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

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; C.A., a minor, by and through her parent and guardian, N.A.; A.M., a minor, by and through her parents and guardians, S.M. and R.M.; N.G., a minor, by and through her parent and guardian, R.G.; A.V., a minor, by and through her parents and guardians, T.V. and A.T.V.; and B.W., a minor, by and through his parents and guardians, D.W. and V.W., Plaintiffs, v. 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, and STUDENTS A, B, and C, by and through their parents and legal guardians Parents A, B, and C, and the ILLINOIS SAFE SCHOOLS ALLIANCE, Intervenor-Defendants.	No. 1:16 CV 4945 The Hon. Jeffrey T. Gilbert, *Magistrate Judge*

INTERVENOR-DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO CONDUCT LIMITED, EXPEDITED DISCOVERY OF INTERVENOR-DEFENDANTS

INTRODUCTION

Plaintiffs have twice disclaimed the need for discovery on their motion for a preliminary injunction: first on June 8, 2016, in their initial motion stating that "the necessary facts are included in Plaintiffs' Verified Complaint" (Dkt. 50 at 6), and then again on June 30, 2016, during the hearing on the Intervenor-Defendants' most recent discovery motion (Dkt. 64). Notably, it was only after Intervenor-Defendants sought, and were granted, limited discovery that Plaintiffs filed the instant motion seeking expedited discovery seeking intimate, personal facts about Student A. *See* Dkt. 81. Specifically, Plaintiffs now seek discovery related to Student A's sex designation on her birth certificate, her genitalia, reproductive organs, and sex chromosomes. *See* Dkts. 81-1 (Plaintiffs' requests for admission), 81-2 (Plaintiffs' interrogatories). But any responses to such discovery would be, *by Plaintiffs' own admission*, irrelevant and unnecessary to their response to Intervenor-Defendants' opposition to Plaintiffs' motion for preliminary injunction. Indeed, as Plaintiffs acknowledge, Intervenor-Defendants' position is that a transgender individual's sex is determined by that individual's gender identity, not the individual's birth-assigned sex. *See* Dkt. 81, ¶ 8. Discovery on the birth-assigned sex of Student A is therefore irrelevant to Plaintiffs' response (or any other proceeding in this matter). Moreover, given Plaintiffs' pleadings in this matter (including their verified Complaint), the requested discovery is not relevant to either a "claim or defense" as required by Fed. R. Civ. P. 26(b)(1). In short, as Plaintiffs have both *admitted* that they already have sufficient information to support their theory regarding Student A's sex and *failed* to explain why discovery of such highly private, intimate information has any impact on any of their claims or legal theories and, in fact, accomplishes anything other the embarrassment of Student A, Plaintiffs' motion for expedited discovery should be denied in its entirety.

ARGUMENT

As an initial matter, a party seeking expedited discovery "must make some *prima facie* showing of the *need* for the expedited discovery." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor*, 194 F.R.D. 618, 623 (N.D. Ill. 2000). Expedited discovery is "not the norm." *Id.* Courts "evaluate a motion for expedited discovery on the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances." *Ibarra v. City of Chicago*, 816 F. Supp. 2d 541, 554 (N.D. Ill. 2011). Plaintiffs plainly have not met this burden and their motion therefore must be denied.

More fundamentally, however, Plaintiffs' proposed discovery seeks highly personal information without making any showing of how it is *relevant* to either their preliminary injunction motion or to a "claim or defense" at issue in this litigation as required under Fed. R. Civ. P. 26. In their preliminary injunction motion, Plaintiffs assert, based solely on the fact that Student A was assigned the sex male at birth, that Student A has an "objective biological status as a male." PI Mot. 1 n.1, Dkt. 1 at ¶¶ 71-76.[1] Intervenor-Defendants, in their opposition, have set forth evidence, including medical research, that the sex of a transgender individual is determined not by birth-assigned sex but by his or her gender identity, which has biological component. Dkt. 79 at 2. Intervenor-Defendants' evidence also establishes that transgender individuals have gender identities that differ from the sex they were assigned at birth, and the only medically supported determinant of sex for individuals with gender dysphoria (the medical diagnosis for the incongruence and accompanying distress when an individual's gender identity differs from their birth-assigned sex) is gender identity. *Id.* at 2-3. These facts establish that Student A is female. None of the information that Plaintiffs seek—such as Student A's sex

[1] While Plaintiffs assert in their complaint that Student A is "anatomically male," they admit in their responses to discovery answers that they based this assertion solely on Student A's male designation at birth. *See* Dkt. 79-1 (facts on which Plaintiffs rely limited to that Student A was "designated male at birth" or "born male").

designation on her birth certificate, her genitalia, reproductive organs, and sex chromosomes—could change that fact. As such, the proposed discovery is completely irrelevant to Plaintiffs' response to Intervenor-Defendants' position on Student A's sex.

It is also irrelevant to any asserted claim or defense in this matter. Plaintiffs ask the Intervenor-Defendants to admit that Student A's birth certificate designated her as "male," that Student A was born with male genitalia and possesses male reproductive organs, that Student A does not possess female reproductive organs, and that Student A has a set of XY chromosomes. Dkt. 81-1. Plaintiffs also ask the Intervenor-Defendants to state all facts upon which they base any denial of the Requests for Admission, and to identify all persons who have information and/or knowledge regarding those facts. Dkt. 81-2. But again, they do not even attempt to show how Student A's chromosomes, reproductive organs or genitalia have any relevance to their claims,[2] and they omit any mention of the publicly available statements, cited by Plaintiffs in their Response Memorandum in Opposition to Intervenor-Defendants' Motion for Expedited Discovery, Dkt. 64, regarding Student A's designated sex at birth, including:

- Student A's mother's statements in her declaration that Student A was "designated male at birth."
- In a letter of findings, the Department of Education stated that "Student A was born male. . . ."

Dkt. 64 at 2-3.

Notwithstanding the foregoing, if it is now Plaintiffs' contention that the requested discovery goes to Plaintiffs' legal theories regarding their privacy and hostile environment allegations, that claim, too, must fall on deaf ears. When Student A has changed clothing in the girls' locker rooms, she has used changing stalls to do so. Dkt. 21-3 at 2. And the girls' restrooms at District 211 have private stalls. Dkt. 78-1 at 2. Plaintiffs have not proffered any

[2] And any pretense of relevance is flatly contradicted by Plaintiffs' earlier statement that "the necessary facts are included in Plaintiffs' Verified Complaint." Dkt. 50 at 6.

contrary facts because no such facts exist. Accordingly, the discovery Plaintiffs seek is entirely irrelevant to either a claim or defense in this case.

Finally, even were the Court to conclude that Plaintiffs' requested discovery is even minimally relevant or necessary to Plaintiffs' claims, the annoying, embarrassing, and oppressive nature of this highly invasive discovery clearly overcomes that conclusion such that the Court should still deny Plaintiffs' motion. As the district court in *Roberts v. Clark Cnty. Sch. Dist.*, 312 F.R.D. 494 (D. Nev. 2016), made clear in denying an employer's request for discovery regarding a transgender man's genitalia in the context of a Title VII claim: "[t]he phrase 'private parts' has been in my vocabulary for more than 50 years for good and common sense reasons. It is difficult to fathom a subject more likely to cause embarrassment than requesting proof of one's genitalia." *Id.* at 604. *See also Marrese v. Am. Acad. of Orthopaedic Surgeons*, 706 F.2d 1488, 1495 (7th Cir. 1983), *vacated on other grounds on rehearing*, 726 F.2d 1150 (7th Cir. 1984), *reversed and remanded on other grounds*, 470 U.S. 373 (1985) ("Discovery of sensitive documents is sometimes sought not in a sincere effort to gather evidence for use in a lawsuit but in an effort to coerce the adverse party. . . . The use of the liberal discovery provisions of the Federal Rules of Civil Procedure to harass opponents is common, and requires the vigilance of the district judges to prevent.").

* * * * * *

By seeking information they admit they already have and by failing to seek discovery relevant to either Intervenor-Defendants' arguments in their preliminary injunction opposition or to the parties' claims and defenses, Plaintiffs' motion appears to be nothing more than retaliation against Intervenor-Defendants for successfully seeking leave for expedited discovery. As noted above, Plaintiffs admitted during the June 30, 2016 hearing before this Court that their proposed

discovery is not necessary for the Court to rule on their preliminary injunction motion. They further stated that "Plaintiffs should be entitled to limited discovery" ***only*** if the Court allowed the Intervenor-Defendants' request for limited discovery, and that if the Intervenor-Defendants' motion were granted, Plaintiffs would have "*no choice* but to ask Student A to admit things that he might prefer not to discuss, in order to establish Student A's biological sex." Dkt. 64 at 3 (emphasis added).

Plaintiffs should not be allowed to file a "verified" complaint alleging that Student A is male, ask for an injunction premised on that claim, and then seek the discovery of private medical information about that individual that they now claim they "need" when they clearly did not need it to file their complaint or to file their preliminary injunction motion.

CONCLUSION

For the reasons stated above, the Intervenor-Defendants respectfully request that the Court deny Plaintiffs' motion for expedited discovery.

Dated: July 12, 2016

Respectfully submitted,

/s/ *Britt M. Miller*

Britt M. Miller
Timothy S. Bishop
Laura R. Hammargren
Linda X. Shi
MAYER BROWN LLP
71 South Wacker Drive
Chicago, IL 60606
Telephone: (312) 782-0600
Facsimile: (312) 701-7711
bmiller@mayerbrown.com
tbishop@mayerbrown.com
lhammargren@mayerbrown.com
lshi@mayerbrown.com

- and –

Catherine A. Bernard

John Knight
ROGER BALDWIN FOUNDATION OF ACLU, INC.
180 North Michigan Avenue
Suite 2300
Chicago, IL 60601
Telephone: (312) 201-9740 ext. 335
Facsimile: (312) 288-5225
jknight@aclu-il.org

- and -

Ria Tabacco Mar*
American Civil Liberties Union FOUNDATION
125 Broad St., 18th Floor
New York, NY 10004

Telephone: (212) 549-2627
Facsimile: (212) 549-2650
rmar@aclu.org

* *Admitted pro hac vice*

MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006-1101
Telephone: (202) 263-3000
Facsimile: (202) 263-3300
cbernard@mayerbrown.com

Counsel for Students A, B, and C, and the Illinois Safe Schools Alliance