support team, which supports Student A's gender identity needs. The student support team prepares a support plan summarizing information and supports for the student.

6. Student A first enrolled in the District at the start of the 2013-2014 school year.

7. Student A has presented a uniform and consistent female gender identity in that she uses a female name; uses female pronouns; has a traditionally female hair style, clothes, and overall appearance; participates in female athletics; and has undergone a course of medical care for gender transition that includes hormone therapy.

8. Prior to the 2013-2014 school year, the District already had a practice of providing female students with facilities that allowed toilet use in private, outside the view of others. The communal student bathrooms have traditional privacy stalls protecting individuals using the toilet from view.

9. The District administration granted Student A bathroom access knowing that she and all other girls would be able to toilet in private. Student A has selected to use the toilet in the nurse's office, not the toilets in the communal girls bathroom.

10. During the 2013-2014 school year, Student A and her family requested that the District grant Student A access to the communal student locker rooms for girls.

11. The District granted Student A access to the bathroom portion of the locker room where Student A and other students had access to the toilet stalls for privacy. At that time, the changing area of the locker room did not have private changing stalls.

12. Student A chose to use a separate, single-user locker room and did not change in the toilet stalls of the communal locker room for physical education or athletic activities.

13. In the fall of 2013, Student A filed a complaint with the United States Department of Education Office for Civil Rights (OCR) alleging that the District's locker room limitations on Student A violated Title IX.

14. In December 2015, to resolve the OCR complaint, the District entered into a Resolution Agreement with the Department of Education's Office for Civil Rights providing that Student A could access the communal girls' locker room on the following terms:

A. For the duration of Student A's enrollment in the District:
   1. based on Student A's representation that she will change in private changing stations in the girls' locker rooms, the District agrees to provide Student A access to locker room facilities designated for female students at school and to take steps to protect the privacy of its students by installing and maintaining sufficient privacy curtains (private changing stations) within the girls' locker room to accommodate Student A and any other students who wish to be assured of privacy while changing; ...

B. If any student requests additional privacy in the use of sex-specific facilities designed for female students beyond the private changing stations described in item II.A.1, the District will provide that student with access to a reasonable alternative, such as assignment of a student locker in near proximity to the office of a teacher or coach; use of a nearby private area (such as a single-use facility); or a separate schedule of use.

15. To facilitate the implementation of the Resolution Agreement, the District took the following steps to ensure all students had privacy for changing clothes at school:

   a. The District added five new changing stalls in the communal changing area of the main girls' locker room, a curtained shower, and privacy curtains on two pre-

existing private changing and showering stalls, which increased the total number of privacy stalls to thirteen. The District also installed private changing stalls in the boys' locker room.

b. The District notified all parents at Student A's school of the following privacy supports:

> The physical education locker room provides accommodating means to ensure privacy for any student when changing clothes. Multiple private changing stalls, similar to stalls found in department store fitting rooms, have been installed in both the male and female physical education locker rooms and are available to any student using the locker rooms. Students who seek additional levels of privacy may request the use of an alternate changing area by contacting their school counselor. These details will be shared with students during physical education classes on Friday, January 15 as part of a presentation regarding school-wide end-of-semester activities.

c. The District directed the dedicated locker room supervisor to monitor the availability of privacy stalls to ensure reasonably timely access to changing stations for all students.

16. The District received inquiries from the parents of six students regarding additional levels of privacy for bathroom or locker room use.

17. In response to these inquiries, the District offered additional privacy options including the use of a separate locker room or the nurse's office. Boy students seeking additional privacy would be offered the same alternatives.

18. The District's male and female bathrooms and locker rooms are of similar size, quality, proximity to activities, and number of lockers.

19. Under the Resolution Agreement, Student A could access the locker room beginning on January 15, 2016.

20. Beginning in January 2016, Student A was enrolled in a second semester physical

education course that met every day, but only required sportswear to be worn on Tuesdays and Thursdays. On Mondays, Wednesdays, and Fridays, students wore their regular attire to the physical education course. Even on days when sportswear is required, students are not required to wear a designated uniform for Student A's physical education course. Instead, students may wear any athletic apparel appropriate for activities, such as yoga pants, running gear, or any other active apparel. Some students choose not to change for the physical education class and instead wear their sportswear throughout the day.

21. According to Student A's May 11, 2016 Support Plan, Student A has changed clothes in the locker room using a bathroom privacy stall on a very limited basis. The Support Plan states that Student A wears sportswear to school to avoid the need to change clothes in the locker room. After January 2016, Student A accessed the communal girls' locker room to store her belongings during her physical education class.

22. The District's Board of Education's policy is to provide an educational environment free from harassment and discrimination based on gender as stated in Policy JFJ/GBCBB.

23. In 2016, the District's Board of Education considered whether to adopt a policy specific to facility access for transgender students.

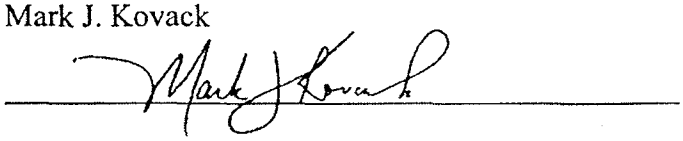
24. After review by a working group, the Board decided not to adopt a policy specific to facility access for transgender students.

25. The District makes decisions regarding specific supports, such as facility access, for transgender students based on the individual needs of every student and family.

26. The District receives approximately $6 million in annual federal funding.

I declare under penalty of perjury that the foregoing is true and correct.

Mark J. Kovack



Executed on (Date): 7/7/16

EXHIBIT B

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

STUDENTS AND PARENTS FOR PRIVACY, et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF EDUCATION, et al., Defendants.	No. 16 C 4945 Chicago, Illinois June 9, 2016 11:11 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. JEFFREY T. GILBERT, MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:
MR. PETER C. BREEN
Thomas More Society
19 South LaSalle Street, Suite 603
Chicago, Illinois 60603

MR. JEREMY D. TEDESCO
MR. JOSEPH E. LaRUE
Alliance Defending Freedom
15100 North 90th Street
Scottsdale, Arizona 85260

For the Federal Defendants:
MS. MEGAN A. CROWLEY
United States Department of Justice
Civil Division, Federal
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001

PATRICK J. MULLEN
Official Court Reporter
219 South Dearborn Street, Room 1412,
Chicago, Illinois 60604

APPEARANCES: (Cont.)

For Defendant School District 211:
MR. MICHAEL A. WARNER, JR.
MS. JENNIFER A. SMITH
MS. SALLY J. SCOTT
Franczek Radelet, P.C.
300 South Wacker Drive, Suite 3400
Chicago, Illinois 60606

For Intervenor Defendant:
MS. LAURA R. HAMMARGREN
MS. LINDA X. SHI
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606

THE CLERK: 16 CV 4945, Students and Parents for Privacy, et al., versus United States Department of Education, et al., for motion hearing.

THE COURT: Okay. Good morning. So for my edification, could we start to my left, your right, so that I could write your names down in order rather than how you would choose to do otherwise.

MS. SHI: Good morning. Linda Shi of Mayer Brown for the intervenor defendant.

09:55:37 THE COURT: Okay. How do you spell Shi?

MS. SHI: S-h-i.

MS. HAMMARGREN: And Laura Hammargren, H-a-m-m-a-r-g-r-e-n, from Mayer Brown also for the intervenor defendant.

09:56:54 MR. BREEN: Good morning, Your Honor. Peter Breen on behalf of the plaintiffs from the Thomas More Society.

MR. TEDESCO: Jeremy Tedesco on behalf of the plaintiffs.

MR. WARNER: Michael Warner on behalf of District 211.

09:57:47 MS. SMITH: Jennifer Smith also on behalf of District 211.

MS. SCOTT: Sally Scott on behalf of District 211.

THE COURT: And on the phone we have?

MS. CROWLEY: (Via telephone) Good morning, Your

09:58:03 Honor. This is Megan Crowley from the Department of Justice on

behalf of the federal defendants.

MR. LaRUE: (Via telephone) Good morning, Your Honor. This is Joe LaRue from Alliance Defending Freedom on behalf of the plaintiffs, and I just want to thank you for making it
09:58:35 possible for us to attend by telephone.

THE COURT: Yes, you're more than welcome. I wanted to do this so you didn't have to be sitting there in your bath robe at 7:00 o'clock in the morning or something on a 9:15 call. So I'm glad that you're able to participate.

09:58:58 Hold on for one sec.

Okay. So good morning, everybody. I have one prefatory comment directed toward plaintiffs. So in the room, it's Mr. Breen and Mr. Tedesco.

MR. TEDESCO: Yes.

09:59:38 THE COURT: Rule 1, even before Federal Rule of Civil Procedure 1, spell the judge's name right. So you've been in front of Judge Alonso, and that's phonetic. It's good, although he could be z-o or s-o so that's confusing, but you guys got it right.

10:00:26 I'm Jeffrey Gilbert. So I'm the r-e-y Jeffrey, not the e-r-y Jeffery. So anyway for the future, I take no offense; I just am starting this really on a light note. But there are people, and I have no -- I don't hold anything against them, who spell their names r-e-y, and there are
10:01:13 Geoffreys that do it G-e-o-f-f-r-e-y. I happen to do it

J-e-f-f-r-e-y, not because that was my choice, but that was my parents. So in honor of my parents, get my name right. Okay?

MR. TEDESCO: We will from this point forward. I apologize, Your Honor.

10:01:56 THE COURT: No problem, no even need for an apology. That's quite all right.

Okay. More substantively, I have now had a chance to look at the district's limited, quote-unquote, limited focused discovery, which is the way it was characterized the last time

10:02:40 you were here, and also the plaintiffs' opposition in the form of your motion for a protective order.

When I left the bench last time -- and I should say on the phone, before I go any further, I think one of my law clerks who is working from home today is also on the home, just

10:03:22 for full disclosure.

Is that right, Katie? I guess not. One of my law was going to --

THE CLERK: I'm sorry, Judge. Pardon me.

THE COURT: Oh, okay. I just wanted to make sure you

10:04:08 were on the line, too. All right?

THE CLERK: Yes, I am on the line.

THE COURT: Okay. I just was letting these people know that.

THE CLERK: I had you on mute.

10:04:33 THE COURT: That's fine. I just wanted them to know

that there was another participant on the call.

THE CLERK: I identified myself when -- oh, but not for people in the courtroom. Yes, I am here listening.

THE COURT: Okay. Bye.

10:05:05 THE CLERK: Bye.

THE COURT: Anyway, when I left the courtroom last time and realized that what I had said was in an effort to accommodate plaintiffs' requests for quick movement that I was going to get a brief from you yesterday and have a hearing

10:05:20 today, I thought: Are you crazy?

But I don't think I was, and I want you to know that I've read everything you submitted to me. I read the district's discovery. I read your motion for a protective order. I've since had an opportunity to go back and look again

10:05:57 at what had been filed, the complaint and the preliminary injunction motion and all that stuff. So I feel good that I'm kind of well-versed in where we are.

I guess what I'd like to do is tell you where I am, and I'd like to tell the district where I am because, frankly,

10:06:28 my inclination is to grant the motion for a protective order. What I'd like to do is tell you why and then listen to what you have to say and see whether or not we need any further proceedings or not, so that you're not speaking to a cold bench, you know, and you don't know what I'm thinking and also

10:07:10 because, although I don't intend to do this all the time, I do

think getting a ruling on this sooner rather than later, given the briefing schedule we've set and where we're going, is not a bad thing to do.

So here's where I am. First of all, I looked at your discovery. This is not fault or anything, but I don't view it as kind of, quote-unquote, limited focused discovery. It's not everything in the world that you might want to discover in the case. Sometimes when lawyers put pen to paper -- and I was one of those people -- sometimes it's hard to stop. So I'm not criticizing; it just is. There's a lot of interrogatories and a lot of subparts.

10:07:30

10:08:06

Would I like to know the answers to all of the questions you're asking if I were deciding this case on the merits? Yes, but it is more -- it is very merits based, and I do understand that your hook on this is that this is necessary for you to fully vet and address probability of success on the merits and irreparable harm in the context of the preliminary injunction proceeding that we're in.

10:08:37

So as I said, would I want those answers if this case were being tried on the merits? Yes. Would you be entitled -- well, I'm not even going to rule on that, but I get why you want the answers to those questions.

10:09:07

The question for me is do I need the answers in order to decide the preliminary injunction motion, which is really the first issue that we're here on, and I'm not sure I do.

10:09:32

Okay? Here's why.

First of all, the plaintiffs say I don't need those answers. Okay? It's the plaintiffs' case, and the plaintiffs set the table in the context of their preliminary injunction motion. It's their burden. It's the plaintiffs' burden to come forward and convince the Court that they are entitled to the preliminary injunction that they're seeking. The way they frame the case at the preliminary injunction stage, they say we don't need -- the Court doesn't need answers to these questions and, instead, the way they framed the case, the Court and the defendants and potentially the intervenors can address the issues that the Court needs to decide without extensive discovery.

You know, in particular, the plaintiffs say in their response -- in their motion for a protective order or in their memorandum in support of the motion for protective order which is ECF document number 50 that the preliminary injunction motion places before the Court two questions of law related to the activities of the district, and this is at page 3. They say two, but it's really three questions. Okay?

The first is: Does letting a biological male use the girl's locker rooms and restrooms, and so subjecting the girl plaintiffs to the risk -- you know, I pause on the risk because that's the way the plaintiffs focus it -- of compelled exposure of their bodies to the opposite biological sex, violate the

girl plaintiffs' constitutional right to privacy?

So that's the way they characterized the first question that they're dealing with here, and that is consistent with their motion for preliminary injunction and the memorandum in support.

10:12:32

The second question they say is: Does letting a biological male use these private female facilities -- and I guess I would focus on letting a biological male because the policies of the district allow that and the locker room agreement allows it -- does that create a hostile environment for the girl plaintiffs in violation of Title IX?

10:13:11

And although this is a run-on sentence in the plaintiffs' motion, I really think it's a separate question, which is the third question: Does offering the girl plaintiffs incomparable facilities -- and by that I take it as not comparable facilities as opposed to incomparable, meaning they're the most wonderful facilities in the world -- not comparable facilities as compared to boy students violate Title IX?

10:13:49

So those are the issues that the plaintiffs are framing that they want the Court to decide on the preliminary injunction motion, and they say that in large part a lot of the issues that underlie these are not necessarily disputed.

10:14:26

I mean, the way the plaintiffs phrase the issues, again, it's the plaintiffs' motion. They set the table. It's

10:14:59

their burden. Given the way they framed the issues and what needs to be decided, given that this is an expedited proceeding, given that plaintiffs are correct that normally in preliminary injunction proceedings a lot of information may
10:15:30 come in that doesn't necessarily meet every single admissibility standard that we would demand at trial, but it's kind of a quick look, if you will, as to whether or not, you know, all the factors, you know, all the irreparable harm, probability of success on the merits, inadequate remedy at law,
10:16:03 all those things are met, you know, the plaintiffs to some extent are entitled to frame what they would like.

Now, there are often proceedings on preliminary injunctions where plaintiffs come in and say: Before I put on my case for the preliminary injunction, before I file my brief,
10:16:36 I want discovery. You know, in a trade secret case, I want to depose the people who allegedly stole my trade secrets. I want the defendants to produce their computers. I want to make sure of all this stuff.

That's not this case now. The plaintiffs are coming
10:17:02 in and saying: This is what I'm asking for and this is how I phrase it, and I want to present the case in this way to the Court and I want the defendants to respond to the case in this way.

So, you know, framed in this way, plaintiffs say the
10:17:20 defendants don't need the discovery that they're asking for,

interrogatories, to respond to the plaintiffs' preliminary injunction motion, and plaintiffs conversely don't need any discovery in order to put their position in front of the Court.

So my thinking from looking at all this is I agree at this stage. All right? The only caveat is that if I proceed with this case and I believe that I disagree with what I just said in some way, I mean, I suppose I could adjust it. But right now we've got a briefing schedule in which we're supposed to get the defendants' response by a certain date, plaintiffs' reply, and if plaintiffs are consistent with what they're saying and if defendants meet what plaintiffs are saying, I think that I can address plaintiffs' arguments without a lot of discovery.

The second reason is a practical and procedural reason, and that's once we start down this path of, quote-unquote, limited discovery, now I've seen what the district means by limited discovery. Again, I'm not casting any aspersions, you know. I know how interrogatories get drafted, and I'm not -- you know, there can always be another subpart. There can always be something that you're asking for.

But if we get to the point of saying, and I toyed with the idea of saying, well, certainly certain interrogatories could be asked, ones that are focused not on -- that are, you know, some of the factual allegations or something. But if the plaintiffs don't answer those as the defendants want, then you

meet and confer. Then you have a motion to compel. Then maybe somebody says: Well, I really need the depositions of these people.

Pretty soon, we're really merging the preliminary injunction phase of this case into the merits phase of the case. If the case was here on consent on all fours, I still don't think I would want to do that. Okay? However, you know, it makes it a little bit different. But right now and in view of the posture of this case as it is currently on referral, I haven't seen any limited consent to the injunction, and I know we have intervenors waiting so, you know, they would have to weigh in on that potentially, too.

You've got lots of procedural -- I mean, even now, for example, if the district disagrees with my ruling on whether or not this discovery is necessary for me to decide the preliminary injunction, even though it's a discretionary ruling and even though the preliminary injunction is in front of me and even though I'm saying I don't need that, you technically have the ability to appeal it to Judge Alonso because the case is on referral.

So, you know, that continues to elongate, complicate, and in some ways -- in ways that I'm not sure are very helpful. So I'm not inviting an appeal, but I'm just saying that in the current procedural posture of the case, given the way plaintiffs have framed it, the types of discovery you want, and

where I think we need to go, as long as I put a marker down with respect to my caveat that as I look at this more carefully or get under the hood a little bit more I can adjust if I need to, my inclination is to grant the motion for protective order and move forward.

10:22:40

So that's a long way of saying that's what I've been thinking, Mr. Warner, Ms. Smith, Ms. Scott, and if you want to say anything or push me in some way, I mean, I am fine with interacting. If you tell me something that I take a pause on, I can think about it or whatever, but that's where I'm headed.

10:23:11

MR. WARNER: Well, thank you, Your Honor. I think your explanation for what you're thinking and your rationale behind it is extremely helpful certainly to the district and hopefully for all the parties, because I do think it helps focus what the purposes of the preliminary injunction proceedings are and what the issues and how the issues can be framed that you have to decide.

10:23:57

To that note, we had conversations very similar to what's going on in your own mind when we read the legal issues in the brief that you just read to us. Now, we would quibble with the phraseology and wording, how they phrased things, because a lot of it is conclusory. But if, in fact, the issues are as described there and they are purely legal issues, frankly, I can't really disagree with your ruling.

10:24:26

The problem here is both in the verified complaint, in

10:25:01

the motion and brief in support of the motion for preliminary injunction, and in their motion for protective order, plaintiffs are completely inconsistent in terms of the position they're taking. On the one hand, they're saying: This is
10:25:25 purely legal. These are purely legal issues here.

They are, but then they go on to say: Oh, but we have a verified complaint, and we want the Court to take the allegations in the verified complaint as actual evidence because our complaint is verified.

10:25:53 They really can't have it both ways. If they're asking this Court to take as a matter of fact these allegations as to what actually has happened in locker rooms and restrooms, what their clients have experienced, it seems to me we do need some additional information in order to respond to that, in
10:26:18 fact, if that's what they want to do, and they're still not committing themselves either way to that. So with that uncertainty, you know, that's why we issued the discovery.

If the Court is saying you're going to look at this as a purely legal issue as you've just framed, you know, I think
10:26:41 that makes a lot of sense. But, you know, our fear is that as the briefing goes down, that's not the way it evolves, and we don't want to be -- particularly in the tight time frame, we don't want to be prejudiced in terms of how we respond.

For instance, if plaintiffs come back in their reply
10:27:09 briefs with affidavits or citing to the specific factual

allegations in the complaint and relying on that in reply, we're going to potentially be seeking discovery then. You know, by that time, it will complicate things even further.

But if there's an understanding, you know, among the
10:28:00 Court and the litigants that really we are looking at this as a legal issue in looking at the first issue, that this is really, okay, is the risk of exposure and, I would say, in front of a biological male whose gender identity is female, because I think the intervenors would agree that's an important fact that
10:28:27 I don't think anybody disputes needs to be considered here, if there's an understanding that that's the real issue here and it's the risk as opposed to looking at what plaintiffs allege has actually happened in locker rooms and restrooms, I think the district is very comfortable proceeding on that basis. But
10:29:00 once you get -- if they get into specifics, we need to get into specifics.

THE COURT: Well, I'd like to hear from the plaintiffs on this. I will say in reaction to what you're saying a couple things. One, I don't know whether it's a matter of law or not,
10:29:33 but what I do know is that what the plaintiffs are telling me right now is that there are certain things that are undisputed. Yes, they have a very long verified complaint and there's a lot of stuff in there, and they have objected to your discovery about some of those factual allegations that you would want to
10:30:01 rebut, for example, harassing comments and statements, what

exactly happened in a locker room, who saw what, when, and who was there, and was there a complaint made.

I would be interested in what plaintiffs have to say about this but, you know, I'm not going to put anybody's foot in stone right now. But if plaintiffs come in with -- well, I'll listen to what plaintiffs have to say. The way they are framing some of this, though, there are certain facts that they have in the complaint that are not even disputed by the defendants, right? There is a policy. There is a locker room agreement.

MR. WARNER: And, Your Honor, I don't believe we dispute those facts, which is why we didn't ask any interrogatories with regard to those.

THE COURT: Right, right, right. And to the extent that -- well, I mean, I'll hold my fire until I hear something from them.

As you were talking, although you didn't see it, some of the plaintiffs' lawyers were shaking their head with respect to if they're going to come in with X, Y, and Z.

So does somebody want to say something? Mr. Tedesco, I think you traveled the farthest, right?

MR. TEDESCO: Yes, I did. Thank you, Your Honor.

THE COURT: Okay.

MR. TEDESCO: So a couple things. One, it's true that Your Honor could rule on the preliminary injunction based on

some of the very basic undisputed facts in the case. Consistent with policy, a biological male student is permitted in the locker rooms and the restrooms on a daily basis. This is a reality for the students at the school.

10:33:30 But I would say to the school district's arguments about this, the specific circumstances that are talked about in the complaint, those are the natural, obvious, you know, logical result of adopting the very policy that the school adopted. So their position is that they need that evidence

10:33:58 because they misunderstand the sexual harassment/hostile environment claim. They say: Well, we didn't have actual knowledge of these specific instances, and we need to have that actual knowledge for you to prove your claim.

Our point is that the adoption of the policy

10:34:25 authorizes everything that the plaintiffs have experienced in the locker room and restroom. Those are just specific obvious kinds of results of a policy that allows a biological boy into the girls' locker room and restroom, and so they have actual knowledge because they've adopted the policy that authorizes

10:34:47 it.

Then the other thing that I think is important about their interrogatories is they're primarily based on another misunderstanding about the case. As you were saying earlier, we're the plaintiffs, and we get to frame the case. Their

10:35:20 interrogatories are based primarily on getting information

related to who saw who in the state of undress or naked, and that is not relevant to the claims, especially at the preliminary injunction stage. We don't need to prove that. We didn't allege that in the complaint, nor do we rely on it at
10:35:39 the preliminary injunction stage.

That's primarily what they're seeking, who saw who, when, where, and what state of undress were they in or were they nude, and that information is simply not going to be helpful to the Court in deciding the preliminary injunction
10:36:05 motion.

What you need to know, Your Honor, is that the policy exists, nobody disputes that, that the policy allows a biological student into a locker room and restroom, and that, of course, results in interactions in the locker rooms on a
10:36:28 daily basis between girls and boys.

Now, those specific interactions don't need to occur because the violation is the fact that a boy could enter after -- so say a girl enters the locker room or restroom. They know that a boy is authorized to enter those facilities
10:37:04 when they're using them to change, to use the restroom, and to engage in other kind of private activities.

So that is the bar when it comes to the Title IX and the privacy violation. Inserting the biological male into those facilities is sufficient to show the violation.

10:37:36 THE COURT: I am -- thanks, Mr. Tedesco. I am sure

the district defendants and probably the Department of Education defendants disagree with a lot of what you've just said about what is sufficient or not sufficient to prove your case, and I'm really not going to wade into that because I haven't -- I'm at the early stage. But nothing that you've said and nothing that Mr. Warner said disabuses me of the notion that I should grant your motion and deny the -- grant your motion as to the interrogatories that were served to be expedited at this point.

10:38:37 You can argue what you want to argue. Okay? You've got a complaint on file, you've got a motion for preliminary injunction, and also you filed an opposition, your motion for protective order, and I can read it and they can read it. Okay? I've told you how I interpret what you've said and I've

10:38:58 told you why I'm going to rule in the way I am, and the defendants are going to respond.

As I said, if I see something as this develops, including something that the plaintiffs might do to frame the issues differently or put something at issue that I think I

10:39:23 need discovery on, I can revisit this issue. All right? So to some extent, you control it. As I said, I mean what I say when I say the plaintiffs can set the table on their own preliminary injunction motion.

Whether the defendants would say you should pursue

10:39:44 something differently or whether I would say either I would do

it differently if we were going -- you know, I mean, one option obviously is to say let's do everything on the merits. I mean, there are some judges who say let's collapse the preliminary injunction with expedited discovery on the merits and go
10:40:20 forward, but we're not in a procedural posture to be able to do that and, as I said, I'm not sure that I would do that regardless. Okay? Because it may be that this is the type of case that needs that kind of a ruling early on based upon how plaintiffs present their case and what I can see.

10:40:55 So I don't feel like -- I'm not going to go in in detail and micromanage what you're going to say or what the defendants are going to say. Based upon the posture of the case in front of me right now, I'm comfortable. With respect to what I hear plaintiffs arguing and what I see defendants
10:41:24 wanting to discover leaning more on the merits, I'm comfortable not having that discovery in front of me now. That doesn't prevent --

You know, there hasn't even been a date for the defendants to answer yet. I mean, I think you have -- I don't
10:41:49 know if you were served under the waiver or not. I don't know if you have 60 days or 30 days. I think the Government uniformally gets 60 days to respond to some stuff, and 60 days hasn't really passed.

So what I'm saying is not intended to dissuade anybody
10:42:14 from seeking discovery on the merits, which is not in front of

me, you know, or putting together a discovery plan that goes past a preliminary injunction. Maybe you'll say: I don't want to do that. I want to focus on the preliminary injunction, see where the chips fall on that, and then regroup.

10:42:40 So all of that is fine. So I have to take it in steps. Where I am at this particular step, faced with the discovery that is being served and what I've seen in the motion for protective order, I'm going to grant the motion for a protective order. I'm going to keep my briefing schedule in

10:43:09 place. I'm going to see how it plays out, and then I'm going to rule as promptly as I can, you know, and keep the case going forward.

I think the result of it is also kind of less complicated for the intervenor parties because, you know, they

10:43:45 know what -- they see how the table is set right now if they're going to come in either as intervenors or amicus or something else. I don't know, but that is also playing out. I read the briefs that were filed on the 7th, and I think you have a brief on the 14th, right? So that's where I am. Okay?

10:44:27 So I appreciate you're coming in. As I said, I am not --

MS. HAMMARGREN: Your Honor, can I ask one point of clarification?

THE COURT: Yes.

10:44:46 MS. HAMMARGREN: In your original scheduling order,

the last sentence talked about leaving open the possibility that perhaps (inaudible) parties could move for leave for discovery at a later date, depending on time and where the case was. Is that still permitted?

10:45:34 THE COURT: Yes, that's still where I am. I mean, I have that, and I have the order in front of me. But I think I heard what -- I don't think it was you. It was somebody else talking about the issue that you felt you wanted to litigate either on the merits or at the preliminary injunction stage, and I'm not weighing in on that at all. I don't know if you're in the case or not. Once you're in the case, we can talk about it.

I think you should be -- I'm not taking anything back because I don't want to say to anybody you can't do what you haven't done yet when I don't know what you're doing. You know what I mean? I mean, I like to try and rule on things as I see them, and that's why I think it was actually a decent idea to get your interrogatories rather than have a lot of discussion of whether discovery can proceed in the abstract, and I feel the same way about what you're saying here.

But you should understand some of the way I'm looking at this, too, you know. We've got a motion for a preliminary injunction on particular issues, and having read more about this and read other courts' decisions in this area in the last week, I think I have some sense of what you're talking about.

I'm not sure where I come out on any of that and whether it's relevant at the preliminary injunction stage, again, as the plaintiffs have phrased this.

You know, first they've got the whole, you know, the 10:48:16 legislative guidance as to rule making and all the kind of the DOE kinds of stuff, and then there are the issues that are happening at the school. I know you and your clients have a view about the terminology that's used and not even terminology, but some, you know, very substantive issues, and I 10:48:48 get that.

You'll have to think about whether those have to be part of discovery or they're in briefing or whatever, but that's a long way of answering your question, which is, I'm not taking anything back and I'm moving forward.

10:49:53 MS. HAMMARGREN: Okay. Yeah, I appreciate that clarification, and we'll certainly take into account everything.

THE COURT: Yes. The only thing I'm taking back from my original order was I said this was going to be the initial 10:50:36 hearing because I really felt like I'd like to kind of initially get everybody in and talk about this, and it's actually the final hearing on the motion for a protective order. But to me that's fine, because at least you get a decision earlier rather than later. Everybody knows where they 10:51:12 stand. You can do what you want to do with it.

So because what I intended was just to get anybody in here quickly and continue to try and move, in my mind I also might have gotten a written response from the district after they saw this thing. I just wanted to continue to manage it. But as I've seen it, as I've thought about it, as I see kind of how the playing field is beginning to come into focus for me, that's where I am.

MR. TEDESCO: Your Honor, can I ask one other question?

10:52:12 THE COURT: Yes.

MR. TEDESCO: I think the initial briefing schedule and hearing date on the PI was set in anticipation that there would likely be discovery, so I'm wondering if we can push it forward two weeks maybe on everything or leave it where it is.

10:52:53 THE COURT: No, no. The answer is no, and part of the reason for that is when the district defendants came in they had asked for like 28 days after their discovery came in. They've got a lot of things to brief. I would like to keep it open. I'm pressing the proposed intervenors if they do get in

10:53:18 the case on the schedule already, and I don't want to press anybody more.

Also, I had a chance to reflect, Mr. Tedesco, on the plaintiffs' position the last time that we got to go, go, go. As I read everything -- and I understand that, but as I read

10:53:46 everything I came to understand a little bit more that this

issue, the issue of A, that the DOE is interpreting the so-called issue of transgender and how it relates to Title IX and the requirements on schools for quite a long time.

I think in the materials you guys submitted in support of your motion, I want to say from memory there was something in January 2014. I am sure that there was extensive guidance in April of 2015. So this issue has been percolating for a while at certain levels, and the fact that the plaintiffs chose to file when they filed in this district this case at this time is fine, but I don't feel that justifies moving my entire schedule up another two weeks and forcing this.

You know, I mean, lawyers, me included when I was on that side of the bench, often come in and say: Judge, we could do that in two weeks. Then as we're doing it and we're seeing what we have to do, there's what you call that motion for extension of time because we need a little bit more time. All right? So you guys held yourself to two weeks. Maybe you are going to hold it, too. Maybe these guys will hold it, too, but we've got to see.

You know, I don't know where the intervenors are going to be. You know, if I were them -- and I am sure they are -- they'd be working on whatever the heck they want to file if they can file it, you know, if they're in the case. I don't know what they would do if they don't have a ruling, whether they -- I don't know what the -- I don't get a lot of amicus

briefs at the district court level, not like the Supremes and what they get. I don't know if that's an option or not, and I'm not even ruling on that, you know. But I'm just saying, if they want to get their views known, I don't know if they're going to do that, either.

10:56:57

But I think the briefing schedule I set was aggressive enough without pushing it farther. I would say that I set a briefing schedule that I thought was fair and then pushed hard on when the discovery responses would be to get into that briefing schedule, not the opposite. So I don't think I calibrated the briefing schedule off of the response date as much as, you know, I said you guys should respond by the 17th so you can get the brief in. Now you don't have to do that, so you won that part. Okay? Anything further?

10:57:15

10:58:12 MR. WARNER: Nothing, Your Honor.

MR. TEDESCO: Nothing, Your Honor.

THE COURT: Okay. Good. Have a good day.

MR. TEDESCO: Thank you, Your Honor.

MR. WARNER: Thank you, Your Honor.

10:58:41 MS. HAMMARGREN: Thank you, Your Honor.

MR. BREEN: Thank you, Your Honor.

THE COURT: Have a good flight back. You're from? Where are you from?

MR. TEDESCO: Scottsdale.

(Proceedings concluded.)

C E R T I F I C A T E

I, Patrick J. Mullen, do hereby certify that the foregoing is an accurate transcript produced from an audio recording of the proceedings had in the above-entitled case before the Honorable JEFFREY T. GILBERT, one of the magistrate judges of said Court, at Chicago, Illinois, on June 9, 2016.

/S/ Patrick J. Mullen
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division