UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STUDENTS AND PARENTS FOR PRIVACY, a voluntary unincorporated association; **C.A.**, a minor, by and through her parent and guardian, **N.A.**; **A.M.**, a minor, by and through her parents and guardians, **S.M.** and **R.M.**; **N.G.**, a minor, by and through her parent and guardian, **R.G.**; **A.V.**, a minor, by and through her parents and guardians, **T.V.** and **A.T.V.**; and **B.W.**, a minor, by and through his parents and guardians, **D.W.** and **V.W.**,

Plaintiffs,

vs.

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.

Case No. 1:16-cv-04945

The Honorable Jeffrey T. Gilbert, Magistrate Judge

Plaintiffs' Supplemental Brief Addressing *Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016)

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INTRODUCTION

This brief responds to the Court's request for no more than 10 pages of opening supplemental briefing on *Hively v. Ivy Tech Community College, South Bend*, No. 15-1720, 2016 WL 4039703 (7th Cir. July 28, 2016), per Minute Entry, ECF No. 113.

Hively was brought by a female plaintiff who "alleged that she had been denied full time employment and promotions based on sexual orientation in violation of Title VII[.]" *Id*. at *1 (quotation omitted). The *Hively* court rejected her argument that sexual orientation discrimination was protected under Title VII and squarely affirmed *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), as the controlling authority in this Circuit.

This ruling decisively supports the preliminary injunction Plaintiffs seek. First, *Hively* upholds the ruling in *Ulane* relied on by Plaintiffs to establish that "sex" in federal discrimination statutes is sex — fixed, binary, and genetically-determined sex, rooted in the nature of human reproduction and the irrefutable fact that we are a sexual species of males and females. It is not, as the Defendants argue, a fluid continuum of "male, female, or something else" determined by the subjective, psychological construct of "gender identity." (Expert Decl. of Robert Garofalo, M.D., M.P.H. ¶12, ECF No. 79-3; Intervenor-Defs.' Br. in Resp. to Pls.' Mot. for Prelim. Inj. 7, ECF No. 79)

As a Title VII case, *Hively* informs the correct reading of "sex" in Title IX. It clarifies that deference cannot save the Federal Defendants' rule redefining sex. It correctly exercises stare decisis to uphold and follow *Ulane*. It is controlling authority for this case and dispositive as to Plaintiffs' APA Claim. Under the law of *Hively* and *Ulane*, Plaintiffs should prevail on the merits of their APA claim, as well as their Title IX and privacy claims, and so Plaintiff's Motion for Preliminary Injunction should be granted.

I. *Hively* confirms that "sex" means sex.

Plaintiffs relied upon *Ulane* because it unambiguously confirmed that "sex" means sex, and not "gender identity" in federal non-discrimination statutes:

> [D]iscrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. **The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.**

Ulane, 742 F.2d. at 1085 (emphasis added).

Defendants attacked *Ulane*, most notably citing out-of-Circuit authority to say that "sex stereotyping" derived from *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), unequivocally "eviscerated" *Ulane*.[1] Intervenor-Defendants condemned Plaintiffs' conventional, historical reading of the law as a "cramped understanding of 'sex.'" I-D PI Resp. 7.

Yet Plaintiffs find themselves in good (and legally binding) company, as the United States Court of Appeals for the Seventh Circuit shares their view of what "sex" means. Just a few days ago, all three judges in *Hively* agreed that Congress intended the "very narrow reading of the term 'sex'" in Title VII. 2016 WL 4039703 at *3. Thus, *Ulane*'s prior holding that "sex" in Title VII meant "the traditional notion of 'sex'[,]" *id*. at *1, was "correct." *Id*. at *3.

To reach this unanimous conclusion, the court considered the same three factors that led the *Ulane* court to its conclusion: one, the common understanding of "sex" during the enacting period, two, the lack of legislative history to indicate Congress intended "sex" to mean anything other than *sex*, and, three, Congress's repeated refusals to amend Title VII to add additional protection. *Id*. at *1, *3; *compare Ulane*, 742 F.2d at 1085-86.

Nor would it seem that such a view is "cramped," as the unanimous panel looked to their sister circuits and found that their decision "is in line with all other circuit courts to have decided or opined about the matter." *Hively*, 2016 WL 4039703 at *2 (*citing Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina v. Income Support Div., New Mexico*, 413 F.3d

[1] I-D PI Resp. 7 (asserting "*Ulane* has been overruled"); *id*. at 8 (proclaiming *Ulane* "eviscerated," (quoting *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6th Cir. 2004)); Fed. Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj. 23, ECF No. 80 (same).

1131, 1135 (10th Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751–52 (4th Cir. 1996); *U.S. Dep't of Hous. & Urban Dev. v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979). The 1st, 2d, 3d, 4th, 5th, 6th, 8th, 10th, and the D.C. Circuits all align with the 7th Circuit in both *Ulane* and *Hively* to hold that "sex" means sex.

II. As a Title VII case, *Hively* informs the correct reading of "sex" in Title IX.

There can be no argument to distinguish *Hively* from our Title IX matter simply because it was grounded in Title VII. *Hively* itself notes that Title VII jurisprudence can apply to "Title IX sex discrimination claim[s, which are] treated in much the same way as [] Title VII sex discrimination claim[s]." 2016 WL 4039703, *19 n.4 (citing *Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011)). This echoes other Seventh Circuit case law. *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1023 (7th Cir. 1997) ("it is helpful to look to Title VII" to interpret Title IX); *see also Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (stating that the court should "look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

Indeed, Defendants themselves have affirmed the relevance of *Hively* to our case, despite it involving Title VII, by relying with unrelenting passion upon *Price Waterhouse*—itself a Title VII case—to say that Title IX now means "gender identity" when it plainly says "sex." As Intervenor-Defendants summarized in their argument, (pointing to an out-of-Circuit district court case, *Finkle v. Howard County*, 12 F. Supp. 3d 780, 788 (D. Md. 2014)), "any discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is proscribed by Title VII's proscription of discrimination on the basis of sex as

interpreted by *Price Waterhouse*." I-D PI Resp. 7.[2]

The excruciatingly simple point to be made here is that Defendants cannot reject *Hively* from confirming the proper understanding of "sex" in Title IX because *Hively* is a Title VII case, then turn around and say that the sex stereotyping theory from the Title VII *Price Waterhouse* case mandates a totally different reading of "sex" in Title IX.

It is important to note that the Court's holding in *Hively* was unanimous on the material parts of the case—Judges Bauer, Ripple, and Rovner joined in Parts I and IIA of the opinion, and in the judgment that "our understanding in *Ulane* that Congress intended a very narrow reading of the term 'sex' when it passed Title VII of the Civil Rights Act … appears to be correct." 2016 WL 4039703 at *3.[3]

III. As *Hively* clarifies, deference cannot save the Federal Defendants' rule redefining "sex."

Having made clear that *Ulane* stands firm, *Hively* also demonstrates that the Court owes no deference to the Federal Defendants' re-write of Title IX and its implementing regulations, contra their arguments. *See* Fed. Def. PI Resp. 18-24 (arguing specifically that the heavily criticized *Auer* deference is the appropriate deference to the Rule).

Very much like our case, in *Hively* a federal agency—the Equal Employment Opportunity Commission—redefined "sex" in Title VII to include sexual orientation. 2016 WL

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[2] We note, of course, that "transsexual" in this context is indistinguishable from "transgender."

[3] Parts IIB-IIE, in which Judge Ripple declines to join with his colleagues, delves deeply into dicta to urge a radical revision in non-discrimination law to transmute "sex" into a subjective perception rather than an objective reality. This dicta is nonetheless informative in two ways helpful to the Plaintiffs. First, it illustrates that the panel was well-versed in the very cases and arguments that Defendants urge in our case, and nonetheless unanimously rejected ambiguity in "sex" and held to its narrow, established meaning. Second, it illustrates the terminal confusion bred of applying laws meant to prohibit invidious discrimination based on *objective* factors like race, age, ancestry, and color, to protect a subjectively-discerned perception of sexuality within a continuum running from male to female to something else. That such confusion arises suggests that the wrong legal tool is being used to address the legitimate issues raised in this case—and that the far better solution for Defendants may be to seek relief through amending the Americans with Disabilities Act, which has proven capable of accommodating a host of challenging, highly individualized and delicate conditions.

4039703 at *3-4. While the *Hively* court acknowledged that EEOC rulings are generally "entitled to some level of deference," *id*. at *4, it immediately made clear that "we need not delve into a discussion of the level of deference we owe to the EEOC's rulings[,]" because "[w]hatever deference we might owe to the EEOC's adjudications, we conclude . . . that Title VII . . . does not reach discrimination based on sexual orientation." *Id*. at *4.

It reached that conclusion because the statutory term "sex" was unambiguous, for the same reasons *Ulane* discussed. First, "the ordinary meaning of the word 'sex' in Title VII" indicated that "Congress had nothing more than the traditional notion of 'sex' in mind when it voted to outlaw sex discrimination," so "discrimination on the basis of sexual orientation and transsexualism . . . did not fall within the purview of Title VII." *Hively*, 2016 WL 4039703 at *1 (citations omitted). Second, the legislative history gave no indication that Congress intended anything more than this traditional notion of sex. *Id*. And third, Congress had repeatedly refused to amend Title VII to expand the meaning of "sex" or add additional protections. *Id*. at *3. So "sex" in Title VII was unambiguous and meant *sex*. Importantly, where there is no ambiguity, there is no deference of any kind to an agency's purported "interpretation."

Plaintiffs have already made the point that "sex" in Title IX is utterly unambiguous. Pls.' Mem. in Supp. of Pls.' Mot. for Prelim. Inj. 16-19, ECF No. 23. This unambiguous term needs no agency "interpretation" and the recent DOE "guidance" merits no deference whatsoever.

IV. *Hively* correctly exercises stare decisis to follow *Ulane*.

Section I and Part IIA of the *Hively* decision, in which all three judges joined, states the holding of the case. In the rest of Section II, two judges lamented that the court, bound by precedent and Congressional intent, could not find that "sex" in Title VII includes more than genetic sex. The two raised concerns about how Title VII provided no protection against being fired for marrying a same-sex spouse (ignoring the fact that Title VII provides no protection against being fired for marrying an *opposite*-sex spouse). 2016 WL 4039703 at *11, *14-15. And they speculated that the Supreme Court might someday declare that Title VII protects against

sexual orientation discrimination. *Id*. at *14. At bottom, it seems that if they had a free hand to legislate from the bench, Title VII would be rewritten to include invidious discrimination based upon sexual orientation. *Id*. at *3-15.

But those judges correctly turned to the doctrine of stare decisis to reach their holding, noting that "[t]his circuit has not remained silent on the matter," and "our own precedent holds that Title VII provides no protection from nor redress for discrimination on the basis of sexual orientation." *Id*. at *14. They continued: "[w]e require a compelling reason to overturn circuit precedent." *Id*. They properly recognized that no such "compelling reason" existed, and *Ulane* remained the law of the Circuit. *Id*. at *14-15. Their duty was the uniquely judicial duty "to interpret Title VII as drafted by Congress, and as we concluded in *Ulane*, Title VII prohibits discrimination only on the basis of gender[,]" *id.* at 11, not anything else[4]. Similarly, this Court's task is to interpret Title IX as drafted by Congress and to follow principles of stare decisis.

V. *Hively* is controlling authority.

Defendants may argue that *Hively* is distinguished from our case because it involved sexual orientation and not gender identity. The first obstacle to that "distinction" is that the two judges themselves recognized that where "sexual orientation and gender non-conformity are intertwined," efforts by courts to "tease apart the two" leave the resulting judicial opinions "turn[ing] circles around themselves because, in fact, it is exceptionally difficult to distinguish between these two types of claims." 2016 WL 4039703 at *5.

The next obstacle is that *Ulane*'s now-affirmed narrow reading of sex doesn't admit other readings from any avenue. And certainly, if the affectional preference of "sexual orientation" is excluded from the meaning of sex, then subjectively discerned transmutation of one sex to the other, (or something else) is similarly excluded.

Nor can Defendants prevail by suggesting that the *Hively* court was unaware of their arguments against *Ulane*, as the *Hively* court directly addressed criticism from the EEOC, saying

[4] *Ulane* used the term "gender" synonymously with sex.

that "[w]e take to heart the EEOC's criticism of our circuit's lack of recent analysis on the issue." *Id*. at * 4. It further stated that "recent legal developments and changing workplace norms require a fresh look at the issue of sexual orientation discrimination under Title VII." *Id*. It took that "fresh look," and considered "recent legal developments," including the cases that Defendants rely upon to argue that *Ulane* has been "eviscerated." *Id*. at *4-10. And, having done so, the *Hively* court still concluded that Title VII bars discrimination based *only* on sex, *id*. at *11, *i.e.*, "against women because they are women and against men because they are men," *Ulane*, 742 F.2d at 1085.

VI. *Hively* and *Ulane* are dispositive for Plaintiffs' APA claim.

The Federal Defendants' Rule redefining "sex" violates the Administrative Procedure Act ("APA") in several ways. V. Compl. ¶¶ 288-357, ECF No 1; *see also* Pls.' PI Br. 3-12. Chief among them is that it exceeds statutory authority, because Congress's term, "sex," is unambiguous; and, Congress has not delegated authority to redefine unambiguous terms in its statute, nor to regulate Title IX in ways that contravene the statute's clear meaning. Pls.' PI Br. 5-9; Pls.' Reply Mem. in Supp. of Their Prelim. Inj. Mot. 9-12, ECF No. 94. When "Congress has directly spoken to the precise question at issue[,] . . . that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124-2125 (2016) (quotations omitted). When agencies fail to do that, such as here, the agencies act "in excess of statutory jurisdiction [and] authority," 5 U.S.C. § 706(2)(C), because they have no legal right to redefine Congress's unambiguous terms. *Ulane*, 742 F.2d at 1087 (7th Cir. 1984) (stating when statutory terms are unambiguous, only Congress may redefine them). Courts must hold such agency action unlawful, and set it aside. 5 U.S.C. § 706(2).

Hively, like *Ulane* before it, recognized that the term "sex" in Title VII refers unambiguously to *genetic* sex, and nothing else. *Hively*, 2016 WL 4039703 at *11; *Ulane*, 742 F.2d at 1085. This led the *Hively* court to the obvious conclusion that Title VII does not prohibit

sexual orientation discrimination, 2016 WL 4039703 at *3, just as the *Ulane* court held that Title VII does not prohibit gender identity discrimination. 742 F.2d at 1087. As we detail below, the Seventh Circuit reached its conclusion because, ***first***, the common understanding of "sex" when Title VII was enacted was genetic sex; ***second***, the legislative history gave no indication that Congress intended "sex" to have a broader meaning than genetic sex; and ***third***, Congress had repeatedly refused to add protections for additional classifications beyond "sex." *Hively*, 2016 WL 4039703 at *1, *3; *Ulane*, 742 F.2d at 1085-86. Those same three factors are present in this case with regard to Title IX and they demonstrate that the Federal Defendants far exceeded the bounds of the APA.

A. "Sex" Meant *Sex* During Title IX's Enacting Period.

Title VII was enacted in 1964; Title IX was enacted in 1972. The same dictionaries were in use during the enacting periods of both statutes, and the same unambiguous term ("sex") is present in Title IX as in Title VII. The common, everyday, dictionary-understanding of that word during Title IX's enacting period was genetic sex, just as it was during Title VII's enacting period. *See* Pls.' PI Brief 6 and 6 n.11; Pls.' PI Reply 10-12.

If anything, the language of Title IX and its implementing regulations is more clear than the language of Title VII, because in Title IX Congress used statutory language that clearly indicated that it understood sex in binary, genetic terms, rather than in terms of "male or female *or something else*," which is what Intervenor-Defendants' expert witness testified "gender identity" encompasses. Garofalo Decl. ¶ 12. So Congress repeatedly used binary language ("one sex . . . the other sex," and "both sexes") to describe what it meant by "discrimination on the basis of sex." *See, e.g.*, 20 U.S.C. § 1681(a)(2); 20 U.S.C. § 1681(a)(8). This binary understanding of "sex" is repeated throughout Title IX's implementing regulations as well. *See, e.g.*, 34 C.F.R. §§106.32-106.33.

B. Title IX's Legislative History Indicates Congress Intended "Sex" to Mean *Sex*.

Defendants will no doubt argue that *Hively* is somehow distinguished because Title VII

has a "different" legislative history than Title IX. But to the extent that's true, the difference redounds to the Plaintiffs' benefit, not the Defendants', for the *difference* in Title IX's legislative history is that it was even more explicit in understanding sex as male/female, man/woman; binary. And yes, fixed.

Where Title VII's legislative history said little specifically about what "sex" meant, Title IX's legislative history indicates that Congress intended "sex" to mean genetic sex. For example, Title IX's bill sponsor stated that the bill would not require co-ed dormitories or locker rooms.[5] Further, the legislative record also confirms that Title IX allows differential treatment among the biological sexes, such as "classes for pregnant girls …, in sport facilities or *other instances where personal privacy must be preserved*."[6] *See also* Pls.' PI Br. 7-8. Congress recognized that males and females naturally desire privacy from one another to protect their modesty and dignity when they are in private living spaces, changing their clothing, showering, or otherwise engaged in intimate, personal activities. Its focus was upon making sure that educational institutions could provide one sex privacy from the other sex without violating Title IX's anti-discrimination provision in the process. This necessitated allowing males and females separate facilities, which are provided for not only by the statutory language, 28 U.S.C. § 1686 (authorizing "separate living facilities for the different sexes"), but also by the implementing regulations, 34 C.F.R. § 106.33 (authorizing separate toilets, locker rooms, and shower facilities for males and females).

In this regard, *Hively* buttresses Plaintiffs' privacy and Title IX claims. Title IX, its legislative history, and its implementing regulations are built on the foundation of the differences between the sexes, a distinction that *Hively* expressly preserves and affirms. In most instances, Title IX makes it illegal to take the differences between the sexes into account, *except when they matter*, like in living facilities, locker rooms, and restrooms where intimate activities take place. Title IX and its regulations expressly exempt these areas from Title IX's bar on sex

[5] 117 Cong. Rec. 30407 (1971) (Statement of Sen. Bayh).

[6] 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) (emphasis added).

discrimination precisely because of the overwhelming need to protect persons of one sex from persons of the other sex in these intimate settings. Put simply, Defendants' proposed reinterpretation of Title IX would gut the foundation and purpose of Title IX and make it impossible for the government to provide the privacy protections, and freedom from a sexually harassing environment, that it was clearly Congress's intent to provide.

C. Congress Repeatedly Refused to Amend Title IX to Add "Gender Identity."

Finally, Congress has repeatedly refused to amend Title IX to add protection against professed gender identity discrimination. *See* Pls.' PI Br. 7 (collecting Congress's repeated rejection of attempts to so amend Title IX).

These three factors discussed above drove the *Hively* and *Ulane* courts to reject any ambiguity in "sex," and our case precisely tracks those factors. This Court should follow *Hively* and *Ulane*'s binding precedent to conclude that "sex" in Title IX means *sex*, and nothing more. Because the Federal Defendants have redefined an unambiguous statutory term, and have promulgated a Rule at odds with congressional intent, the Federal Defendants' redefinition is unlawful and must be set aside. 5 U.S.C. § 706(2).

CONCLUSION

This development makes clear that it is not *Ulane* that has been eviscerated, but rather the Defendants' arguments. *Ulane* remains good law and, along with *Hively*, is controlling for determining what "sex" means in federal anti-discrimination statutes, including Title IX. *Hively*'s and *Ulane*'s rule means that Plaintiffs should prevail on their APA claim, and significantly buttresses their privacy and Title IX claims. *See* Pls' PI Br. This Court should therefore issue Plaintiffs' a preliminary injunction.

Respectfully submitted this the 5th day of August, 2016.

By: /s/ Jeremy D. Tedesco

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