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

STUDENTS AND PARENTS FOR PRIVACY, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:16-cv-4945
UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,	)	
Defendants.	)	

FEDERAL DEFENDANTS' SUPPLEMENTAL BRIEF

The Seventh Circuit's recent decision in *Hively v. Ivy Tech Community College*, --- F.3d ---, 2016 WL 4039703 (7th Cir. July 28, 2016), stands for the proposition that, in this Circuit, "'harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII.'" *Id.* at *1 (quoting *Hamner v. St. Vincent Hosp. & Health Care Ctr.*, 224 F.3d 701, 704 (7th Cir. 2000), and *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000)). But this case is not about whether Title VII of the Civil Rights Act of 1964 ("Title VII") (or Title IX of the Education Amendments of 1972 ("Title IX"), for that matter) prohibits discrimination based on sexual orientation—the issue presented in *Hively*—rather, it is about whether the term "sex" in Title IX and its implementing regulations unambiguously means "sex assigned at birth" or "genetic sex," as plaintiffs' claim, *see* Pls.' Reply Mem. in Support of Prelim. Inj. Mot. ("Pls.' Reply") at 1-2, ECF No. 94. As such, *Hively* does not affect, much less control, the outcome of this case.

In *Hively*, a part-time professor alleged that she had been denied a full-time position because of—and *only* because of—her sexual orientation. *See id.* at *1. The Seventh Circuit

acknowledged that "[o]ur precedent has been unequivocal in holding that Title VII does not redress sexual orientation discrimination." *Id.* at *2. Nevertheless, the panel went on to examine the underlying logic of that precedent in light of a recent, contrary administrative decision by the Equal Employment Opportunity Commission (EEOC), *see Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015). *See Hively*, 2016 WL 4039703, at *4. In particular, the panel noted that courts have generally treated sex-stereotyping claims (also referred to as "gender non-conformity claims") by gay and lesbian individuals as cognizable under Title VII, but *not* claims of discrimination based solely on sexual orientation. *See id.* at *4-*7. The panel recognized that this distinction is often difficult to draw, and that the result is "a somewhat odd body of case law that protects a lesbian who faces discrimination because she fails to meet some superficial gender norms—wearing pants instead of dresses, having short hair, not wearing make up—but not a lesbian who meets cosmetic gender norms, but violates the most essential of gender stereotypes by marrying another woman." *Id.* at *11. Nevertheless, the court concluded that, "although disentangling gender discrimination from sexual orientation discrimination may be difficult, we cannot conclude that it is impossible." *Id.* at *7. Therefore, because there must be "a compelling reason to overturn circuit precedent," *id.* at *14, the court affirmed the dismissal of the plaintiff's claim.

Hively stands for the proposition that discrimination based solely on sexual orientation is not discrimination "because of . . . sex," 42 U.S.C. § 2000e-2, under Title VII. But this conclusion has little or nothing to do with the questions of whether Title IX protects the rights of transgender individuals to use the sex-segregated facilities that comport with their gender identity or what determines the sex of a transgender individual. *See Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at * (D. Minn. Mar. 16, 2015) ("[A]n individual's

transgender status in no way indicates that person's sexual orientation."). Indeed, while the courts of appeals are thus far unanimous on the question at issue in *Hively*, with regard to the question at issue here, the courts of appeals have largely held that Title VII and Title IX prohibit discrimination against transgender individuals. "[T]he weight of circuit authority" recognizes that "discrimination against transgender individuals constitutes discrimination 'on the basis of sex'" under Title IX and "analogous statutes," including Title VII. *Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 727 (4th Cir. 2016) (Davis, J., concurring) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989); *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000)), *mandate recalled and stayed by Gloucester Cnty. Sch. Bd. v. G.G.*, No. 16A52 (Aug. 3, 2016).

Thus, *Hively*—and *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), before it—has little to say about the issues that are central to this case. In particular, *Hively* does not address the question of whether a transgender female should be treated as a man or as a woman for purposes of access to single-sex facilities in educational institutions. Indeed, as explained in Federal Defendants' initial brief, the *Ulane* court explicitly allowed for the possibility "that society, as the trial judge found, considers Ulane [a transgender female] to be female," and went on to analyze whether she had established that she was discriminated against because she was a woman. *Id.* at 1087; *see also* Fed. Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj. at 22, ECF No. 80 (discussing *Ulane*). Neither *Hively* nor *Ulane* addresses whether a transgender person should be considered a member of the sex that matches his or her gender identity.

Nor does *Hively* shed any light on the broader questions of how an individual's "sex" under Title IX should be determined, and whether a transgender individual is a "biological male or biological female," *Ulane*, 742 F.2d at 1087; *see also Hamner*, 224 F.3d at 704. As the Fourth Circuit recently explained, Title IX and its implementing regulations could be understood to mean that a school should determine "maleness or femaleness with reference exclusively to genitalia"; on the other hand, it could mean that a school should "determin[e] maleness or femaleness with reference to gender identity." *Gloucester*, 822 F.3d at 720. When Title IX was enacted, dictionaries included psychological and behavioral differences within the definition of "sex." *See id.* at 721-22. Contemporaneous dictionaries defined "sex" as "the character of being male or female" or "the sum of the morphological, physiological, and behavioral peculiarities . . . that is typically manifested as maleness or femaleness." *Id.*[1] In other words, plaintiffs' contention that the meaning of "sex" in Title IX is based purely on some immutable biological reality, *see* Pls.' Reply at 1-2, is belied by contemporaneous dictionary definitions, which demonstrate "that a hard-and-fast binary division on the basis of reproductive organs – although useful in most cases – was not universally descriptive." *See Gloucester*, 822 F.3d at 721.[2]

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[1] *See also* Am. Heritage Dictionary 548, 1187 (1973) (defining "sex" as, *inter alia*, "the physiological, functional, and psychological differences that distinguish the male and the female" and defining "gender" as "sex"); Webster's Seventh New Collegiate Dictionary 347, 795 (1970) (defining "sex" to include "behavioral peculiarities" that "distinguish males and females" and defining "gender" as "sex"); 9 Oxford English Dictionary ("OED") 577-78 (1st ed. 1939) (defining "sex" as, *inter alia*, a "distinction between male and female in general").

[2] Even assuming *arguendo* that the Court were to accept plaintiff's underlying premise that one's "sex" is determined exclusively by reference to biological distinctions, it would not preclude a finding that sex encompasses gender identity. To the contrary, "numerous medical studies conducted in the past six years . . . 'point in the direction of hormonal and genetic causes for the in utero development" of gender identity that is inconsistent with an individual's genitalia. Christine Michelle Duffy, *The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, in* GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE ch.16, at 16-72 to 16-74 & n.282 (Christine Michelle Duffy ed. Bloomberg BNA 2014); *see also* Aruna Saraswat, MD, Jamie D. Weinand, BA, BS & Joshua D. Safer, MD, *Evidence Supporting the Biologic Nature of Gender Identity*, 21 ENDOCRINE PRACTICE 199, 199-202 (Feb.2, 2015) (providing a review of data in support of a "fixed,

Accordingly, the term "sex" "sheds little light on how exactly to determine the 'character of being either male or female'" in situations where the morphological, physiological, and behavioral indicators of sex "diverge." *Id.* Unsurprisingly, as these issues were not before the court, *Hively* does nothing to resolve these ambiguities.

Furthermore, plaintiffs' own approach leads to substantial uncertainty. As the Fourth Circuit noted in *Gloucester*, reducing "sex" solely to genitalia creates unresolvable ambiguities about how laws and regulations governing sex discrimination and the lawfulness of sex-segregated facilities would apply to "an intersex individual," and "an individual born with X-X-Y chromosomes," and "an individual who lost external genitalia in an accident." 822 F.3d at 720-21. The Court further explained that "[m]odern definitions of 'sex' also implicitly recognize the limitations of a nonmalleable, binary conception of sex. For example, Black's Law Dictionary defines 'sex' as '[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender.' The American Heritage Dictionary includes in the definition of 'sex' '[o]ne's identity as either female or male.'" *Id.* at 721 n.7 (quoting Black's Law Dictionary 1583 (10th ed. 2014) and American Heritage Dictionary 1605 (5th ed. 2011)).[3]

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biologic basis for gender identity" and concluding that "current data suggest a biologic etiology for transgender identity"); E.S. Smith, J. Junger, B. Derntil & U. Habel, *The Transexual Brain – a Review of Findings on the Neural Basis of Transsexualism*, NEUROSCIENCE AND BIOBEHAVORIAL REVIEWS (2015) (unedited manuscript, accepted for publication) (citing numerous studies and concluding that "[t]he available data from structural and functional neuroimaging-studies promote the view of transsexualism as a condition that has biological underpinnings"). Thus, the current research increasingly indicates that gender identity has physiological or biological origins.

[3] Plaintiffs' view is not only incorrect; it also leads to absurd results when taken to its logical conclusion. According to plaintiffs, even transgender individuals who have undergone gender confirmation surgery must be treated as belonging to their sex assigned at birth. *See* Pls.' Reply at 2 ("[A]ll males' 'sex' remains male. This is true even for those who take female hormone supplements and have surgery to remove their male genitalia."). In other words, plaintiffs appear to believe that a transgender individual who was born with male genitalia but who identifies as female and has female genitalia as a result of surgery should still be required to use restroom and locker room facilities for men. And in referring to

Hively also cannot be read to simply defer to the understanding of the individual legislators who enacted Title IX. While *Ulane* and *Hively* turned on the Seventh Circuit's view that Congress did not intend discrimination "because of . . . sex" to encompass discrimination based on sexual orientation, those cases cannot stand for the proposition that affirmative evidence of congressional intent to cover a specific circumstance is necessary to determine whether it is within the scope of Title VII and Title IX. Otherwise, the Seventh Circuit would be in direct conflict with the Supreme Court, which rejected such an approach in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). There, the Court explicitly rejected the notion that Title VII (and, by extension, Title IX) proscribes only the types of discrimination specifically contemplated by Congress at the time the statute was enacted:

> Male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

Id. at 79; *see also Doe by Doe v. City of Belleville*, 119 F.3d 563, 572 (7th Cir. 1997), *judgment vacated on other grounds by City of Belleville v. Doe by Doe*, 523 U.S. 1001 (1998) ("[T]he legislative history suggests that legislators had very little preconceived notion of what types of sex discrimination they were dealing with when they enacted Title VII.").

Ultimately *Hively*, like *Ulane*, does nothing to resolve the question of how sex should be determined when the indicators of sex diverge, as they do for Student A. As this court is aware, Student A carries a passport identifying her as female, experiences the effects of female hormones, and is known by a female name. *See* Mem. of Law in Support of Mot. to Intervene at 2, ECF No. 32. She believes—and the Federal Defendants agree—that she is entitled to use all

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"genetic sex", *see, e.g.*, Pls.' Reply at 1, 10, they seem to suggest that an analysis of chromosomes is needed to determine sex.

facilities available to the other girls at her school. Plaintiffs believe that she is not entitled to use those facilities because they believe she is not really a girl at all. Neither *Hively* nor *Ulane* speaks to this issue.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2016, a copy of the foregoing Supplemental Brief was filed electronically via the Court's ECF system, which effects service upon counsel of record.

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