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' RESPONSIVE SUPPLEMENTAL BRIEF

The central question in this case is whether Title IX and its implementing regulations protect the rights of transgender students to use the sex-segregated facilities that comport with their gender identity. Federal Defendants believe that they do, because the sex of transgender individuals is properly determined by reference to their gender identity, and Title IX protects every student's right to use the facilities appropriate to his or her sex—regardless of whether that student shares the chromosomes or was born with the reproductive organs normally associated with that sex. Despite plaintiffs' arguments to the contrary, *Hively* does not speak to this question. It does not explain who is male and who is female, nor how the sex of transgender individuals should be determined. Nor does *Hively* suggest, much less hold, that the language or legislative history of Title VII or Title IX settles any of these questions.

Hively does reaffirm the Seventh Circuit's holding that Title VII does not prohibit workplace discrimination based solely on sexual orientation. 2016 WL 4039703 at *1 (7th Cir. July 28, 2016). But this is not because the statute's reference to discrimination "because of . . . sex," 42 U.S.C. § 2000e-2, implies—much less unambiguously mandates, as plaintiffs suggest,

Pls.' Supp. Br. at 7-10, ECF 118—that "sex" should be determined by reference to either chromosomes or genitalia. The sex of any individual is irrelevant to the question of whether "sex" encompasses "sexual orientation," which was all that the *Hively* court considered.

Hively also affirms the continuing vitality of the sex-stereotyping (or "gender non-conformity") doctrine arising from the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Under *Price Waterhouse*, it is unlawful sex discrimination to subject an individual to cognizably adverse treatment because of his or her failure to conform to the applicable gender stereotypes. *Id.* at 250-51; *Hively*, 2016 WL 4039703 at *4 ("The holding in *Price Waterhouse* has allowed many employees to marshal successfully the power of Title VII to state a claim for sex discrimination when they have been discriminated against for failing to live up to various gender norms."). The *Hively* court acknowledged the tensions inherent in any attempt to "disentangl[e] gender discrimination from sexual orientation" in the case of homosexual employees, 2016 WL 4039703 at *7, but concluded that Circuit precedent required judges and juries to do so, *id.* at *15.

Although *Hively* relied on statements in the Seventh Circuit's decision in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), it did not address *Ulane*'s holding that Title VII (and, by implication, Title IX) allows discrimination against transgender individuals on the basis of their transgender status, much less establish a standard for determining the sex of individuals. *See Hively*, 2016 WL 4039703 at *1-3. As the Federal Defendants noted in their first supplemental brief, unlike the question of whether Title VII prohibits discrimination on the basis of sexual orientation, "the 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). Although *Hively* did not address these cases because it did not concern transgender individuals, nor the question of who belongs to a particular sex, the Seventh Circuit's analysis suggests some reason to doubt that it would stand by *Ulane*'s conclusion that a prohibition on sex discrimination does not reach discrimination on the basis of transgender status. *Compare Hively*, 2016 WL 4039703 at *2 (describing its holding as "in line with all other circuit courts to have decided or opined about the matter") *with Gloucester*, 822 F.3d at 727 (Davis, J., concurring) (noting "the weight of circuit authority" against *Ulane*).

Even if the *Hively* court could be understood to have affirmed *Ulane* in its entirety, Federal Defendants' position here is unaffected. *Ulane* explicitly allowed for the possibility that a transgender individual is a member of the sex or gender with which he or she identifies, rather than the sex to which he or she was assigned at birth. 742 F.2d 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*). Nothing in *Hively* suggests that the Seventh Circuit has retreated from this position.

Suggesting that *Hively* resolves the questions at issue here in their favor, plaintiffs largely repeat their briefs in support of a preliminary injunction, which the Federal Defendants have already rebutted. Plaintiffs point to dictionary definitions, legislative history, and subsequent congressional action to argue that Title IX's reference to "sex" means what plaintiffs describe as "genetic sex." Pls.' Supp. Br. at 7-10, ECF 118. But *Hively* cannot be read to resolve the

interpretive issue here. The absence of a specific reference to transgender individuals in the statutory language or legislative history of Title IX does not move transgender individuals outside the ambit of that statute's protection, because both Title IX and *Hively* must be understood in light of *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), which explicitly rejected that interpretive approach, *id.* at 79. *See* Fed. Defs.' Supp. Br. at 6, ECF 116. And the failure of subsequent legislatures to amend a statute is exceedingly weak ground on which to rest an interpretation. *See* Fed. Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj. at 24 n.17, ECF No. 80.

Finally, nothing in *Hively* suggests that the Federal Defendants' interpretation of the Title IX regulations is entitled to anything less than the deference long accorded to agency interpretations of their own regulations, which the Supreme Court has recognized in a litany of cases dating back fifty years and continuing to this day. *See id.* at 18-20. Plaintiffs suggest that the *Hively* court's interpretation of Title VII in the face of a contrary reading by the Equal Employment Opportunity Commission has implications here, Pls.' Supp. Br. at 4-5, ECF 118, but EEOC interpretations of Title VII are entitled to significantly less deference than the Federal Defendants' interpretations of their own regulations. *Compare Hively*, 2016 WL 4039703 at *4 (EEOC interpretations of Title VII entitled to "some level of deference") *with Gloucester*, 822 F.3d at 723 ("We conclude that the Department's interpretation of its own regulation . . . as it relates to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case."); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

The Seventh Circuit's decision in *Hively* addressed questions that are not presented in this case, and did not resolve the questions that are presented here. Federal Defendants respectfully submit that *Hively* has little to teach us about how to determine the sex of a transgender individual or whether Title IX protects that individual's right to use the sex-segregated facilities that comport with his or her gender identity.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2016, a copy of the foregoing Responsive Supplemental Brief was filed electronically via the Court's ECF system, which effects service upon counsel of record.

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