UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PRIVACY MATTERS, a voluntary unincorporated association; and **PARENT A**, president of Privacy Matters, 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 **INDEPENDENT SCHOOL DISTRICT NUMBER 706, STATE OF MINNESOTA.** Defendants.	**Case No. 0:16-cv-03015-WMW-LIB** Judge Wilhelmina M. Wright Magistrate Judge Leo I. Brisbois

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs ask this Court to protect the privacy of all students within Independent School District 706 ("Virginia School District") by preliminarily enjoining Defendants' rules and policies that require all federally-funded schools to treat a student's gender identity as their sex, and which authorize access to and use of locker rooms, restrooms, shower rooms, and overnight accommodations on school-sponsored trips by gender identity rather than by sex.

The Defendants impose these dramatic new requirements on schools and students by radically redefining one word in Title IX – "sex" – a term that both courts and Congress have understood for decades to refer to an individual's status as male or female – two objective, fixed, binary classes which are rooted in our human reproductive nature and normatively established when we are conceived. The Defendants demand that Title IX protect the distinct and altogether different theory of gender identity, a concept that is subjective, fluid, non-binary and disconnected from our reproductive nature and human genetics.[1]

[1] The term "**sex**" as used in both Title IX and this Memorandum, is a binary concept that refers to one's biological status as either male or female determined at conception, ascertained at birth and manifested by biological indicators such as chromosomes, gonads, hormones, and genitalia. *See, e.g.*, Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression* 1, http://www.apa.org/topics/lgbt/transgender.pdf ("*Sex* is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy."); Am. Psychological Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013) ("DSM-5") (noting that sex "refer[s] to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external

The Federal Defendants' Rule is succinctly stated this way: a school must "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." *Dear Colleague Letter: Transgender Students* 2 (**Exhibit A**).

This Federal Rule redefines "sex" under Title IX and its implementing regulations, and effectively bars schools from providing sex-specific facilities in places where privacy matters: locker rooms, restrooms, showers, and overnight accommodations for school-related travel. Federal Defendants promulgated the Rule through a series of Guidelines, including the *Dear Colleague Letter* just mentioned and other documents: U.S. Department of Education, *Questions and Answers on Title IX and Sexual Violence*, 5 (Apr. 2014) (**Exhibit B**); U.S. Department of Education, *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities,* 25 (Dec. 2014) 2 (**Exhibit C**); and U.S. Department of Education, *Title IX Resource Guide*, 1, 15, 16, 19, 21-22 (Apr. 2015) (**Exhibit D**). All schools receiving federal aid must comply by the Rule as a "condition of receiving Federal funds." *Dear Colleague Letter* 2.

The Federal Rule contradicts the language of Title IX and comprises unprecedented agency overreach. The Department of Education and Department of

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genitalia."). When "male" and "female" are used in this Memorandum, they are used consistently with this definition. The term "**gender identity**" as defined by the Department of Education "refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth." U.S. Department of Justice and U.S. Department of Education, *Dear Colleague Letter:Transgender Students* 1 (May 13, 2016). **Exhibit A**. It is also subjective, fluid, nonbinary and not rooted in human reproduction or tied to birth sex. Lawrence S. Mayer & Paul R. McHugh, *Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences*, New Atlantis, at 87-93 (2016). When "gender identity" is used in this Memorandum, it is used consistently with this definition.

Justice ("Federal Defendants") disregarded the minimum standards for notice and comment rulemaking under the Administrative Procedures Act, choosing instead the artifice of issuing "guidelines" ("Federal Guidelines" or "Guidelines") which they now enforce as law against school districts, directly threatening the removal of federal education funding from districts that resist their agency demands.

Virginia School District ("Defendant District" or "District") readily complied, fully adopting and implementing the Federal Defendant's Rule as their own policy ("District Policy" or "Policy"). Then the District promptly authorized a male student who professes a female gender identity to have unhindered access to girls' private facilities.[2] The consequence of the Rule and Policy on Plaintiffs was dramatic: teenage girls disrobing within the girls' locker room were joined by a teenage boy who was also semi-naked.

The risk of such encounters, and the encounters themselves, merit prompt judicial intervention to reject the Defendants' legally unauthorized and radical redefinition of "sex"; to reestablish the commonsense policy of sex-specific private facilities' and to protect the bodily privacy of every student in school.

FACTUAL BACKGROUND

The term "sex" in Title IX is not ambiguous. Compl. ¶¶48, 53-58. For more than 40 years it has been universally understood to refer to male and female. *Id.* Courts and Congress have repeatedly confirmed that it does not include the concept of gender

[2] The term "private facilities," as used in this Memorandum, includes locker rooms, shower rooms, restrooms, and housing on school-sponsored overnight trips.

identity. Compl. ¶¶ 59-60. Title IX is equally unambiguous in expressly authorizing sex-specific living facilities, defined in the regulations to include locker rooms, shower rooms and restrooms. 34 C.F.R. § 106.33; Compl. ¶¶ 61-63.

Despite the clarity of these provisions, the Federal Defendants created, promulgated, and now enforce their novel Rule contradicting the settled Title IX precedent and requiring schools to "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." *Dear Colleague Letter* 2; *see also* Compl. ¶¶ 48, 53-60, 64-67. The Rule changes and adds substantive provisions to Title IX and does so by brute agency fiat, not the obligatory notice-and-comment rulemaking for such legislative rules. Compl. ¶¶ 64-73

Having proclaimed the new rule, Federal Defendants began enforcing it across the nation, including Township High School District 211 in Illinois where the DOE issued a Letter of Findings (**Exhibit E**) and threatened to remove $6 million in federal education funding to secure compliance with its novel Rule regarding gender identity. (**Exhibit F**). Compl. ¶¶ 68-69, 74-86.

As Federal Defendants launched a nationwide enforcement effort with their new Rule, Virginia School District officials sought input from District 211 officials in Illinois before deciding what to do. Compl. ¶¶ 87-104. Having done so, Defendant District officials eliminated their sex-specific private facilities by adopting their Policy which conforms in every material point to the Federal Rule. Compl. ¶¶ 105-115. The District promptly authorized Student X, a male student who professes a female gender identity, to have unhindered access to girls' locker rooms and restrooms. Compl. ¶ 111. Student X

promptly and regularly began using these private facilities while Girl Plaintiffs were present and using them. Compl. ¶¶ 37, 111, 116-129.

Consequently, the Policy severely and negatively impacts students, creating a school environment that strips them of their privacy and causes students, particularly Girl Plaintiffs, anxiety, stress, humiliation, embarrassment, intimidation, fear, apprehension and distress throughout their day as they use, and anticipate using, private facilities unprotected from the entrance, presence, or exposure to a male student, Student X. Compl. ¶¶ 37, 116-129, 231-237.

Girl Plaintiffs A, B, D, E, and F are particularly impacted. Compl. ¶¶ 130-230. Because of the Policy, Girl Plaintiff A will not return to Virginia High School ("VHS") for school in fall 2016, Compl. ¶¶ 41, 187-197; she will also not continue on the VHS track team, *Id.*; Girl Plaintiffs A, B, and E missed instructional class time or athletic practice time while seeking a locker room or restroom where only girls were likely to be present, Compl. ¶¶ 41, 139-143, 182, 218-219; Girl Plaintiffs A and E stopped using restrooms for days, holding their urine all day rather than use a restroom that is accessible to a male, Compl. ¶¶ 41, 183-186, 220-221; and Parent Plaintiffs A, B, D, E, and F observed their daughters' visible distress, including tearfulness, withdrawal from others, isolation, and anger, over the Policy. Compl. ¶¶ 41, 132, 173, 187, 200, 205, 215, 226-228. And they notified the school about it. Compl. ¶ 242.

The Girl Plaintiffs' distress is exacerbated by Student X's behavior in the locker room including commenting on Girl Plaintiff F's body and her bra size, Compl. ¶¶ 224-

227; dancing to loud music with sexually explicit lyrics while "twerking,"[3] "grinding," and lifting up his skirt to reveal his underwear near Girl Plaintiff A, Compl. ¶¶ 157-165; and using secondary girls' locker rooms where Girl Plaintiffs A and D sought additional privacy, walking in while Girl Plaintiffs A and D were in their underwear. Compl. ¶¶ 166-172, 203-209.On one such occasion, Student X removed his pants near Girl Plaintiff A while she was in the middle of changing and similarly disrobed. Compl. ¶¶ 171-172.

The District is aware of Student X's behavior and the Policy's impact on Girl Plaintiffs, but it has done nothing to ensure and protect their privacy. Compl. ¶¶ 242-243. Girl Plaintiffs will continue to be harmed by encountering and risking more encounters with Student X in private facilities as long as the Rule and Policy stand.

ARGUMENT

A preliminary injunction requires (1) likely merits success, (2) irreparable harm, (3) favorable balance of equities, and (4) furtherance of the public interest. *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). The standard is more deferential where plaintiffs seek to enjoin something other than a "validly enacted statute": they need only show a "fair chance of prevailing" on the merits, which "does not require a strict probabilistic determination of the chances of a movant's success when other factors, for example irreparable harm, carry substantial weight." *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1053-54 (8th Cir. 2014). Additionally, when "the balance of other factors tips decidedly toward [P]laintiff[s]" and Plaintiffs "raise[]

[3] "Twerking is a type of dancing in which an individual, often female, moves to music in a sexually provocative manner involving thrusting hip movements and a low squatting stance." https://en.wikipedia.org/wiki/Twerking, last visited August 28, 2016).

questions so serious and difficult as to call for more deliberate investigation," a preliminary injunction should issue. *Dataphase,* 640 F.2d at 113. All four factors tip decidedly in Plaintiffs' favor, and a preliminary injunction should issue forthwith.

I. The Plaintiffs Will Likely Succeed on the Merits.

The Federal Defendants' Rule violates the APA substantively and procedurally. The District Defendant's Policy violates Title IX and both the Rule and the Policy violate the Constitution, particularly Plaintiffs' constitutional privacy rights.

A. The Federal Defendants' Rule Violates the APA.

1. The Rule is reviewable agency action.

The APA empowers courts to review agency action when it is "made reviewable by statute" or there is "final agency action for which there is no other adequate remedy in a court." 5 U.S.C § 704. Agency rules are agency actions, 5 U.S.C. § 551(13). Through their agency action, Federal Defendants make a "statement of general of particular applicability and future effect" that "implement[s]" and "prescribe[s]" law, namely that school districts must treat a student's gender identity as their sex for the purposes of Title IX and its implementing regulations, and that federal education funding is contingent upon compliance. 5 U.S.C. § 551(4). And it is "reviewable by statute" per 5 U.S.C. § 704. Nor is there "other adequate remedy in a court." *Id.*

An agency action is "final" if it "mark[s] the 'consummation' of the agency's decision-making process," as opposed to being "merely tentative or interlocutory [in] nature," and is an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997)

(citations omitted). These conditions are both met when an agency issues "a definitive statement of its position, determining the rights and obligations of the parties." *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F. 3d 808, 813 (8th Cir. 2006) *quoting Bell v. N.J.*, 461 U.S 773, 779-780 (1983).

In our case, the Rule definitively states the Federal Defendants' position that "sex" in Title IX includes "gender identity" and consequently Title IX no longer permits sex specific private facilities. There has been no variance from the Rule permitted in any of the several subsequent Federal enforcement actions[4] and the Rule establishes legal rights for students who profess a gender identity incongruent to their sex to access facilities designated for use by the opposite sex. The Rule is therefore final.

As to adequate remedy at law, "it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate." *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992). Violation of the right to bodily privacy is irreparable harm, *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984). Such

[4] DOE has enforced its Rule against at least seven educational entities: Highland Local School District (OH), *see Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ., et al.*, No. 2:16-cv-00524 (S.D. Ohio June 10, 2016); Dorchester County School District (SC); Broadalbin-Perth Central School District (NY); Township High School District 211 (IL); Central Piedmont Community College (NC); Downey Unified School District (CA); and Arcadia Unified School District (CA), http://www2.ed.gov/about/offices/list/ocr/lgbt.html (last visited Sept. 8, 2016). Federal Defendants also brought suit against the State of North Carolina, its officials, and its university system for not granting unhindered access to sex-specific facilities based on gender identity. *U.S.* v. *N.C., et al.*, No. 1:16-cv-00425 (M.D.N.C. filed May 9, 2016).

violation has already occurred and is at imminent risk of recurring, so injunctive relief is not only appropriate, but essential. *See Bednar v. Neb. Sch. Activities Ass'n*, 531 F.2d 922, 923 (8th Cir. 1976) (per curiam) (authorizing injunctive relief where sex-based denial of participation in sports meet was imminent irreparable harm under Title IX). And, damages would do nothing to forestall the ongoing consequences of Defendants' onerous Rule and Policy.

The APA instructs courts to "hold unlawful and set aside" an agency rule if it is (a) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; (b) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; (c) "contrary to constitutional right, power, privilege or immunity"; or (d) "without observance of [the rulemaking] procedure required by law." 5 U.S.C. § 706(2). The Federal Defendants' Rule fails on all four points.

2. The Rule exceeds statutory authority.

"Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *Federal Commc'n Comm'n v. RCA Commc'n, Inc.*, 346 U.S. 86, 90 (1953). Accordingly, an agency exceeds its statutory authority when it promulgates a rule that changes unambiguous statutory terms. *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 876-77 (8th Cir. 2013).

In reviewing a rule, a court must "conduct an independent review of the statute and of its legislative history." *Id.* at 876. "If the plain language of the statute is unambiguous, that language is conclusive," *Clark v. U.S. Dep't of Agric.*, 537 F.3d 934, 940 (8th Cir. 2008), *quoting U.S. v. McAllister*, 225 F.3d 982, 986 (8th Cir. 2000), and

"the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

Courts and Congress have spoken consistently and unambiguously across decades: "sex" in Title IX refers to an individual's status as male or female and Title IX authorizes sex-specific private facilities in schools to preserve student privacy. Yet neither of these statutory standards remains in the wake of the Federal Rule.

Sex is objective, fixed, and binary, while gender identity is subjective, fluid, and non-binary.[5] Title IX and its implementing regulations use the term "sex"—not "gender identity"—to describe the characteristic protected from invidious discrimination. 20 U.S.C. § 1681 et seq. The words "gender identity", "transgender," and "transsexual" appear nowhere in either the statutory or regulatory scheme. *Id.* But tellingly, the words "both sexes," "one sex," and "the other sex" appear *throughout* the statute and regulations referring to males and females. 20 U.S.C. 1681(2); 20 U.S.C. § 1681(8); 34 C.F.R. §106.33. This binary view of male and female fits with the context of the times in which Congress enacted Title IX to rectify unequal opportunities in education for women.

The absence of "gender identity" terminology is striking because when Congress intends to protect on the basis of "gender identity", it explicitly says so, providing separate prescriptions for "sex" and "gender identity." *See e.g.* 42 U.S.C. § 13925(a)(39), (b)(13)(A) (Violence Against Women's Act); 18 U.S.C. § 249(a)(2), (c)(4) (Hate Crime

[5] *See supra* fn 1.

Act); 42 U.S.C. 12211(b) (Equal Opportunity for Individuals with Disabilities); and 29 U.S.C. § 705(20)(F)(i) (Labor law dealing with vocational and rehabilitation services). This congressional practice demonstrates that Congress understands the difference between sex and gender identity and intends to address only sex in Title IX.

This view is confirmed by the 2011, 2013, and 2015 attempts to pass the Student Non-Discrimination Act, which was modeled on Title IX and would add protections for gender identity. 157 Cong. Rec. S1548-01(2011); H.R. 1652, 113th Cong. (2013); S. 1088 113th Cong. (2013); H.R. 846, 114th Cong (2015); S. 439, 114th Cong. (2015). Even today, the Bill's sponsor, Senator Al Franken (D. Minn.) firmly maintains that federal laws such as Title IX do not protect gender identity:

> While federal civil rights statutes clearly address discrimination on the basis of race, color, sex, religion, disability, and national origin, they do not explicitly include sexual orientation or gender identity. As a result, LGBT students and parents have limited legal recourse for this kind of discrimination.
>
> Senator Franken introduced the *Student Non-Discrimination Act* to change this by establishing a comprehensive federal prohibition against discrimination and bullying in public schools based on sexual orientation or gender identity. Specifically, the bill would forbid schools from discriminating against LGBT students or ignoring harassing behavior.

Student Non-Discrimination Act. Official Website of Sen. Al Franken, https://www.franken.senate.gov/?p=issue&id=212 (last visited Sept 8, 2016).

Controlling Eighth Circuit authority affirms Senator Franken's view and the evident Congressional intent. In *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982)(per curiam), Budget Marketing terminated Mr. Sommers, who had stated he was female on his job application, but then presented to work as a male professing a female

gender identity. He sued under Title VII, a statute analogous to Title IX,[6] and the Court conducted an independent review of the statute and legislative history.

Importantly, the Court held that "for the purposes of Title VII the plain meaning must be ascribed to the term 'sex'…", that "the legislative history does not show any intention to include transsexualism in Title VII," that Congress's repeated rejection of bills that would have added "sexual preference" to Title VII demonstrated Congress's intent "that the word 'sex' in Title VII…be given its traditional definition, rather than an expansive interpretation", and that "[b]ecause Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act." *Id.* at 750.

This holding is mirrored in the Seventh Circuit, which reached the same conclusion when a male pilot who professed a female gender identity sued after he was fired. *Ulane v. Eastern Airlines, Inc*. 742 F.2d 1081 (7th Cir. 1984):

> "…to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating."

Id. at 1086, *citing Gunnison v. Comm'r*, 461 F.2d 496, 499 (7th Cir 1972) (it is for the legislature, not the courts, to expand the class of people protected by a statute.).

[6] Note that Title VII jurisprudence is a useful guide to understanding Title IX. *Papelino v. Albany Coll. of Pharmacy of Union Univ*., 633 F.3d 81, 89 (2d Cir. 2011).

The enduring validity of the reasoning in *Ulane* and *Sommers* was recently confirmed by *Hively v. Ivy Tech Cmty. Coll.*, ___ F.3d ____, 2016 WL 4039703, *11 (7th Cir. July 28, 2016). The *Hively* court reviewed Title VII's language, legislative history, and repeated congressional refusals to expand Title VII and held that "Title VII as drafted by Congress, and as we concluded in *Ulane*, Title VII prohibits discrimination only on the basis of gender." *Hively*, 2016 WL 4039703 at *11. Importantly, the *Hively* court noted that this Title VII jurisprudence applies to "Title IX sex discrimination claim[s, which are] treated in much the same way as [] Title VII sex discrimination claim[s]." *Id.* at *6 n.4.

Finally, it examined the decisions of its sister circuits and found *Hively* and *Ulane* to be "in line with all other circuit courts to have decided or opined about the matter." *Id.* 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 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)). This means the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and D.C. Circuits all align with *Sommers*', *Ulane*'s, and *Hively*'s holding that "sex" means sex.

Importantly, "[o]nly Congress can consider all the ramifications to society of such a broad view" of the term "sex," and therefore, the Court should leave to Congress the right to "judicially expand the definition of sex…beyond its common and traditional interpretation." *Ulane*, 742 F.2d at 1086.

But Congress has not done that, but instead authorized the sex-separation of male and female students in intimate facilities under Title IX, stating that under Title IX, "nothing contained herein shall be construed to prohibit any educational institution…from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. This includes "housing", 34 C.F.R. § 106.32, and "separate toilet, locker room, and shower facilities." 34 C.F.R. § 106.33.

And there is no mystery as to why Congress allowed that privacy to be protected. When the bill sponsor, Senator Birch Bayh of Indiana, was questioned about Title IX's impacts on sex-specific facilities, he stated that "[w]e are not requiring that…men's locker room[s] be desegregated." 117 Cong. Rec. 30407 (1971). When the bill was re-introduced a year later, Senator Bayh spoke of separating the sexes to preserve privacy, "such as in classes for *pregnant girls* or emotionally disturbed students, in sport facilities or *other instances where personal privacy must be preserved*." 118 Cong. Rec. 5807 (1972) (Statement of Sen. Bayh) (emphasis added). As the bill was debated, Senator Thompson added, "I have been disturbed however, about the statements that if there is to be no discrimination based on sex then there can be no separate living facilities for the different sexes." 117 Con. Rec. 39260 (1971) (Statement of Sen. Thompson). His concerns were resolved by adding the living facilities exception in 20 U.S.C. § 1686.

Courts likewise have consistently recognized the need for people to have privacy from the opposite sex in locker rooms and restrooms. For example, the District Court for the Western District of Pennsylvania upheld privacy rights under Title IX by affirming a University policy that sex-separated locker rooms and restrooms on campus. *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015). A female student who professed a male gender identity challenged the policy. According to the court, "the applicable legal principles are well-settled" that "separating students by sex based on biological considerations – which involves the physical differences between men and women – for restroom and locker rooms use" is lawful under Title IX and other federal laws. *Id.* at 668, 670. The court explained that the University has an interest "in providing its students with a safe and comfortable environment for performing…life functions consistent with society's long-held tradition of performing such functions in sex-segregated spaces based on biological or birth sex[,]" as well as in ensuring "the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex." *Id.* at 668-69.

Similarly, the Ninth Circuit upheld employer rights to bar a male employee who professed a female gender identity from the women's restroom for safety reasons, *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 Fed. Appx. 492, 493-94 (9th Cir. 2009), as well as affirming the interest of prisoners in "separate toilet, shower and locker room facilities" and "separate housing on the basis of sex." *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994).

State courts that have addressed the issue include the Minnesota Supreme Court and a Missouri Court of Appeals. The Minnesota Supreme Court confirmed that "an employer's designation of employee restroom use based on biological gender is not sexual orientation discrimination." *Goins v. W. Group*, 635 N.W.2d 717, 720 (Minn. 2001). Similarly, the Missouri Court of Appeals upheld a lower court's holding that a student had "no existing, clear, unconditional legal right" which allows him to access restrooms or locker rooms consistent with his gender identity. *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 477 S.W.3d 185, 187 (Mo. Ct. App. 2015).

The issue came before the Eighth Circuit in *Cruzan v. Special School District #1*, — a case which did not consider the constitutional right to privacy— when a female teacher named Cruzan challenged the school's decision to accommodate a male teacher who professed a female gender identity by letting him use one staff restroom in the teacher's lounge. 294 F.3d 981 (8th Cir. 2002) (per curiam). The Court dismissed Cruzan's religious discrimination claim on summary judgment based upon a failure to give proper notice and *because* she "had convenient access to numerous restrooms other than the one Davis used." *Id.* at 984. Put simply, Ms. Cruzan had a safe haven in any number of facilities that could not be accessed by the male professing his womanhood, which is not our case: our Girl Plaintiffs have no such refuge. Under the Federal Defendant's Rule, the gender identity rule regulates access to *all* restrooms, which are thus accessible by the opposite sex, rather than access being regulated by sex and the facilities are off-limits to the opposite sex.

The only federal appellate court to defer to the Federal Rule was a divided Fourth Circuit panel that ruled on a preliminary injunction absent *any* consideration of the Rule's constitutional and Title IX violations at the center of our case. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.,* 15-2056, 2016 WL 1567467 (4th Cir. 2016).[7] In a powerful dissent, Judge Niemeyer emphasized the aberrational nature of the court's decision, noting that the court reached its decision "without any supporting case law" and its holding "tramples the relevant statutory and regulatory language [of Title IX] and disregards the privacy concerns animating that text." *Id.* at *15, 22 (Niemeyer, J., dissenting). For Judge Niemeyer, "when the School Board assigned restrooms and locker rooms on the basis of biological sex, it was clearly complying precisely with unambiguous language of Title IX and its regulations." *Id.* at *22.

In light of the unambiguous language of Title IX and the plethora of circuits which hew to a narrow reading of "sex," *Gloucester* (which did not even consider the privacy claims like Girl Plaintiffs') is of no moment. *Hively*, 2016 WL 4039703 at *2 (citing 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and D.C. Circuit decisions agreeing with *Ulane, Sommers,* and *Hively.*) The Federal Rule is *ultra vires* and, as such should be enjoined.

3. The Rule is arbitrary, capricious, an abuse of discretion, and not in accordance with law.

An agency rule is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important

[7] As discussed below, the Fourth Circuit's mandate has been recalled by the Supreme Court. *See infra* Section III.

aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, **or** is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added). The Rule fails each of these standards.

To begin with, the Federal Defendants relied on a concept – gender identity – that Congress did not include in Title IX. Compl. ¶¶ 48, 53-60. Judicial precedent, Title IX's text, legislative history, and congressional history clearly demonstrate Congress meant "sex" to mean the reality of male and female, and not the very different theory of gender identity. *Id.*

In addition, the Federal Defendants failed to consider the Rule's practical ramifications. Compl. ¶¶ 72-73. The Rule requires schools to defer entirely to a student's professed gender identity without any objective verification. This poses a safety risk, as nothing in the rule would screen out a male adolescent who professes a female identity so as to access girls' private facilities in order to see girls in various states of partial or complete undress. In such cases, the school would have to wait for a violation to occur as the Rule precludes objective verification.

And worse, when District 211 in Illinois pointed to the type of privacy claims our Plaintiffs raise, Federal Defendants dismissed those serious concerns absent any analysis, curtly rejecting any appeal to other students' privacy rights as "unavailing." Township High School District 211, 05-14-1055 (Office of Civil Rights Nov 2, 2015) (letter of findings) **Exhibit E**. Such conclusory dismissal of the profound privacy claims of the

vast majority of students clearly runs both "counter to the evidence before the agency" and shows that it "failed to consider an important aspect of the problem."

The Federal Defendants further failed to consider how to accommodate students who profess gender identities that are neither male nor female, like "gender fluid," or "gender queer" as have already appeared in District 211. *Students and Parents for Privacy v. Dep't of Educ., et al.*, No. 1:16-cv-04945, ECF 32-3 (N.D. Ill. filed May 4, 2016) (**Exhibit G**). Given that the Rule obligates school officials to defer to a student's professed gender identity, there is no clear path to accommodate the personal needs of a student who professes a non-binary identity.

All these factors show that the DOE acted implausibly when it substituted—or as Judge Niemeyer argued, supplanted—the binary, objective, reproductively-based reality of sex with a subjective psychological condition which is non-binary, unverifiable, fluid, and absent from the text and context of Title IX.

Further evidence of arbitrary and capricious action arises when an agency changes the longstanding understanding of federal law without at least "display[ing] awareness that it is changing position" and showing "good reasons for the new policy." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, No. 15-415, 2016 WL 3369424 at *7 (June 20, 2016), *quoting FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Such a change requires "a reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* And it requires "cognizan[ce] that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Id.*

The Federal Defendants have reversed two longstanding Title IX positions–the definition of sex and the sex-separation of private facilities– without any apparent awareness that it eliminated schools' ability to preserve the valid separation of the sexes, or the reliance that schools placed on the longstanding rule in providing communal facilities that protect the privacy of the two sexes. There is a direct and significant impact on schools nationally as they look to adding (and maintaining) single-user facilities for restrooms and locker rooms in a strained effort to satisfy privacy needs. Meanwhile, the Federal Defendants act as if no change was made at all to Title IX and its implementing regulations. This is by definition arbitrary and capricious and the Rule should be enjoined accordingly.

4. The Rule is unconstitutional and contrary to law.

The Rule also violates the fundamental constitutional right to privacy of every Student Plaintiff, and in particular, of every Girl Plaintiff. *See supra Section C.* It violates each Parent Plaintiffs' fundamental right to control the upbringing of their children, and some Plaintiffs' rights to the free exercise of their religion. Compl. ¶¶ 238-243. And it violates the Spending Clause of the U.S. Constitution, to which we now turn.

Title IX was "enacted pursuant to Congress' authority under the Spending Clause." *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999). When Congress exercises this power, "it generates legislation 'much in the nature of a contract: in return for federal funds, the States [or their political subdivisions] agree to comply with federally imposed conditions.'" *Id.* (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

A rule violates the Spending Clause if it fails to unambiguously state the conditions of funding, so that the recipients can voluntarily and knowingly decide whether to accept funding, *Pennhurst*, 451 U.S. at 17; if it coerces compliance by conditioning such a substantial portion of the governmental entity's budget on adopting the federal policy that the governmental entity has no real choice not to follow, *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2601-07 (2012); if the "conditions on federal grants" are "unrelated 'to the federal interest in particular national projects or programs,'" *South Dakota v. Dole,* 483 U.S. 203, 207-08 (1987), *citing Massachusetts v. U.S.*, 435 U.S. 444, 461 (1978); or if federal funds are conditioned on violating constitutional rights. *Id.* at 210-11. The Rule does all of these.

Changing "sex" in Title IX to include "gender identity" is a monumental shift away from the purpose of Title IX, which was to eliminate invidious discrimination against women. Compl. ¶¶ 45-48. That purpose is certainly still valid, but certainly is not served by manipulating Title IX to force schools to affirm an individual's psychological perception of "gender." The Rule forces schools to change how they organize classes, restrooms, locker rooms, and activities to accommodate gender identity theory. None of these changes were foreseeable when schools accepted federal funding over the past four decades. And Federal funding now comprises such a substantial portion of educational support that school districts have no choice but to adopt the Federal Defendants' Rule while abandoning commonsense policies and practices that protected students' privacy for years. The Rule further violates the Spending Clause because it requires school

districts to violate students' and parents' constitutional rights, including the right to privacy. *See supra* Section C. The Rule is therefore unconstitutional and contrary to law.

5. The Rule is without observance of procedure required by law.

The Rule did not go through notice-and-comment rulemaking as required of legislative or substantive (as opposed to interpretive) rules under the APA. 5 U.S.C. § 553; Compl. ¶¶ 70-71. A rule is legislative if it "imposes new rights or duties", "creates a new legal norm based on the agency's own authority" or "expand[s] the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created." *Iowa League of Cities*, 711 F.3d at 873. A rule is also legislative if it has the "force and effect of law," *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1020 (D.C. Cir. 2000), or if it substantively changes the law. As the D.C. Circuit aptly put it, "When an agency gets out the Dictionary of Newspeak and pronounces that for purposes of its regulation war is peace, it has made a substantive change." *Nat'l Family Planning and Reprod. Health Ass'n, Inc. v. Sullivan,* 979 F.2d 227, 235 (D.C. Cir. 1992). Here, Defendants have proclaimed that a boy is a girl, which is Newspeak writ large.

The Federal Defendants' Rule imposes new rights for some students to use private facilities designated for the opposite sex, while placing new duties on school districts to treat a student's declaration of gender identity as establishing their sex and authorizing use of private facilities accordingly. Compl. ¶¶ 64-69. The Federal Defendants' Rule creates a new legal norm and expands the Title IX's footprint by adding "gender identity" to "sex" in Title IX, undercuts the protection of females from invidious discrimination,

and contradicts 40 years of Title IX history and settled precedent. *Id.* In this way, the Rule substantively changes the law.

The Rule has the force and effect of law as seen in the Rule's mandatory language and the Federal Defendants' relentless enforcement actions applying that language. *Id.* A rule can be binding "if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding." *Iowa League of Cities*, 711 F.3d at 862; *quoting Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002). "[T]he mandatory language of a document alone can be sufficient to render it binding. *Gen. Elec. Co.*, 290 F.3d at 383. The Federal Rule is certainly mandatory as it uses "must," at least fifteen times to describe the obligations of schools. *See Dear Colleague Letter* 2-5. And the "must" is enforced as "shall," with Federal Defendants enforcing the rule multiple times[8], using the big stick of threatening the schools' federal educational funding. Where "parties have 'reasonably [been] led to believe that failure to conform will bring adverse consequences,'" the rule is binding. *Iowa League of Cities*, 711 F.3d at 864, *quoting Gen. Elec. Co. v. E.P.A.*, 290 F.3d at 383. At a minimum—assuming that any Federal agency can rewrite a law at the level Federal Defendants have—the DOE should have advanced its agenda via notice-and-comment rulemaking. It failed to do so, and should be enjoined as violating the APA.

B. The District Policy Violates Title IX.

Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

[8] See *supra* fn. 4.

discrimination under any education program or activity receiving Federal financial assistance…" 20 U.S.C. § 1681. This prohibition on excluding students from educational programs and benefits is restated in the implementing regulations. 34 C.F.R. § 106.31. A school district that violates these laws can be liable for damages to the victimized student. *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); *Franklin*, 503 U.S. 60.

1. The Policy excludes Girl Plaintiffs from educational programs.

The Virginia School District is a Title IX funding recipient. Compl. ¶ 24. Instructional classes, athletic teams, locker rooms, and restrooms are educational programs covered by Title IX. *Dear Colleague Letter; see also G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718, fn. 4 (4th Cir. 2016).

The Policy excludes Girl Plaintiffs from these programs by authorizing Student X's unhindered use of girls' locker rooms and restrooms, which he regularly does. All Girl Plaintiffs thus know that their use of school locker rooms and restrooms subjects them to the risk of a male student entering and using their private facilities while they attend to their personal needs.

Consequently, Girl Plaintiff A will not return to VHS for fall 2016 unless the Policy is enjoined. Compl. ¶¶ 41, 187-197. Girl Plaintiff A will also not return to the VHS track team. *Id.* Girl Plaintiffs A, B, and E missed instructional time and athletic practice time searching for a locker room or restroom where only girls were likely to be present. Compl. ¶¶ 41,139-143, 182, 218-219. Girl Plaintiffs A and E stopped using school restrooms for days, holding their urine all day rather than use a restroom open to and used by a male student. Compl. ¶¶ 41, 183-186, 220-221.

The Policy of the Virginia School District effectively excludes Girl Plaintiffs from locker rooms, restrooms, athletics, class time, and school. That violates Title IX.

2. The Policy creates a sexually harassing hostile environment for Girl Plaintiffs.

A school district may be held liable for sexual harassment. "[S]exual harassment...clearly constitutes discrimination under Title IX," *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 782 (8th Cir. 2001), when it is "so severe, pervasive, and objectively offensive that it … deprive[s] the victims of access to the educational opportunities or benefits provided by the school." *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 864 (8th Cir. 2011), *quoting Davis*, 526 U.S. at 650. When a school's policy violates Title IX it can be held liable. *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569 (7th Cir. 2014).

A student can bring a private cause of action for damages against the school district when the district acts with "(1) deliberat[e] indifferen[ce] (2) to known acts of discrimination (3) which occur[red] under its control." *Shrum*, 249 F.3d at 782; *see generally Davis*, 526 U.S. 629; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

This case goes far beyond the typical judicial investigation of indifference, knowledge, and control in respect to the problematic behavior. Here, the District Defendants acted intentionally (not merely indifferently) by authorizing a male's access to the private facilities within which Girl Plaintiffs disrobe at least to their underwear, as does a male student in close proximity to them. Compl. ¶¶ 116-230, 242-248. The Policy

also obligates Girl Plaintiffs to attend to their most personal needs in restrooms with a male. Compl. *Id.* The hostility of this Policy is confirmed by the repeated privacy violations, *see supra* Section C, and should be enjoined immediately.

Yet if it is not enough that the District Defendants are intentionally authorizing unhindered access for a male to use girls' private facilities for the Court to find a hostile environment, the Policy still satisfies every element of the traditional sexual harassment - hostile environment cases.

The harassment is "on the basis of sex," because the "underlying intent" or "motivation" of the Policy is the Girl Plaintiffs' "sex or gender." *Wolfe*, 648 F.3d at 864-65. Here, the Policy is entirely motivated by Girl Plaintiffs' sex as it affirms the professed gender identity of a male student by authorizing his access to private facilities *specifically because they are restricted to use by girls only*.

The harassment is "severe" and "pervasive" because it impacts Girl Plaintiffs every time they use a school locker room or restroom. *Davis*, 526 U.S. at 650; Compl. ¶¶ 116-230. And it is severe because some Girl Plaintiffs have manifested severe emotional distress even off campus and at home because of the Policy. Compl. ¶¶ 41, 132, 173, 187, 200, 205, 217, 226-228.

The harassment is objectively offensive because it puts a teenage girl in a situation where she must sacrifice privacy to pursue an education or participate in athletics. This leaves Girl Plaintiffs but few options: avoid the restrooms and locker rooms entirely, or use them, and hope that Student X doesn't follow them. Compl. ¶¶ 166-172, 183-186,

203-209, 220-221. But he has, without any corrective action by the District Defendants. Compl. ¶¶ 162-165, 206-208, 228, 242-243

Students need not withdraw from school or have their grades suffer to be denied access to educational opportunities and benefits. *Davis*, 526 U.S. at 650-51. Thus, missing class time while Plaintiffs seek genuine privacy—or try to evade the male student—is a denial of access under Title IX. But there is more: Because of the Policy, Girl Plaintiff A is transferring out of the District, Compl. ¶¶ 41, 187-197; and also will not return to VHS track, *id.*; Girl Plaintiffs A, B, and E missed instructional time or athletic practice time, Compl. 41, 139-143, 182, 218-219; and Girl Plaintiffs A and E stopped using school restrooms for at least periods of time, Compl. ¶¶ 41, 183-186, 220-221.

To make matters worse, the District Defendant knew of these impacts and responded indifferently. Compl. ¶¶ 242-243. Parent Plaintiffs notified the District of their objection to the Policy and of their children's distress over the Policy. Compl. ¶¶ 242-243. Parents A, D, and F also notified the District of Student X's comments about girls' bodies, sexual dancing in the locker room, and undressing in the girls' secondary locker room near girls who sought privacy. Compl. ¶¶ 162-165, 205-209, 228. Instead of addressing any of these concerns, all of which were in the District's control, the District acted with deliberate indifference and continued to authorize Student X to use girls' private facilities via the Policy. *Id.*

These actions violate Title IX. Plaintiffs are likely to succeed on the merits of this claim against the District Defendants, so the Policy should be enjoined. So, too, should

the Federal Rule which obligates District Defendants to take such actions even had they not crafted their own Policy.

C. The Rule and Policy Violate Girl Plaintiffs' Fundamental Right to Privacy.

Girl Plaintiffs have a reasonable and constitutionally protected expectation of privacy that is violated when Defendants authorize a male student to use all girls' locker rooms and restrooms. This expectation of privacy is rooted in the fundamental right to bodily privacy – a right that includes shielding one's body and private activities from view by the opposite sex. It is a right grounded in due process and protected by the Fifth and Fourteenth Amendments. And when it arises in the context of locker rooms and restrooms, protection for the right begins at the doorway, not at some curtain or commode stall within the private facility.

Indeed, it's hard to "conceive of a more basic subject of privacy than the naked body…[t]he desire to shield one's unclothed figured from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963); *see also*, *Doe v Luzerne Cty.*, 660 F.3d 169, 176-77 (3d Cir. 2011); *Poe v. Leonard*, 282 F.3d 123, 138 (2d Cir. 2002).

The right is not narrowly constrained to "bright lines based on anatomical parts or regions." *Doe*, 660 F.3d at 176-77. Rather, protection is appropriate where people are engaged in activities that they are "self-conscious" or "uncomfortable" attending to in the

presence of the opposite sex. *Livingwell (North) Inc. v. Pa. Human Relations Com'n*, 147 Pa. Commw. 116, 125-27 (1992).

When this right implicates using locker rooms, restrooms, and even gyms, courts have drawn protective privacy lines at the doorway to protect these vital privacy rights. In *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410 (N.D. Ill. 1984), the court upheld as a bona fide occupational qualification ("BFOQ") the hiring of only male employees to clean men's restrooms, opining that even "an attendant knock[ing] on the opposite sex's washroom's door to determine if the washroom were in use" would "cause stress to tenants and guests" that violate their privacy. *Id.* at 1422.

Similarly, in *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122 (S.D. W. Va. 1982) the court upheld another janitorial BFOQ, stating "[t]he privacy factor concerns the right of the hundreds of male employees who use the three bathhouses during any given shift not to be required to undress, dress, shower, and perform the grosser biological functions in the presence and view of a female engaged in the performance of janitorial duties assigned to her in one or the other of those bathhouses." *Id*. at 1128.

In *Livingwell*, the Court upheld a business's right to hire only women as a BFOQ for employment at an all-women's health club. *Livingwell,* 147 Pa. Commw. 116. The Court concluded that hiring a man would violate the women's privacy because of the "extreme embarrassment, anxiety or stress" these women would suffer if a man were present when they were exercising and "expos[ing] parts of the body about which they are most sensitive, assum[ing] awkward and compromising positions, and mov[ing] themselves in a way which would embarrass them." *Id.* at 125-27.

These cases confirm that privacy rights start at the locker room or restroom door, which Title IX and its implementing regulations recognized by authorizing sex-specific living facilities, housing, locker rooms, shower rooms, and restrooms. 20 U.S.C. § 1686, 34 C.F.R. § 106.32, 34 C.F.R. § 106.33. The implementing regulations also codify as a BFOQ the hiring of employees based on sex to service school locker rooms and restrooms. 34 C.F.R. § 106.31.

The Policy violates this right to bodily privacy on its face and as applied. On its face, the Policy authorizes one or more male students to have unhindered access to the girls' private facilities where the girls normatively change for PE and athletics, and necessarily attend to their personal needs throughout their school day. Compl. ¶¶ 106-109. It similarly allows certain female students unhindered access to the boys' private facilities where the boys change for PE and athletics and attend to their personal needs through their school day. *Id*.

The Policy applies to mandatory PE classes, where Girl Plaintiffs must use the locker rooms to change their clothing, exposing themselves at least down to their underwear, and more for some Girl Plaintiffs, when they change into swim suits or sports bras. Any Girl Plaintiff who participates in athletics must similarly change their clothing for practice and games. Girl Plaintiffs have no escape from doing this in a room accessible to, and used by Student X.

Restrooms likewise pose privacy violations. Student X has authority to use any restroom designated for girls, so every time any girl in the school uses a restroom to

attend to her most personal needs, she does knowing that a male student may enter unhindered, as he has indeed done. Compl. ¶ 117.

Of course, the consequent difficulties Girl Plaintiffs have encountered in seeking true privacy have resulted in loss of class time, and even withdrawal from the school itself. Compl. ¶¶ 41, 139-143, 182, 187-197, 218-219.

When the government infringes on a fundamental right, as it has here, the Policy is presumptively unconstitutional. Defendants must show a compelling interest and use of the least restrictive means to effect their purpose. *Reno v. Flores*, 507 U.S. 292 (1993). No compelling interest justifies forcing young women or boys to use locker rooms and restrooms with the opposite sex. And there certainly is no compelling governmental interest in forcing others to affirm an individual's self-perception of his or her identity.

Nor does the Policy use the least restrictive means to meet Student X's needs. As required by the Federal Defendant's Rule, the Policy eviscerated the sex-separation of all locker rooms and restrooms in all District schools, pre-school to 12th grade, impacting students from 3-years-old to 18-years-old. This was done despite the admission of Student X, on YouTube, that he was satisfactorily accommodated by the District's provision of private facilities for his locker room and restroom needs—an approach which likely would satisfy the "least restrictive means" test. And that approach protected the privacy rights of all students, including Student X. Compl. ¶ 95-96.

For these reasons, the Policy and the Rule it is based upon should be enjoined and student privacy preserved.

II. Plaintiffs Have Suffered Irreparable Harm and Will Continue to Suffer Irreparable Harm without a Preliminary Injunction.

When a "constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Am. Civil Liberties Union of Ky. v. McCreary Cty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003); *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977); *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960)(per curiam) ("The District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right.").

The Plaintiffs' privacy injuries are irreparable harms. *McDonell*, 746 F.2d at 787. Without a preliminary injunction, Girl Plaintiffs will continue suffering that irreparable harm to their constitutional privacy rights. And they will continue suffering exclusion from education programs; a sexually harassing hostile environment; and the stress, anxiety, emotional distress, embarrassment, and apprehension that result from those violations. No after-the-fact relief can restore their lost privacy, nor make whole the violated statutory and constitutional rights. *See Am. Civil Liberties Union of Ky.*, 354 F.3d at 445.

III. The Balance of Equities Sharply Favors Plaintiffs.

As explained above, Girl Plaintiffs will continue to experience significant harms absent an injunction and have shown a substantial likelihood that the Federal Defendants' Rule and the District's Policy are unconstitutional. The government suffers no harm

when it is prevented from enforcing unconstitutional laws. *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson Cty., Tenn.*, 274 F.3d 377, 400 (6th Cir. 2001).

Against this, the prior accommodation given Student X wholly satisfied his privacy needs. Compl. ¶¶ 95-96. The demand to access the communal girls' facilities is not rooted in his privacy needs, but the supposed obligation to affirm his subjective perception that he is a girl. There can be no serious dispute that his privacy needs have been satisfactorily protected, per his own admission, Compl. ¶ 96, and the facilities provided exclude access to the opposite sex. And no weight should be given to the Defendants' position that either Title IX or the Constitution obligates the government to affirm a person's self-perceived psychological condition, which would be an unprecedented expansion of governmental power.

Moreover, in a most instructive turn of events, the United States Supreme Court recently recalled the mandate in *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 16A52, 2016 WL 4131636 (August 3, 2016). The facts in *G.G.* are quite similar to ours—a girl professing a male gender identity sought access to the boys' restroom facilities. *G.G. v. Gloucester Cty. Sch. Bd*, 822 F.3d 709, 714-716 (4th Cir. 2016). Although the Gloucester defendants provided individualized, entirely private facilities for the complaining student, that was not enough. Leveraging the Federal Defendants' Rule which supplants "sex" with "gender identity," she demanded access to all of the boys' restrooms. *Id*. The school resisted, prevailing at the district court but losing at the Fourth Circuit. *Id*. at 717. The Fourth Circuit timely issued its mandate, and the lower court

promptly enjoined the Gloucester defendants to admit the girl to the boys' communal facilities.

When the *G.G.* defendants sought to have the mandate recalled, they expressly argued that the constitutional and Title IX injuries to the other students who desired to access facilities reserved to their sex had to be protected, and further argued that absent recall and stay, parents' rights to control when their children might be exposed to the opposite sex would be violated.[9]

On August 3, 2016 the Supreme Court recalled the mandate and stayed the district court's injunction. *Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016), 2016 WL 4131636 at *1. This returned *Gloucester* to a status quo which is virtually identical to that which Plaintiffs seek to restore in this case: Student X would have fully private facilities for his personal needs, while Girl Plaintiffs would be assured that they may use their single-sex private facilities without the risk of a male reappearing in their facilities with the consequent violation of their privacy.

In short, the Supreme Court telegraphed that the balance of harms falls in favor of *all* students' privacy rights, which certainly should inform this Court in deciding to issue preliminary relief forthwith to protect the privacy of Girl Plaintiffs.

[9] Petitioners' Application for Recall and Stay of the U.S. Fourth Circuit's Mandate Pending Petition for Certiorari at 33-36, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 16A52, 2016 WL 4131636 (August 3, 2016), a true and correct copy of which is attached as **Exhibit H**.

IV. A Preliminary Injunction is in the Public Interest.

"It is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), overruled on other grounds by *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012). It is also in the public interest to prevent the government from "violat[ing] the requirements of federal law," *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053,1069 (9th Cir. 2014) such as Title IX. The Federal Defendants' Rule and the District's Policy violate the constitution and federal law. Accordingly, public policy favors granting a preliminary injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the preliminary injunction issue.

Respectfully submitted this the 16th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, I electronically filed the foregoing Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction with the Clerk of Court using the ECF system. Because Defendants have not yet entered an appearance, I have served the Defendants listed below via U.S. Certified Mail, Return Receipt Requested. Defendant Independent School District Number 706 will be personally served upon the following members of the school board: Bill Hafdahl, Stacey Sundquist, Tom Tammaro, Sonya Pineo, Kimberly Stokes, and Greg Manninen.

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CERTIFICATE OF COMPLIANCE

I hereby certify that that this brief complies with the requirements of Local Rule 7.1(h) because it has been prepared in 13-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-size limitation of Local Rule 7.1(f) because it contains 9,564 words, excluding the parts of the brief exempted, according to the count of Microsoft Word.

/s/ Jordan Lorence

Jordan Lorence