UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ASHTON WHITAKER, a minor, by his mother and next friend, MELISSA WHITAKER, Plaintiff, v. KENOSHA UNIFIED SCHOOL DISTRICT NO. 1 BOARD OF EDUCATION and SUE SAVAGLIO-JARVIS, in her official capacity as Superintendent of the Kenosha Unified School District No. 1, Defendants.	Civ. Action No. 2:16-cv-00943-PP Judge Pamela Pepper

PLAINTIFF'S REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Through his motion for preliminary injunction, Plaintiff Ash Whitaker seeks targeted relief to prevent Defendants Kenosha Unified School District Board of Education No. 1 and Superintendent Sue Savaglio-Jarvis, in her official capacity (collectively, "KUSD"), from inflicting further irreparable educational, physical, and emotional harms on him while litigation on the merits of this lawsuit proceeds. Ash asks this Court to temporarily enjoin KUSD from enforcing—*against him alone*—any policy, practice, or custom: (1) denying him access to boys' restrooms at school, including disciplining him for using those restrooms; and (2) stigmatizing his transgender status and revealing private information related to his gender transition to students and staff—who know and recognize Ash as a boy—through the use of his female birth name, feminine pronouns, or visible badges such as wristbands that mark him as transgender.

Ash is not, as KUSD suggests in its opposition brief, asking this Court at this juncture to order KUSD to implement systemic policy changes or grant any broader relief that may be appropriate at the conclusion of this case. Defs' Opp. Br. [Dkt. No. 17] ("Defs' Opp Br."). And, despite KUSD's assertion to the contrary, the requested relief would have no impact whatsoever on any other school district. A temporary injunction would impose no harm on KUSD, any of its students or staff, or any member of the public—nor has KUSD offered *any* evidence to suggest that the speculative harms it identifies in its brief would materialize. In fact, KUSD has not filed a single declaration, or any other piece of evidence, to rebut Ash's allegations or the conclusions of multiple expert and fact witnesses who submitted declarations in support of this motion.

Ash faces certain irreparable harm if KUSD's conduct is not enjoined and is likely to succeed on the merits of his claims. In contrast, neither KUSD nor the public will be harmed by the temporary relief sought here. The Court should therefore grant Plaintiff's motion.

ARGUMENT

I. PLAINTIFF MEETS THE THRESHOLD REQUIREMENTS OF SOME LIKELIHOOD OF SUCCESS ON THE MERITS AND A SHOWING OF IRREPARABLE HARM IF HE REMAINS SUBJECTED TO KUSD'S DISCRIMINATORY POLICIES REMAIN IN THE NEW SCHOOL YEAR.

A. KUSD misstates Plaintiff's burden of showing some likelihood of success.

A party moving for a preliminary injunction in the Seventh Circuit must only demonstrate "*some* probability of success on the merits" (*i.e.*, a "better than negligible" chance), to meet the threshold showing. *See Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986) (emphasis added). In an apparent attempt to hold Plaintiff to a higher standard here, KUSD cites a D.C. Circuit case requiring a showing of a "substantial likelihood" of success on the merits. Defs' Opp. Br. at 7. That higher bar is not the standard in this Circuit and is inapplicable to this motion. For the reasons explained in Plaintiff's opening brief, Ash greatly exceeds the low threshold showing of "some" likelihood of success on the merits on both of his causes of action. Mem. in Support of Pl's Mot. for Prelim. Inj. [Dkt. No. 11] ("Pl's PI Br.") at 12-28.[1]

B. Ash's claims under Title IX and the Equal Protection Clause are likely to succeed under each of several theories of discrimination "on the basis of sex."

Plaintiff has shown a likelihood of success on his sex discrimination claims, whether those claims arise because (1) Ash's "sex" is properly understood to include his male gender identity, such that it is *per se* sex-based discrimination to treat him differently merely because his gender identity is incongruent with his assigned sex at birth; or (2) it is actionable gender discrimination arising from sex stereotyping to treat Ash differently from other boys because he

[1] KUSD also questions the well-established "sliding scale" approach to preliminary injunction motions, citing a concurring opinion from a 1986 Seventh Circuit decision. Defs' Opp. Br. at 5 n.5. The Seventh Circuit has applied the sliding-scale approach time and again since then. *See Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). KUSD's suggestion that some other standard applies here is incorrect.

does not conform to certain gender norms, including that all boys were assigned the male sex at birth or have the same physical features. Because many courts have found that transgender plaintiffs state valid sex discrimination claims on one or both of these theories, Ash easily meets the threshold burden of showing "some" likelihood of success on the merits.

KUSD is simply wrong to assert that Ash has "no likelihood" of succeeding under the theory that Title IX's prohibition on sex-based discrimination encompasses discrimination based on gender identity. Defs' Opp. Br. at 8-14. KUSD's argument depends on the illogical premise that there is no chance that this Court and the Seventh Circuit will adopt the same interpretation of Title IX that the federal government and many federal courts already have adopted.

Whether through the formal regulatory process or administrative guidance, a number of federal agencies charged with interpreting statutes banning discrimination "on the basis of sex" have interpreted such statutes to include discrimination based on gender identity and transgender status. *See* Pl's PI Br. at 20-24. The two departments with primary enforcement authority over Title IX—the Department of Education ("ED") and the Department of Justice ("DOJ")—share this interpretation. That interpretation, previously stated in informal opinion letters, amicus briefs filed in private Title IX cases, and enforcement actions dating back to 2013, *id.* at 20-24 & n.13, was most recently and thoroughly articulated in the Departments' May 13, 2016 Dear Colleague Letter on Transgender Students, a "significant guidance document" issued by the senior officials heading ED's Office for Civil Rights and DOJ's Civil Rights Division. *Id.* at 20-21.

Meanwhile, federal courts have adopted those agencies' reasonable interpretation of the term "sex." *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 719-23 (4th Cir. 2016), *mandate recalled and stay issued by Gloucester Cty. Sch. Bd. v. G.G.*, 136 S. Ct. 2442 (2016); *Carcaño v. McCrory*, No. 1:16-CV-236, 2016 WL 4508192, at *1 (M.D.N.C. Aug. 26, 2016) (attached as

Ex. A); *see also Schroer v. Billington*, 577 F. Supp. 2d 293, 301 (D.D.C. 2008) (adopting analogous reasoning to conclude gender identity discrimination is *per se* sex discrimination). All of this is consistent with Supreme Court jurisprudence, which has clarified the scope of Title VII and analogous sex discrimination laws, including Title IX, to broadly prohibit discrimination beyond the "principal evil" Congress might have had in mind in enacting those laws to include gender-based discrimination. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989)

KUSD argues that the Supreme Court's stay of the Fourth Circuit's decision in *G.G.*, a case presenting facts similar to this one, is "significant." Defs' Opp. Br. at 8. But all the Supreme Court did was temporarily stay a preliminary injunction in that case pending an anticipated petition for writ of certiorari by the defendant school district. *Gloucester Cty. Sch. Bd.*, 136 S. Ct. 2442. Notably, the stay will "terminate automatically" and the injunction will be restored if the Court denies the writ. *Id.* The stay serves only to permit the Court to consider that writ; it says nothing as to whether the Court will grant certiorari or, if it does, how it may ultimately rule. *Id.* Indeed, Justice Breyer, who cast the deciding vote for the stay, said he did so because the Court was in recess and his vote was only a "courtesy."[2] Indeed, as a federal court recognized just last week in enjoining North Carolina's enforcement of its anti-transgender "bathroom bill" pursuant to Title IX, *G.G.* is controlling law in the Fourth Circuit. *Carcaño*, 2016 WL 4508192, at *13.

Moreover, Ash independently has a likelihood of success pursuant to the well-established principle that Title IX bans discrimination based on "sex-stereotyping." That principle readily

[2] Legal scholars have suggested Justice Breyer's vote had more to do with preserving capital defendants' ability to obtain stays pending certiorari in death penalty cases, not an indication of his views on the merits in *G.G.*. *See* Michael C. Dorf, *Justice Breyer Uses Trans Restroom Case to Revive "Courtesy Fifth Vote,"* Verdict (Aug. 10, 2016), http://bit.ly/2c6NKJo.

applies here, since KUSD is treating Ash differently from other boys based on his nonconformity to stereotypical expectations that all boys were assigned the male sex at birth and have the same physical features. Federal courts have repeatedly applied the sex-stereotyping theory in finding that transgender plaintiffs stated sex discrimination claims. *See* Pl's PI Br. at 2.[3]

KUSD misreads the cases it relies on to assert, first, that a sex-stereotyping claim can *only* arise from a limited subset—which it calls "behaviors, mannerisms, and appearances"—of the ways people can be perceived as failing to conform to gender stereotypes, and second, that Ash's claim does not fall within that category. Defs' Opp. Br. at 11. Those cases actually hold that discrimination against transgender people is inherently based on sex stereotypes. In *Glenn v. Brumby*, the Eleventh Circuit found "congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms," concluding that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination." 663 F.3d 1312, 1317 (11th Cir. 2011). Far from limiting actionable sex discrimination to the examples listed in KUSD's brief, *Glenn* found that the bases for the employer's discrimination—his "perception of Glenn as 'a man dressed as a woman and made up as a woman'" and "the sheer fact of the transition" were actionable sex stereotypes. *Id.* at 1320-21. Similarly, in *Smith v. City of Salem*, the Sixth Circuit concluded that the transgender plaintiff, who was discriminated against when she began to assert her female gender identity at

[3] KUSD curiously asserts that the Amended Complaint "is utterly devoid of any allegations of sex-stereotyping" and that Ash, through this motion, is making an "eleventh-hour sex-stereotyping claim." Defs' Opp. Br. at 10 & n.12. The stereotyping theory is not a stand-alone "claim"; rather, it is one of several forms of sex discrimination under which this Court can grant relief under the same Title IX or Equal Protection Clause claim. Notwithstanding the fact that a plaintiff is not required to plead his legal theories, *see Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 743 (7th Cir. 2010), Ash refers to the sex-stereotyping theory throughout his Amended Complaint. *See* Am. Compl. [Dkt. No. 12] ¶¶ 3, 111, 114, 115, 117, 120, 121, 122, 124.

work, stated a claim under a sex-stereotyping theory. 378 F.3d 566, 571 (6th Cir. 2004). *Smith* noted the faulty logic of "superimpos[ing] classifications such as 'transsexual' on a plaintiff, and then attempting to legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the gender non-conformity into an ostensibly unprotected classification." *Id.* at 574. That is precisely what KUSD is urging this Court to do here.

At least one court has specifically concluded that a transgender person states a sex stereotyping claim under Title VII and Title IX based on the fact that the person does not have genitalia associated with his gender identity. *See Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. Civ. 02-1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) (attached as Ex. B). In that case, where a college prohibited a transgender woman from using the women's restroom, the court denied the school district's motion to dismiss the plaintiff's Title IX claims, finding that "neither a woman with male genitalia nor a man with stereotypically female anatomy . . . may be deprived of a benefit or privilege of employment by reason of that nonconforming trait." *Id.*

KUSD is plainly treating Ash differently from other boys—irrespective of whether that's because KUSD does not consider him to be a boy, because it considers him a boy only *some* of the time because of certain gender nonconforming characteristics,[4] because he is a boy who is also transgender, or because he is a boy undergoing a gender transition—and *Glenn*, *Smith*, and other cases stand for the principle that such treatment is based on impermissible sex stereotypes.

[4] KUSD admits it "has permitted [Ash] to live in conformance with the male gender identity in all material respects, with the one exception of the policy regarding bathrooms and overnight accommodations." Defs' Opp. Br. at 13. But treating Ash differently from other boys in *any* way for not conforming to KUSD's idea of what a boy should be is, by definition, gender nonconformity discrimination.

C. The federal government's interpretation of Title IX is entitled to deference.

For the reasons stated in Plaintiff's opening brief, the interpretation of the term "sex" in Title IX and its implementing regulations by ED and DOJ is entitled to deference. Pl's PI Br. at 13-24. Furthermore, under *Auer v. Robbins*, 519 U.S. 452 (1997), this Court must defer to the Departments' considered interpretation that 34 C.F.R. § 106.33—which permits schools to maintain sex-segregated restrooms without violating Title IX—requires schools to treat transgender students according to their gender identity if they choose to operate separate restrooms. *Id.* at 22-23. Although KUSD hopes the principle of *Auer* deference may change in the future, Defs' Opp. Br. at 19-23, *Auer* is good law. In fact, the Seventh Circuit recently afforded *Auer* deference to another ED guidance letter. *See Bible v. U.S. Aid Funds, Inc.*, 799 F.3d 633, 651 (7th Cir. 2015), *cert. denied*, 136 S.Ct. 1607 (2016). *Auer* is binding on this Court, which must defer to the ED/DOJ Title IX interpretation unless and until the law changes in the manner KUSD desires.

II. KUSD WILL SUFFER NO HARM, IRREPARABLE OR OTHERWISE, IF THIS COURT GRANTS THE PRELIMINARY RELIEF REQUESTED IN THIS CASE.

A. In response to this lawsuit, KUSD has invented a policy that it has never enforced before and is now applying to just one student: Ash Whitaker.

The student restrooms at Tremper High School, where Ash will begin his senior year tomorrow, have signs on the door that say either "Boys" or "Girls." When Ash, a transgender boy, began to use the boys' restrooms at the beginning of his junior year, KUSD had no policy limiting access to those restrooms to students whose "biological sex" was male. Nor did KUSD have any policy defining "boys" or "girls" for purposes of restroom use or otherwise.

Only after Ash's seven, unremarkable months of using the boys' restrooms last year, did Tremper administrators concoct a new policy: Ash had to use girls' restrooms or segregated,

single-occupancy restrooms to which only he had access. Pl's PI Br. at 1-2. Only after being pressed on the issue by Ash's mother did a Tremper assistant principal—several weeks later—announce that Ash could not use the boys' restrooms because the gender marker in his official school records had not been changed from "female" to "male." Pl's PI Br. at 6. That administrator told Ms. Whitaker that KUSD could change Ash's records—thus allowing him to use boys' restrooms—if the school received some kind of medical documentation confirming Ash's gender transition. Pl's PI Br. at 6. Ms. Whitaker promptly provided such documentation from Ash's physician, but KUSD nevertheless refused to change the records or permit Ash access to boys' restrooms. Pl's PI Br. at 6. Instead, KUSD administrators refused to give any reason at all. M. Whitaker Decl. [Dkt. No. 10-4] ¶¶ 16-17, 24.

Now, months later and only after Ash filed this lawsuit, KUSD claims its policy is even more restrictive, "requiring the use of sex-segregated bathroom and locker room facilities based on a students' [sic] birth sex, rather than their gender identity." Defs' Opp. Br. at 3. KUSD treats "birth gender" as synonymous with "biological sex," defining those terms to mean "the gender designation recorded on an infant's birth certificate." Defs' Opp. Br. at 1.[5] This new formulation is at odds with KUSD's earlier directive that Ms. Whitaker provide documentation of Ash's gender transition to allow him to use boys' restrooms. Now, Ash could *never* satisfy KUSD's purported prerequisites for being treated like any other boy.

[5] Plaintiff disputes KUSD's assertion that "biological sex" and assigned sex at birth mean the same thing. Plaintiff has submitted evidence that biological sex refers to the sum of physical, hormonal, chromosomal, psychological, and other factors, including gender identity, which do not always match an infant's external genitalia—typically a doctor's only reference point for designating an infant male or female. *See* Gorton Decl. [Dkt. No. 10-3] ¶¶ 12-21; Budge Decl. [Dkt. No. 10-2] ¶¶ 17-18. Tellingly, KUSD has submitted no evidence—or even argument—to support its conclusory assertion that "biological sex" means assigned sex at birth.

Whatever KUSD's actual policy toward transgender students is (a question that may only be answered definitively after discovery in this case), one thing is clear: it is *not* a longstanding policy that would be disrupted if a preliminary injunction is granted here. Rather, KUSD recently created its discriminatory policy for the specific purpose of excluding Ash Whitaker from boys' restrooms. In its briefing, KUSD now describes an even harsher policy—albeit one that has not been formally adopted by KUSD's school board—that would wholly deny Ash the ability to use boys' restrooms, or even be called by his chosen name and masculine pronouns, at school. That is the very definition of unlawful gender-based discrimination that violates Ash's civil rights.

B. The requested injunction here is necessary to prevent irreparable harm to Ash.

KUSD narrowly defines the purpose of a preliminary injunction as preserving the status quo. Defs' Opp. Br. at 5. Not so. Rather, the core purpose of a preliminary injunction is to prevent irreparable injury to the moving party until a decision on the merits can be reached. *See Praefke Auto Elec. & Battery Co. v. Tecumseh Prods. Co.*, 123 F. Supp. 2d 470, 473 (E.D. Wis. 2000). "It often happens that this purpose is furthered by preservation of the status quo, but not always." *Id.* (quoting *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974)). "If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury." *Id.* (quoting same). "The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Id.* (quoting same).

Through this motion, Ash is asking this Court for targeted relief that would restore him and KUSD to their "last uncontested status" before their dispute began in February 2016: Ash's

use of boys' restrooms without issue and without any interference from KUSD. To the extent some of the requested relief is "mandatory," it is only with respect to Ash's request to be referred to uniformly by his chosen name and male pronouns. Many of Ash's teachers already do this. Regardless of the label, that additional relief is appropriate here given the irreparable harm Ash will suffer by being misgendered by his school. As described below, KUSD has not shown what interest is served by staff disrespecting Ash's gender identity and stigmatizing him in this way.

In response to this motion, KUSD has offered no evidence to rebut Ash's showing of irreparable harm. In its brief, KUSD simply ignores the expert declarations submitted in support of Ash's motion. KUSD does not offer any evidence to dispute the conclusion of Dr. Nicholas Gorton, M.D., that gender identity is an immutable part of one's sex and that permitting transgender young people to live in accordance with their gender identity promotes their health and well-being. Gorton Decl. ¶ 29. Nor does it dispute the conclusion of Dr. Stephanie Budge, a University of Wisconsin professor and clinical psychologist specializing in transgender youth, that Ash is a transgender boy whose gender dysphoria and related conditions, including anxiety and depression, have worsened as a direct and proximate result of KUSD's actions, "causing significant psychological distress and plac[ing] [Ash] at risk for experiencing life-long diminished well-being and life-functioning." Budge Decl. ¶¶ 40-56. Nor does KUSD quarrel with the parallel conclusions of Dr. Jenifer McGuire, a University of Minnesota professor and youth development expert, who confirmed that the harms Ash is suffering are consistent with research regarding transgender students whose schools refuse to respect their gender identity. McGuire Decl. [Dkt. No. 10-5] ¶¶ 10-37.

In the absence of *any* contrary evidence, KUSD instead attempts to defeat this motion by arguing that Ash's so-called "delay" in seeking a preliminary injunction undermines his showing

of irreparable harm. Defs' Opp. Br. at 20-21. This argument has no merit. Plaintiff filed this lawsuit just weeks after KUSD's most recent act of discrimination against Ash: its refusal to permit him to stay in a suite with boys during an off-campus, school-sponsored orchestra camp in mid-June. He had already taken swift action to enforce his rights by filing a complaint with the U.S. Department of Education Office for Civil Rights on May 12, 2016, just two weeks after KUSD's attorney advised Ash's attorney that KUSD would not grant Ash's formal request for boys' restroom access.[6] Ash's original complaint in this litigation specifically requested, *inter alia*, a preliminary injunction. Compl. [Dkt. No. 1] at 35. Twenty days later, Plaintiff filed his amended complaint, containing the same prayer for relief, and the present motion.

It is hard to understand how KUSD thinks this compressed timeline amounts to a delay, let alone an "excessive" one. A party's delay in seeking a preliminary injunction may be relevant to a court's consideration of the party's claim of irreparable harm. *See Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 903 (7th Cir. 2001). But a delay is only material "if the defendant has been lulled into a false sense of security or had acted in reliance on the plaintiff's delay." *Id.* (internal quotation omitted). Where, as here, only a few months passed between the injurious conduct and the preliminary injunction motion—and where school was not in session for nearly three months of that time, so Ash's use of boys' restrooms was not an issue—the delay is not unreasonable. *See Praefke*, 123 F. Supp. 2d at 478 ("[Plaintiff's] delay here—four months before filing suit and demanding a temporary injunction, and another two-and-a-half months before formally moving for a preliminary injunction—is not excessive, nor is it inconsistent with irreparable harm.").

[6] Given the emotional toll KUSD's discrimination took on Ash in the final months of the school year, and his desire to focus on final exams, Ash and his mother, Melissa Whitaker, waited until the beginning of summer break to make a final decision on whether to pursue their claims through that existing administrative complaint or to litigate their claims in federal court.

C. KUSD's speculative assertions of harm to KUSD and the public are unfounded.

KUSD offers no evidentiary support—not a single declaration from a KUSD official or anyone else—to support its speculation that KUSD or the broader public somehow will suffer harm if this Court permits Ash to use boys' restrooms (as he already has done, without issue) or requires KUSD to refer to him by his chosen name and male pronouns (as many teachers and students already do, without issue). On the other hand, Ash has provided declarations showing that many school districts—including in Wisconsin—treat their transgender students in accordance with their gender identity, and that treating Ash as a boy pending a merits determination in this case will impose no harm on KUSD or its other students.

1. Referring to Ash by his chosen name and male pronouns will not harm KUSD.

KUSD does not even attempt to explain how it would be harmed by requiring staff to refer to Ash by his name and male pronouns. Whereas misgendering Ash at school causes him serious harm—by violating his privacy, stigmatizing him for being transgender, and undermining a critical component of his gender transition, Budge Decl. ¶¶ 53-56; McGuire Decl. ¶¶ 13-18; Gorton Decl. ¶ 24—it is not obvious, and KUSD makes no attempt to explain, what injury would be caused by personnel using his name and male pronouns this year. This is not complicated. Other Wisconsin school districts have adopted policies and procedures under which transgender students may request to be called by a name other than their legal name and by pronouns matching their gender identity.[7] Other districts around the country adopt this same common-sense approach. Pl's PI Br. at 29-30. KUSD could readily do the same.

[7] *See* Sch. Dist. of Shorewood, 411 (2) Guideline (reviewed Feb. 25, 2014) ("Shorewood Policy") (attached as Ex. C) (same); Monona Grove Sch. Dist., Admin. Rule 411 (2) (Aug. 26, 2015) ("Monona Grove Policy") (attached as Ex. D) (same); Middleton-Cross Plains Area Sch. Dist., Admin. Pol. & Proc. Manual 411.2, at 2 (attached as Ex. E) ("Middleton Policy") (same); Menasha Joint Sch. Dist., Bd. Pol. 2260 ("Menasha Policy") (attached as Ex. F) (same).

2. Ash's use of boys' restrooms will harm neither KUSD or any other student.

KUSD asserts, also without any support, that giving Ash access to the same boys' restrooms he used without incident in the past would harm KUSD or other students. KUSD relies on the same speculative harms that other courts have already rejected, correctly, in similar cases.

For example, KUSD claims other students' privacy rights would be violated if Ash is allowed to use the boys' restroom. It does not explain how Ash's use of boys' restrooms, which have private stalls and locking doors, would affect anyone else's privacy. As the court in *Carcaño* found just last week, the "uncontested evidence" shows that the transgender plaintiffs used "bathrooms and other facilities consistent with their gender identity for an extended period of time without causing any known infringement on the privacy rights of others." *Carcaño*, 2016 WL 4508192, at *27. "In fact, rather than protect privacy, it appears at least equally likely that denying an injunction will create privacy problems, as it would require the individual transgender Plaintiffs, who outwardly appear as the sex with which they identify, to enter facilities designated for the opposite sex . . . , thus prompting unnecessary alarm and suspicion." *Id.* The potential for similar problems exists here if Ash were required to use girls' restrooms.

Many school districts permit transgender students to use restrooms consistent with their gender identities, without incident or any effect on other students' privacy. Chiasson Decl. [Dkt. No. 10-9] ¶¶ 8-12; Kenney Decl.[Dkt. No. 10-7] ¶¶ 5-6; Davis Decl. [Dkt. No. 10-8] ¶¶ 6-7. Other Wisconsin districts already recognize that it is harmful and inappropriate to require a transgender student to use gender-neutral restrooms or the restrooms designated for their assigned sex, and have adopted policies that consider the rights of all students, including transgender students. For example, Monona Grove's policy provides that:

> In most cases, students shall have access to the restroom or locker room that correspond to the gender identity that the student consistently asserts at school and in other social environments. . . . In any gender-segregated facility, any student who is uncomfortable using a shared facility, regardless of the reason, shall, upon the student's request, be provided with a safe and non-stigmatizing alternative. . . . However, requiring a transgender or gender nonconforming student to use a separate, nonintegrated space threatens to publicly identify and marginalize the student as transgender and should not be done unless requested by a student. Under no circumstances may students be required to use sex segregated facilities that are inconsistent with their gender identity.

Monona Grove Policy at 2-3. Other Wisconsin districts have adopted comparable policies.[8]

KUSD's purported interest in its "birth sex" requirement for restroom access is undermined by its inability to enforce that requirement in any consistent or meaningful way. To enroll at KUSD, a student may, but is not required to, produce a birth certificate as one way to establish of his or her age. *See* KUSD, Registration, http://www.kusd.edu/registration (attached as Ex. G). New students may also present a passport for this purpose.[9] *Id.* Indeed, a student's gender is self-reported on KUSD's Student Enrollment Form (attached as Ex. H). Thus, in reality, KUSD does not require, and could not require, all students to demonstrate their "birth sex"; rather, it relies in most cases on parents' representations of their child's sex at the time of enrollment. Even if KUSD's policy were based on proof of appropriately "conforming" external genitalia, it is impossible to imagine that such a policy could be workable or enforceable in a nondiscriminatory manner that respects all students' rights to bodily privacy.

And even if KUSD required all students to submit birth certificates, it would not necessarily learn from that document the gender designation assigned to the student at birth, as

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[8] *See, e.g.*, Shorewood Pol. at 4; Middleton Pol. at 5; Menasha Pol. at 2. Without endorsing any particular policy as a model, Plaintiff offers these examples to show that providing appropriate restroom access to transgender students is not novel or impossible.

[9] Moreover, to comply with *Plyler v. Doe*, 457 U.S. 202 (1982), "[a] school district may not bar a student from enrolling in its schools because he or she lacks a birth certificate" and may "accept a variety of documents" to confirm a student's age. U.S. Dep't of Justice & U.S. Dep't of Educ., Dear Colleague Letter: School Enrollment Procedures, at 2 (May 8, 2014) (attached as Ex. I.)

some transgender people may be able to obtain amended birth certificates or passports reflecting their gender identity. KUSD does not explain how it would, or could, identify the "birth gender" of a transgender student presenting an amended birth certificate or passport reflecting their correct sex for purposes of regulating that student's restroom access.

3. KUSD's other asserted harms are not credible or, in any event, irreparable.

None of the other harms KUSD asserts—that a preliminary injunction "will have the effect of forcing policy changes, imposing financial consequences, and stripping KUSD of its basic authority to enact polices [sic] that the [sic] accommodate the need for privacy of all students"—are supported by evidence or logic. KUSD further complains of having "no time to make changes to KUSD facilities or to develop new policies to safeguard the privacy rights of all of its students." Defs' Opp. Br. at 26. It is unclear (and unexplained) why any modifications to Tremper's existing boys' restrooms would be needed for Ash to resume his use of them. The existing partitions and stall doors should suffice to protect all students' privacy in those restrooms—including Ash's.

In sum, KUSD has offered no evidence to show it will suffer any harm at all. The experience of other school districts shows that the relief sought here can be implemented easily and without any harm to others. The balancing of harms weighs heavily in Ash's favor.

CONCLUSION

For the reasons stated herein, Plaintiff Ash Whitaker respectfully requests that the Court grant his motion enjoining KUSD from enforcing any policy denying him access to boys' restrooms or requiring him to wear a visible marker of his transgender status such as a green wristband, and directing KUSD personnel to refer to him by his name, Ash Whitaker, and male pronouns, during the pendency of this lawsuit.

Dated: August 31, 2016

Respectfully submitted,

/s Joseph J. Wardenski

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** Application for admission to this Court to follow*

EXHIBIT A

***Carcaño v. McCrory*, 1:16-CV-236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016)**

2016 WL 4508192
United States District Court,
M.D. North Carolina.

JOAQUÍN CARCAÑO, et al., Plaintiffs,
v.
PATRICK MCCRORY, in his official capacity as Governor of North Carolina, et al., Defendants,
and
PHIL BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and TIM MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, Intervenor-Defendants.

1:16cv236
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August 26, 2016

MEMORANDUM OPINION, ORDER AND PRELIMINARY INJUNCTION

Thomas D. Schroeder United States District Judge

***1** THOMAS D. SCHROEDER, District Judge.

This case is one of three related actions in this court concerning North Carolina's Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, commonly known as House Bill 2 ("HB2"). Although Plaintiffs challenge multiple portions of HB2, they presently seek preliminary relief only as to Part I, the so-called "bathroom bill" portion of the law, which requires public agencies to ensure that multiple occupancy bathrooms, showers, and other similar facilities are "designated for and only used by" persons based on their "biological sex," defined as the sex listed on their birth certificate. 2016 N.C. Sess. Laws 3 §§ 1.2–1.3. Plaintiffs include two transgender [1] students and one employee (collectively, the "individual transgender Plaintiffs") of the University of North Carolina ("UNC"), as well as the American Civil Liberties Union of North Carolina ("ACLU-NC"), which sues on behalf of its transgender members. (Doc. 9 ¶¶ 5–7, 10.) The individual transgender Plaintiffs (in their individual capacities) claim that Part I violates Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. ("Title IX"). (Doc. 9 ¶¶ 235–43.) In addition, the individual transgender Plaintiffs and ACLU-NC claim that Part I violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. [2] (Id. ¶¶ 186–200, 220–34.)

1 Transgender individuals are persons who do not identify with their birth sex, which is typically determined on the basis of external genitalia. (Doc. 22-1 ¶¶ 12, 14; see also Doc. 9 ¶ 26.) According to the latest edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, some transgender individuals suffer from a condition called gender dysphoria, which occurs when the "marked incongruence between one's experienced/expressed gender and assigned gender" is associated with "clinically significant distress or impairment in social, occupational, or other important areas of functioning." (Doc. 22-5 ¶¶ 12–13.) In other words, gender dysphoria occurs when transgender individuals experience emotional, psychological, or social distress because "their deeply felt, core identification and self-image as a particular gender does not align" with their birth sex. (See Doc. 22-1 ¶ 19.) For purposes of the present motion, the court accepts Plaintiffs' unrebutted evidence that some transgender individuals form their gender identity misalignment at a young age and exhibit distinct "brain structure, connectivity, and function" that does not match their birth sex. (Id. ¶¶ 18, 22.)

[2] After the preliminary injunction hearing, ACLU-NC moved to file a second amended complaint to allege a Title IX representational claim. (Doc. 116.) Briefing on that motion is incomplete, so the court only considers Title IX relief for the individual transgender Plaintiffs at this time.

It is important to note what is (and is not) in dispute. All parties agree that sex-segregated bathrooms, showers, and changing facilities promote important State privacy interests, and neither Plaintiffs nor the United States contests the convention. Further, no party has indicated that the pre-HB2 legal regime posed a significant privacy or safety threat to anyone in North Carolina, transgender or otherwise. The parties do have different conceptions, of how North Carolina law generally operated before March 2016, however, and whether "sex" includes gender identity.

***2** Plaintiffs contend that time is of the essence, as HB2's impact will be most felt as educational institutions across the State begin a new academic year. As a result, the court has endeavored to resolve Plaintiffs' motion for preliminary relief as quickly as possible.

Ultimately, the record reflects what counsel for Governor McCrory candidly speculates was the status quo ante in North Carolina in recent years: some transgender individuals have been quietly using bathrooms and other facilities that match their gender identity, without public awareness or incident. (See Doc. 103 at 70 (speculating that, even if Part I remains in force, "some transgender individuals will continue to use the bathroom that they always used and nobody will know.").) This appears to have occurred in part because of two factors. First, the record suggests that, for obvious reasons, transgender individuals generally seek to avoid having their nude or partially nude bodies exposed in bathrooms, showers, and other similar facilities. (See Doc. 103 at 140.) Second, North Carolina's decades-old laws against indecent exposure, peeping, and trespass protected the legitimate and significant State interests of privacy and safety.

After careful consideration of the limited record presented thus far,[3] the court concludes that the individual transgender Plaintiffs have made a clear showing that (1) they are likely to succeed on their claim that Part I violates Title IX, as interpreted by the United States Department of Education ("DOE") under the standard articulated by the Fourth Circuit; (2) they will suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities weighs in favor of an injunction; and (4) an injunction is in the public interest. Accordingly, the court will enjoin UNC from enforcing Part I against the individual transgender Plaintiffs until the court reaches a final decision on the merits in this case. Plaintiffs have not made a clear showing they are likely to succeed on their Equal Protection claim, and the court will reserve ruling on their Due Process claims pending additional briefing from the parties.

[3] In response to Plaintiffs' motion for preliminary injunction, Governor McCrory, Senator Burger, and Representative Moore requested a several-month delay. (Doc. 53 at 9–11; Doc. 61 at 27–29.) These Defendants claimed the need for extensive factual discovery to adequately address the issues presented in Plaintiffs' motion. (Id.) They collectively submitted only six exhibits, however, each of which consists of a short news article or editorial. (See Docs. 55-1 through 55-6.) Moreover, during a scheduling conference held on July 1, 2016, they indicated that they did not intend to offer additional exhibits or live testimony and that any preliminary injunction hearing could be limited to oral argument. As a result, nearly the entire factual record in this case is derived from materials submitted by Plaintiffs.

It is important to emphasize that this injunction returns the parties to the status quo ante as it existed in Title IX facilities prior to Part I's passage in March 2016. On the current record, there is no reason to believe that a return to the status quo ante pending a trial on the merits will compromise the important State interests asserted.

I. BACKGROUND

***3** Based on the record thus far, the court makes the following findings for the limited purpose of evaluating Plaintiffs' motion for preliminary injunction.

A. North Carolina Law Before 2016

Like most States, North Carolina has long enforced a variety of public decency laws designed to protect citizens from exposing their nude or partially nude bodies in the presence of members of the opposite sex, as well as from being exposed to the nude or partially nude bodies of members of the opposite sex. With regard to the former, North Carolina's peeping statute, enacted in 1957, makes it unlawful for any person to "peep secretly into any room occupied by another person," N.C. Gen. Stat. § 14-202(a), including a bathroom or shower, and penalties are enhanced if the offender does so for the purpose of sexual gratification, id. § 14-202(d). With regard to the latter, North Carolina's indecent exposure statute, enacted in 1971, makes it unlawful for any person to "willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons." Id. § 14-190.9(a). Traditionally, the indecent exposure statute applied only to individuals who exposed themselves to members of the opposite sex. See State v. Fusco, 136 N.C. App. 268, 270, 523 S.E.2d 741, 742 (1999) (interpreting an earlier version of § 14-190.9(a)). In 2005, North Carolina removed the language that had previously limited the statute's application to situations in which individuals exposed themselves in the presence of members of the opposite sex. 2005 N.C. Sess. Laws 226 § 1 (modifying N.C. Gen. Stat. § 14-190.9). That same amendment, however, created an exception for situations in which "same sex exposure" occurs in a "place[ ] designated for a public purpose" and is "incidental to a permitted activity." Id.

In addition to these statutes, public agencies in North Carolina have also traditionally protected privacy through the use of sex-segregated bathrooms, locker rooms, showers, and similar facilities. Although this form of sex discrimination has a long history in the State and elsewhere, the parties offer differing ideas of the justification for the practice. Plaintiffs acknowledge, as Defendants contend, that such segregation promotes privacy and serves important government interests, particularly with regard to minors. (See, e.g., Doc. 103 at 15–21.) Arguably, segregating such facilities on the basis of sex fills gaps not addressed by the peeping and indecent exposure statutes – for example, a situation in which a man might inadvertently expose himself to another while using a facility that is not partitioned. It is also possible that sex-segregated facilities protect against embarrassment from engaging in intimate bodily functions in the immediate vicinity of the opposite sex, regardless of whether one's body is subject to view.

Whatever the justification, the segregation of these facilities has traditionally been enforced through voluntary compliance, social mores, and, when necessary, criminal trespassing law. See In re S.M.S., 196 N.C. App. 170, 675 S.E.2d 44 (2009). For example, in S.M.S., a fifteen year old boy was adjudicated delinquent of second degree trespass after he was caught in the girls' locker room at his high school. Id. at 170–71, 675 S.E.2d at 44–45. Pursuant to N.C. Gen. Stat. § 14-159.13, it is a second degree trespass to enter the premises of another when reasonably conspicuous signs are posted to give the intruder "notice not to enter the premises." In upholding the boy's conviction, the North Carolina Court of Appeals concluded, "The sign marked 'Girl's Locker Room' was reasonably likely to give respondent notice that he was not authorized to go into the girls' locker room." S.M.S., 196 N.C. App. at 173, 675 S.E.2d at 46.

***4** For most, the application of the peeping, indecent exposure, and trespass laws to sex-segregated bathrooms and showers is straightforward and uncontroversial. For transgender users, however, it is not clearly so. While there are no reported cases involving transgender users, at the preliminary injunction hearing Governor McCrory, Senator Berger, and Representative Moore indicated their assumption that this was so because transgender users have traditionally been excluded (or excluded themselves) from facilities that correspond with their gender identity. The evidence in the current record, however, suggests the opposite. At least in more recent years, transgender individuals who dress and otherwise present themselves in accordance with their gender identity have generally been accommodated on a case-by-case basis, with educational institutions generally permitting them to use bathrooms and other facilities that correspond with their gender identity unless particular circumstances weigh in favor of some other form of accommodation.

For example, Plaintiffs submitted an affidavit from Monica Walker, the Diversity Officer for public schools in Guilford County, North Carolina, the State's third largest school district, with over 72,000 students in 127 school campuses. (Doc. 22-19 ¶¶ 2–3.) Over the last five years, Ms. Walker has developed a protocol for accommodating transgender students as they undergo the social transition from male to female, or vice versa. (Id. ¶¶ 8–11.) This protocol emphasizes the importance of developing a "tailored" plan that addresses the unique needs and circumstances of each case. (See id.

¶ 11.) Based on her experience with four transgender students, Ms. Walker indicates that these students typically use bathrooms that correspond with their gender identity. (Id.) Ms. Walker has not received any complaints about this arrangement from students or parents, and although every school in Guilford County has single occupancy bathrooms available for any student with privacy concerns, no student has ever requested such an accommodation. (Id. ¶¶ 13–16.) This may be because all multiple occupancy bathrooms in Guilford County schools have separate stalls or privacy partitions, such that students are not exposed to nudity in bathrooms. (See id.) Although Ms. Walker has yet to deal with questions concerning access to locker rooms, she is confident that the privacy interests of transgender and non-transgender students alike could be accommodated through the same means used to accommodate any student with body image or shyness issues. (See id.) In sum, Ms. Walker reports that the practice of tailoring specific accommodations for transgender students on a case-by-case basis in Guilford County has been "seamless." (Id. ¶ 12.) And according to an amicus brief filed by school administrators from nineteen States plus the District of Columbia – including Durham County Schools in North Carolina, another large school district – Guilford County's experience is typical of many school districts from across the country. (See Doc. 71.)

This conclusion is also consistent with the experiences of the individual transgender Plaintiffs in this action. All three submitted declarations stating that they used bathrooms, locker rooms, and even dormitory facilities corresponding with their gender identity beginning as early as 2014. (Doc. 22-4 ¶ 15; Doc. 22-8 ¶ 19; Doc. 22-9 ¶¶ 15, 19–20.) No one has reported any incident or complaint from their classmates or the general public. (See Doc. 22-4 ¶ 30; Doc. 22-8 ¶ 25; Doc. 22-9 ¶ 20.)

This evidence is admittedly anecdotal. It is possible that before Part I, some transgender individuals in North Carolina were denied accommodations and completely excluded from facilities that correspond with their gender identity due to privacy or safety concerns. Also, minors may have received different types of accommodations than adults, and practical considerations may have led to different arrangements for bathrooms as opposed to showers and other facilities. And, it may be that the practice of case-by-case accommodation is a more recent phenomenon, such that other norms prevailed for most of North Carolina's history until the last few years. But Defendants have not offered any evidence whatsoever on these points, despite having four months between the filing of this lawsuit and the hearing on this motion to do so. Indeed, the court does not even have a legislative record supporting the law to consider. [4]

[4] Defendants have since filed transcripts of the legislative record in a separate case. (Docs. 149-5 through 149-8 in case no. 1:16cv425.)

***5** As a result, the court cannot say that the practices described by Ms. Walker, the school administrators, and the individual transgender Plaintiffs represent an aberration rather than the prevailing norm in North Carolina, at least for the five or more year period leading up to 2016. Rather, on the current record, it appears that some transgender individuals have been quietly using facilities corresponding with their gender identity and that, in recent years, State educational institutions have been accommodating such students where possible.

B. The Charlotte Ordinance and the State's Response

In November 2014, the Charlotte City Council began considering a proposal to modify that city's non-discrimination ordinances to prohibit discrimination on the basis of marital status, familial status, sexual orientation, gender identity, and gender expression. [5] (Doc. 23-3 at 2.) [6] On March 2, 2015, the proposed ordinance was amended to include the following language: "Notwithstanding the forgoing [sic], this section shall not, with regard to sex, sexual orientation, gender identity, and gender expression, apply to rest rooms, locker rooms, showers, and changing facilities." (Id.) Shortly thereafter, the proposed ordinance failed by a vote of six to five. (Id.)

[5] Charlotte's existing non-discrimination ordinances prohibited discrimination on the basis of race, gender, religion, national origin, ethnicity, age, disability, and sex. (See Doc. 23-2 at 1, 6.)

6 Not all of the exhibits in the record contain internal page numbers, and many include cover pages that were not part of the original documents. For clarity, all record citations in this opinion refer to the pagination in the CM/ECF version of the document.

On February 22, 2016, the Charlotte City Council considered a new proposal to revise its non-discrimination ordinances. (Doc. 23-5 at 2–3.) Like the prior proposal, the new proposal added "marital status, familial status, sexual orientation, gender identity, [and] gender expression" to the list of protected characteristics. (Doc. 23-2 at 1.) Unlike the prior proposal, however, the new proposal did not contain any exceptions for bathrooms, showers, or other similar facilities. (See id. at 1–6.) In addition, the new proposal repealed prior rules that exempted "[r]estrooms, shower rooms, bathhouses and similar facilities which are in their nature distinctly private" from Charlotte's prohibitions against sex discrimination. (Id. at 5.) The new proposal, which regulated places of public accommodation and businesses seeking to contract with Charlotte (id. at 2–6), passed by a vote of seven to four (Doc. 23-5 at 3)[7] and set an effective date of April 1, 2016 (Doc. 23-2 at 6).

7 All seven votes in favor of the ordinance were cast by Democrats, while two Democrats and two Republicans voted against the ordinance. (See Doc. 23-5 at 4–8.)

The Charlotte ordinance provoked a swift response from the State. Governor McCrory and several members of the General Assembly strongly condemned the ordinance, which they generally characterized as an affront to both privacy and public safety, and they indicated their desire to see a legislative response to Charlotte's actions. (See, e.g., Doc. 23-7 at 2; Doc. 23-8 at 2.) The General Assembly was not scheduled to reconvene until April 25, 2016, however, and despite his opposition to the Charlotte ordinance, Governor McCrory declined to exercise his authority to call a special legislative session. (See Doc. 23-16 at 2–3; Doc. 23-18 at 4.) As a result, the General Assembly only reconvened after three-fifths of the members of the House of Representatives requested a special session. (Docs. 23-17 at 2.)[8]

8 The Governor may call special sessions of the General Assembly in response to unexpected or emergency situations. (See Doc. 23-18 at 4.)

***6** On March 23, 2016, the General Assembly convened for the special session and moved quickly. (See Doc. 23-19 at 2.) The parties have offered little information on the legislative process, but it appears that members of the House Judiciary Committee were given only a few minutes to read HB2 before voting on whether to send the bill back to the House for a full debate. (See id.) That afternoon, the House passed HB2 by a vote of eighty-four to twenty-five after three hours of debate. (Doc. 23-21 at 3.) All Republicans and eleven of the thirty-six Democrats present voted for the bill, while twenty-five Democrats voted against it. (Id.) HB2 then passed with unanimous support in the Senate after Democrats walked out in protest. (Id.) Governor McCrory signed the bill into law later that day. (Id.) The law became effective immediately. HB2 § 5.

C. HB2's Effect on North Carolina Law

Despite sweeping rhetoric from both supporters and opponents, a few basic contours of HB2 are apparent.

1. Nondiscrimination Standards Under State Law

First, HB2 modified the State's nondiscrimination laws. Previously, the State had prohibited discrimination on the basis of race, religion, color, national origin, age, sex, and handicap. See id. §§ 3.1. Part III of HB2 modified this language to prohibit discrimination on the basis of "biological sex," rather than simply "sex." Id. (modifying N.C. Gen. Stat. § 143-422.2). It also extended these nondiscrimination protections, which had previously applied only to the State, to cover private employers and places of public accommodation. See id. §§ 3.1-3.3.

Part III also eliminated State common-law causes of action for violations of non-discrimination laws. See id. § 3.2 (modifying N.C. Gen. Stat. 143-422.3). This appeared to eliminate the State cause of action for wrongful termination in violation of public policy, although it did not prevent North Carolinians from filing actions under federal non-discrimination laws, whether in State or federal court. This provision has since been repealed. 2016 N.C. Sess. Laws 99 § 1(a).

2. Preemption of Local Ordinances

Parts II and III of HB2 preempt all local ordinances that conflict with the new Statewide nondiscrimination standards, including the Charlotte ordinance that prompted HB2's passage. [9] Specifically, Part II preempts local non-discrimination requirements for public contractors to the extent that such requirements conflict with State law. HB2 §§ 2.1–2.3. Similarly, Part III preempts local nondiscrimination ordinances for places of public accommodation to the extent that such ordinances conflict with State law. Id. §§ 3.3. Collectively, Parts II and III effectively nullified the prohibitions in Charlotte's ordinance against discrimination on the basis of marital status, familial status, sexual orientation, gender identity, and gender expression. [10]

9 Part II also preempted local minimum wage standards. HB2 §§ 2.1–2.3. This portion of HB2 has not been challenged in these cases.

10 These are apart from the law's effect, if any, on the Charlotte ordinance's protections against discrimination on the basis of "gender," "ethnicity," and "handicap."

3. Public Bathrooms and Changing Facilities

As discussed above, Parts II and III effectively nullified the controversial portions of the Charlotte ordinance, including its regulation of bathrooms, showers, and other similar facilities among contractors and in places of public accommodation. Part I goes a step further, however, explicitly setting rules for the use of similar facilities operated by State agencies.

Part I provides that all public agencies, including local boards of public education, shall "require" that every "multiple occupancy bathroom or changing facility" [11] be "designated for and only used by persons based on their biological sex." [12] Id. §§ 1.2–1.3. Part I defines "biological sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." [13] Id. Although Part I allows public agencies to provide separate, single occupancy facilities as an accommodation for individuals who are uncomfortable with their assigned facility, the law does not require the option. See id. (stating that public agencies may provide "accommodations such as single occupancy bathroom or changing facilities upon a person's request due to special circumstances" (emphasis added)). In addition, Part I prohibits agencies from accommodating individuals by permitting them to access multiple occupancy facilities that do not match the sex listed on their birth certificates. Id. ("[I]n no event shall [any] accommodation result in the public agency allowing a person to use a multiple occupancy bathroom or changing facility designated ... for a sex other than the person's biological sex."). Because the law is limited to State agencies, there is no dispute that private businesses, places of public accommodation, and other persons throughout the State remain free to define "sex" and regulate bathroom and other facility usage as they please, subject to other applicable law.

11 The statute defines a "multiple occupancy bathroom or changing facility" as a "facility designed or designated to be used by more than one person at a time where [persons] may be in various states of undress in the presence of other persons. A

multiple occupancy bathroom or changing facility may include, but is not limited to, a [restroom], locker room, changing room, or shower room." Id. §§ 1.2-1.3.

12 This rule is subject to various exceptions that are not pertinent here. For example, Part I does not apply when individuals enter bathrooms for custodial or maintenance purposes, or to assist other individuals in using the facility. See id. §§ 1.2–1.3.

13 Notwithstanding the reference to "the physical condition of being male or female," all parties agree that the law defines "biological sex" as the sex listed on the individuals' current birth certificate. (See Doc. 22 at 6 (Plaintiffs, stating that Part I restricts access to facilities "based on the gender marker on one's birth certificate"); Doc. 50 at 15 (UNC, stating that Part I requires individuals to use bathrooms corresponding with their "biological sex, as listed on their birth certificates"); Doc. 55 at 1 (Governor McCrory, stating that Part I "notes that ['biological sex'] is 'stated on a person's birth certificate' "); Doc. 61 at 6 (Senator Berger and Representative Moore: "HB2 determines biological sex based on the person's current birth certificate.").) Notably, the law's reliance on birth certificates necessarily contemplates that transgender individuals may use facilities consistent with their gender identity - notwithstanding their birth sex and regardless of whether they have had gender reassignment surgery - as long as their current birth certificate has been changed to reflect their gender identity, a practice permitted in some States.

***7** At the hearing for this motion, the parties offered differing interpretations of how Part I affects North Carolina law. As discussed below, UNC argues that, at least on its campuses, Part I means only that public authorities must maintain signs on their multiple occupancy bathrooms designated "men" or "women." Senator Berger and Representative Moore suggested that Part I functions as "a directive" to public agencies that they must "implement policies" on bathroom use. (Doc. 103 at 112.) Ultimately, the United States, Senator Berger, and Representative Moore all agree that, at a minimum, Part I dictates how the trespassing statute applies to transgender individuals' use of bathrooms.

Before Part I became law, North Carolina had no prohibition against public agencies determining on a case-by-case basis how best to accommodate transgender individuals who wished to use particular bathrooms, showers, or other similar facilities. In addition, transgender individuals who used facilities that did not match the sex listed on their birth certificate could presumably argue that they believed they had permission to enter facilities that matched their gender identity; indeed, as discussed above, a number of transgender students had actual permission from the agencies with authority over the facilities in question.

Part I forecloses these possibilities. Now, public agencies may not provide any accommodation to transgender individuals other than the provision of a separate, single-user facility – though they are not required to do so. Thus, unless the agency that controls the facility in question openly defies the law, any person who uses a covered facility that does not align with his or her birth certificate commits a misdemeanor trespass. Similarly, unless school administrators like Ms. Walker wish to openly defy the law, they cannot give students permission to enter facilities that do not correspond with the sex on their birth certificates and presumably must discipline or punish students who disobey this directive.

D. Procedural History

Almost immediately, HB2 sparked multiple overlapping federal lawsuits. On March 28, 2016, ACLU-NC, Equality North Carolina, and the individual transgender Plaintiffs filed this action against Governor McCrory (in his official capacity), UNC,[14] and Attorney General Roy Cooper, alleging that various parts of HB2 discriminate against transgender, gay, lesbian, and bisexual individuals on the basis of sex, sexual orientation, and transgender status in violation of Title IX and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. (Doc. 1.)[15]

14 Plaintiffs named UNC, the UNC Board of Governors, and W. Louis Bissette, Jr., in his official capacity as Chairman of the UNC Board of Governors, as Defendants. For convenience and clarity, the court refers to these and other related entities collectively as "UNC," except where otherwise indicated.

15 Plaintiffs dropped Equality North Carolina and Attorney General Cooper in their first amended complaint on April 21, 2016. (Doc. 9.)

On May 9, 2016, the United States filed a separate action against the State, Governor McCrory (in his official capacity), the North Carolina Department of Public Safety ("NCDPS"), and UNC, seeking a declaration that compliance with Part I constitutes sex discrimination in violation of Title IX, the Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13925(b)(13) ("VAWA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). (Doc. 1 in case no. 1:16cv425 (the "425 case").)

That same day, State officials filed two separate declaratory judgment actions in the United States District Court for the Eastern District of North Carolina. Governor McCrory and Frank Perry, Secretary of NCDPS, filed an action in their official capacities against the United States and the United States Department of Justice ("DOJ"), seeking a declaration that HB2 does not violate Title VII or VAWA (case no. 5:16cv238 (the "238 case")). Meanwhile, Senator Berger and Representative Moore filed a separate lawsuit against DOJ on behalf of the General Assembly, seeking a declaration that HB2 does not violate Title VII, Title IX, or VAWA, as well as declarations that DOJ had violated both the Administrative Procedure Act and various constitutional provisions (case no. 5:16cv240 (the "240 case")). Finally, on May 10, 2016, an organization called North Carolinians for Privacy filed its own action in support of HB2 in the Eastern District, seeking declaratory and injunctive relief against DOJ and DOE related to Title IX, VAWA, the Administrative Procedure Act, and the Religious Freedom Restoration Act (case no. 5:16cv245 (the "245 case")).

***8** The 240 and 245 cases were subsequently transferred to this court and renumbered 1:16cv844 and 1:16cv845, respectively. This court also granted Senator Berger and Representative Moore's motion to intervene permissively in both this action (Doc. 44) and the 425 case (Doc. 64 in the 425 case). As a result, Senator Berger and Representative Moore dismissed their separate declaratory action as duplicative of the claims and defenses presented in the 236 and 425 cases, (Doc. 33 in case no. 1:16cv844), leaving three HB2 cases pending before this court. The 238 case remains pending in the Eastern District.

In the midst of all of this procedural fencing, Plaintiffs filed the instant motion for preliminary injunction on May 16, 2016. (Doc. 21.) The motion was fully briefed as of June 27, 2016 (see Doc. 73), and the court began discussions with the parties regarding an appropriate schedule for a hearing on and consideration of this motion. However, on July 5, 2016 – two months after filing its complaint and over three months after the passage of HB2 [16] – the United States filed its own motion for preliminary injunction in the 425 case. (Doc. 73 in the 425 case.) The United States' motion would not be fully briefed until mid-August 2016, and in light of the Defendants' request for preliminary discovery, consolidation of United States' motion with Plaintiffs' motion would likely delay a hearing on the present motion until at least September 2016.

16 The United States also announced that it would not cut off Title IX funding during the pendency of its lawsuit and asked this court for relief from a provision in VAWA that requires it to suspend funding forty-five days after filing suit. (See Doc. 53 in the 425 case.)

As a result, despite the court's strong preference to avoid piecemeal litigation of the HB2 cases, the court held a hearing on Plaintiffs' motion on August 1, 2016, and the court permitted the United States to participate in light of the fact that the 425 case also contains a Title IX claim. [17] The motion is now ready for determination.

17 Defendants sought leave to conduct up to six months of discovery before responding to the United States' motion for preliminary injunction. (See Docs. 53, 61.) In response to these and other concerns, the court exercised its authority under Federal Rule of Civil Procedure 65(a)(2) to advance the trial in the United States' action and consolidate it with the hearing on the United States' motion for preliminary injunction, which is scheduled to begin November 14, 2016. (Doc. 104.)

II. ANALYSIS

Plaintiffs ask this court to enjoin Defendants from enforcing Part I until the court issues a final ruling on the merits. (Doc. 22 at 44–45.) Before reaching the merits of Plaintiffs' motion, however, the court must first address threshold defenses raised by UNC. [18]

18 UNC has also filed a motion to dismiss the claims against it. (Doc. 89.) The motion to dismiss raises similar issues, as well as additional issues not addressed in the briefing on the present motion. (See Doc. 90.) The court will issue a separate ruling on the motion to dismiss at a later date.

A. Justiciability and Ripeness

As UNC Board of Governors Chairman Louis Bissette has noted, "[UNC] is in a difficult position," in this case, "caught in the middle between state and federal law." (Doc. 23-28 at 2.) Neither embracing nor repudiating Part I, UNC argues that while it intends to comply with the law, it does not intend to enforce the law because Part I contains no mechanism to do so. UNC argues that Part I therefore has essentially no effect on its campuses and that this court should not consider the individual transgender Plaintiffs' Title IX claim for jurisdictional and prudential reasons. [19] For the reasons that follow, the court disagrees.

19 UNC also argues that it is immune from the individual transgender Plaintiff's constitutional claims and that Chairman Bissette is not a proper party under Ex Parte Young, 209 U.S. 123 (1908). Because Plaintiffs have since moved to amend their complaint to drop Chairman Bissette and substitute UNC President Margaret Spellings as a Defendant (see Doc. 116-1 ¶¶ 11–12), and because the court will not grant relief on their constitutional claims at this time, see infra Section II.B.1.b, the court does not reach these issues.

***9** "Federal courts are principally deciders of disputes, not oracular authorities. We address particular cases or controversies and may not arbitrate abstract differences of opinion." Doe v. Duling, 782 F.2d 1202, 1205 (4th Cir. 1986) (citations and internal quotation marks omitted). This requirement stems from Article III, Section 2 of the United States Constitution and presents both jurisdictional and prudential limits on the exercise of federal judicial power. Warth v. Seldin, 422 U.S. 490, 498–99 (1975). As a jurisdictional matter, a plaintiff complaining about State conduct must show "some threatened or actual injury resulting from the putatively illegal action." Id. at 499 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973)). For example, where the dispute concerns the validity of a criminal statute, the challenger must show a credible threat of prosecution in order to establish a live case or controversy. Duling, 782 F.2d at 1205–06.

Similarly, the prudential ripeness requirement is designed to prevent courts from "entangling themselves in abstract disagreements over administrative policies" until "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732–33 (1998) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967). A case is ripe and fit for judicial decision when the "rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings." Franks v. Ross, 313 F.3d 184, 195 (4th Cir. 2002). In determining whether a case is ripe, the court must consider both "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." Ohio Forestry Ass'n, 523 U.S. at 733 (quoting Abbott Labs., 387 U.S. at 149).

Here, UNC points to numerous statements from UNC President Margaret Spellings, including a guidance memorandum sent to the chancellors of all UNC constituent institutions, that Part I "does not contain provisions concerning enforcement" and that the university's non-discrimination policies, which generally prohibit discrimination on the basis of gender identity, "remain in effect." (See, e.g., Doc. 38-5 at 1–2.) The guidance memorandum also notes, however, that UNC must "fulfill its obligations under the law unless or until the court directs otherwise." (Id. at 2.) UNC therefore acknowledges that "University institutions must require every multiple occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex." (Id. at 1 (emphasis added).) President Spellings directed constituent institutions to take three specific actions under the law: (1) maintain existing single-sex signage

on multiple occupancy bathrooms and other similar facilities, (2) provide notice of HB2 to campus constituencies as appropriate, and (3) share information about the locations of single occupancy bathrooms on campus. (See id. at 1–2.)

Despite the assertion that UNC does not intend to "enforce" Part I, UNC's pronouncements are sufficient to establish a justiciable case or controversy. The university has repeatedly indicated that it will – indeed, it must – comply with State law. (Id. at 1–2.) Although UNC has not changed the words and symbols on its sex-segregated facilities, the meaning of those words and symbols has changed as a result of Part I, and UNC has no legal authority to tell its students or employees otherwise. In light of Part I, the sex-segregated signs deny permission to those whose birth certificates fail to identify them as a match. UNC can avoid this result only by either (1) openly defying the law, which it has no legal authority to do, or (2) ordering that all bathrooms, showers, and other similar facilities on its campuses be designated as single occupancy, gender-neutral facilities. Understandably, UNC has chosen to do neither.

***10** As a result, although President Spellings promises to "investigate" instances in which individuals are excluded from bathrooms "to determine whether there has been a violation of the University nondiscrimination policy and applicable law" (Doc. 38-1 ¶ 15), this does not help UNC because it has not expressly given any student or employee permission to the use bathrooms, showers, and other facilities consistent with his or her gender identity. To the contrary, UNC has explicitly acknowledged that Part I "remains the law of the State" and that neither UNC nor its nondiscrimination policies has "independent power to change that legal reality." (Doc. 23-27 at 2–3.) Unless and until UNC openly defies the law, the signs that UNC posts on its bathrooms, showers, and other similar facilities render transgender individuals who use facilities that match their gender identities trespassers, thus exposing them to potential punishment (certainly by other authorities, if not by UNC). In addition, if the trespasser is a student, he or she is subject to discipline under one of UNC's student codes of conduct, which generally prohibit students from violating federal, State, or local laws. (See, e.g., Doc. 67-8 at 3.)

Thus, contrary to UNC's characterizations, this is not a case in which an arcane criminal law lingers on the books for decades with no threat of enforcement. See, e.g., Duling, 782 F.2d at 1206 (finding no justiciable case or controversy surrounding a fornication and cohabitation statute when there had been no arrests or prosecutions pursuant to the law for several decades). Nor is this a case in which public agencies do nothing more than "stand ready to perform their general duty to enforce laws." See id. Instead, UNC currently instructs the individual transgender plaintiffs that Part I is in effect on UNC's campuses. (See, e.g., Doc. 67-5 at 3 (memorandum from UNC Chancellor Carol Folt stating, "The memo from UNC General Administration also confirms that the law relating to public restrooms and changing facilities does apply to the University.").) That UNC has not articulated plans for administering a specific punishment for transgender individuals who violate its policy does not undermine the existence of a justiciable case or controversy. See G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 716–17 (4th Cir. 2016) (evaluating the merits of a Title IX claim involving transgender bathroom use without discussing whether the school board had threatened the student with any specific punishment for disobeying the policy), stay and recall of mandate granted, 136 S. Ct. 2442.

These considerations also dictate the ripeness analysis. President Spellings has indicated that she does not intend to take any further action, including promulgating any further guidelines or regulations with regard to Part I, until after this lawsuit concludes. (Doc. 38-1 at ¶ 16.) As a result, a delay will not render this case more fit for judicial review. See Ohio Forestry Ass'n, 523 U.S. at 733. In addition, for reasons discussed below, UNC's exclusion of the individual transgender Plaintiffs from sex-segregated facilities that match their gender identity causes them substantial hardship each day the policy is in effect. See infra Section II.B.2. As a result, this case is prudentially ripe.

B. Preliminary Relief

In order to obtain a preliminary injunction, a party must make a "clear showing" that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 21 (2008). All four requirements must be satisfied in order for relief to be granted. Real Truth About Obama, Inc. v. Fed. Election

Comm'n, 575 F.3d 342, 346 (4th Cir. 2009), vacated on other grounds, 559 U.S. 1089 (2010). A preliminary injunction is "an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in the limited circumstances which clearly demand it." Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991) (citations and internal quotation marks omitted). Plaintiffs must show more than a grave or serious question for litigation; they must "clearly" demonstrate that they are "likely" to succeed on the merits. Real Truth About Obama, 575 F.3d at 346-47.

1. Likelihood of Success on the Merits

a. Title IX

***11** To establish a claim under Title IX, the individual transgender Plaintiffs must show that (1) they were excluded from participation in an education program because of their sex; (2) the educational institution was receiving federal financial assistance at the time of their exclusion; and (3) the improper discrimination caused them harm. G.G., 822 F.3d at 718. UNC and its constituent institutions receive federal financial assistance under Title IX. (See Doc. 23-27 at 2.) In addition, for the reasons explained below, UNC's enforcement of Part I has caused medical and other harms to the individual transgender Plaintiffs. See infra Section II.B.2. Thus, the primary question for the court is whether the individual transgender Plaintiffs are likely to show that Part I unlawfully excludes them from certain bathrooms, showers, and other facilities on the basis of sex.

Title IX provides: "No person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). This prohibition against sex discrimination protects employees as well as students. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530 (1982). As a result, covered institutions may not "limit any person in the enjoyment of any right, privilege, advantage, or opportunity" on the basis of sex. 34 C.F.R. § 106.31(b)(7); see also id. § 106.31(b)(2) (prohibiting discrimination in the provision of "aid, benefits, or services"). Access to bathrooms, showers, and other similar facilities qualifies as a "right, privilege, advantage, or opportunity" for the purposes of Title IX. G.G., 822 F.3d at 718 n.4.

"Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition." Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 175 (2005). Thus, "[n]ot all distinctions on the basis of sex are impermissible under Title IX." G.G., 822 F.3d at 718. For example, the statute itself contains an exception that permits covered institutions to "maintain[ ] separate living facilities for the different sexes." 20 U.S.C. § 1686. In addition, a DOE regulation states that covered institutions "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." 34 C.F.R. § 106.33.

Until very recently, little to no explicit authority existed regarding the application of Title IX and its related regulations to transgender students and employees. Around 2013, however, DOE began taking the position that covered institutions must treat transgender individuals consistent with their gender identity. (See Doc. 23-29 at 3 (citing Letter from Anurima Bhargava, Chief, U.S. Dep't of Justice, and Arthur Zeidman, Director, U.S. Dep't of Educ. Office of Civil Rights, to Dr. Joel Shawn, Superintendent, Arcadia Unified Sch. Dist. (July 24, 2013), available at https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadialetter.pdf).)

On April 19, 2016, the Fourth Circuit concluded that courts must defer to DOE's relatively recent position in the context of sex-segregated bathrooms. G.G., 822 F.3d at 723. In G.G., a high school sophomore in eastern Virginia transitioned from female to male, living as a boy in all aspects of life. Id. at 715. School officials initially supported G.G.'s transition and took steps to ensure that teachers and staff treated the student as a boy. Id. School officials also gave G.G. permission to use the boys' bathrooms, although they made no decision with regard to locker rooms or showers because G.G. did

not participate in physical education. Id. & n.2. G.G. used the boys' bathrooms without incident for several weeks. Id. at 715–16. At some point, however, parents and community members began contacting the local school board to complain about G.G.'s use of the boys' bathrooms. Id. at 716. In response, the school board implemented a policy limiting access to sex-segregated bathrooms and locker rooms based on "biological gender" and requiring its schools to provide "an alternative appropriate private facility" to accommodate students with "gender identity issues." Id. The school board also mandated a series of steps designed to improve privacy for all students, including adding partitions and privacy strips in bathrooms and constructing additional single occupancy bathrooms. Id.

***12** Shortly after the school board adopted its new policy, G.G. requested an opinion letter from DOE regarding the application of Title IX to transgender students. See id. at 732 (Niemeyer, J., dissenting in part). On January 7, 2015, DOE responded with an opinion letter that states,

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.

(Doc. 23-29 (the "DOE opinion letter").) On June 11, 2015, G.G. sued the school board, claiming that the policy of excluding students from bathrooms on the basis of "biological gender" violated Title IX. G.G., 822 F.3d at 717.

The district court dismissed G.G.'s Title IX claim, concluding that the DOE opinion letter is not entitled to deference under the doctrine announced in Auer v. Robbins, 519 U.S. 452 (1997). See G.G., 822 F.3d at 717. [20] The district court concluded that 34 C.F.R. § 106.33, which permits schools to "provide separate toilet, locker room, and shower facilities on the basis of sex," unambiguously refers to a student's "birth or biological sex." 822 F.3d at 719. The district court also reasoned that, even if the meaning of the phrase "on the basis of sex" were ambiguous in this regulation, then DOE's interpretation would be clearly erroneous and inconsistent with the regulation because " 'on the basis of sex' means, at most, on the basis of sex and gender together, [so] it cannot mean on the basis of gender alone." Id.

20 Under Auer, an agency's interpretation of its own ambiguous regulation is "controlling unless plainly erroneous or inconsistent with the regulation." 519 U.S. at 461 (citations and internal quotation marks omitted).

The Fourth Circuit reversed. Id. at 727. The court first concluded that the phrase "on the basis of sex" in § 106.33 is ambiguous because the regulation "is silent as to how a school should determine whether a transgender individual is a male or female." Id. at 720. The court then determined that DOE's interpretation, while "novel" and "perhaps not the intuitive one," is not clearly erroneous because a dictionary from 1971 defined the word "sex" as encompassing "morphological, physiological, and behavioral" characteristics. Id. at 721–22. [21] Finally, the court concluded that the DOE opinion letter reflects the agency's fair and considered judgment on policy formulation, rather than a convenient litigating position. Id. at 722–23. As a result, the court remanded with instructions for the district court to give the DOE opinion letter "controlling weight" with regard to the meaning of § 106.33. Id. at 723, 727.

21 The court noted that another dictionary defined "sex" as "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished." Id. at 721. Neither of the dictionaries cited by the majority included gender identity as a component of "sex." See id. at 721–22.

On remand, the district court entered a preliminary injunction requiring the school board to allow G.G. to use the boys' bathrooms. G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., No. 4:15cv54, 2016 WL 3581852, at *1 (E.D. Va. June 23, 2016). The Fourth Circuit denied the school board's request to stay that injunction pending appeal. G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., No 16-1733, 2016 WL 3743189, at *2 (4th Cir. July 12, 2016). However, on August 3, 2016 – two days after the hearing on Plaintiffs' motion in the present case – the Supreme Court stayed the Fourth Circuit's mandate and the district court's preliminary injunction until it could rule on the school board's forthcoming petition for

a writ of certiorari. Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 136 S. Ct. 2442 (2016). Such intervention is granted where a lower court "tenders a ruling out of harmony with [the Supreme Court's] prior decisions, or [raises] questions of transcending public importance, or [presents] issues which would likely induce [the] Court to grant certiorari." See Russo v. Byrne, 409 U.S. 1219, 1221 (1972) (Douglas, J.).

***13** In light of the foregoing, the fate of G.G. is uncertain. But, despite the stay and recall of the mandate, the Supreme Court did not vacate or reverse the Fourth Circuit's decision. See G.G., 136 S. Ct. at 2442. Thus, while other courts may reach contrary decisions, see Texas v. United States, No. 7:16cv54, 2016 WL 4426495, at *14–15, (N.D. Tex. Aug. 21, 2016) (adopting the view advanced in Judge Niemeyer's dissenting opinion from G.G.), [22] at present G.G. remains the law in this circuit. See United States v. Collins, 415 F.3d 304, 311 (4th Cir. 2005) ("A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court."); Friel Prosthetics, Inc. v. Bank of America, No. CIV.A.DKC 2004-3481, 2005 WL 348263, at *1 & n.4 (D. Md. Feb. 9, 2005) (noting that a stay of a Fourth Circuit mandate in a separate case would not "prevent the Fourth Circuit decision from having precedential value and binding authority" in the present case); see also Abukar v. Ashcroft, No. 01-242, 2004 WL 741759, at *2–3 (D. Minn. Mar. 17, 2004) (assuming that an Eighth Circuit opinion in a separate case retained its precedential value despite the Eighth Circuit's subsequent decision to recall and stay its own mandate in light of impending Supreme Court review).

22 The court also concluded that DOE's guidance violated the Administrative Procedure Act, and the court preliminarily enjoined DOJ from using or asserting DOE's position on gender identity in any litigation initiated after the entry of its order. Id. at *11–*14, 17. Because Texas is a district court opinion from outside the Fourth Circuit, however, and because the court's order was issued after the initiation of this case, this court remains bound by G.G. and the Texas order has no direct effect on this litigation.

Consequently, to evaluate the individual transgender Plaintiffs' Title IX claim, the court must undertake a two-part analysis. First, the court must determine whether Part I violates Title IX's general prohibition against sex discrimination. See 20 U.S.C. § 1681(a). Second, if Part I violates Title IX's general prohibition against sex discrimination, the court must then determine whether an exception to that general prohibition applies. See Jackson, 544 U.S. at 175 ("Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition."). The only potentially applicable exception cited by the parties comes from a DOE regulation that allows schools to "provide separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. However, in light of G.G., this court must give controlling weight to the DOE opinion letter, which states that schools "generally must treat transgender students consistent with their gender identity" (Doc. 23-29 at 3), when considering the scope of this exception during the second stage of the analysis.

Under this framework, the Title IX analysis in this case is relatively straightforward. Part I requires schools to segregate multiple occupancy bathrooms, showers, and other similar facilities on the basis of sex. HB2 § 1.2–1.3. Because the provision of sex-segregated facilities necessarily requires schools to treat individuals differently depending on their sex, Part I falls within Title IX's general prohibition against sex discrimination. The only potentially applicable exception comes from § 106.33, which permits sex-segregated bathrooms and other facilities. But G.G. and the DOE opinion letter teach that, for the purposes of this regulation, a school generally must treat students consistent with their gender identity. (See 822 F.3d at 723; Doc. 23-29 at 3.) Part I, by contrast, requires schools to treat students consistent with their birth certificates, regardless of gender identity. HB2 §§ 1.2–1.3. Thus, although Part I is consistent with the DOE opinion letter when applied to most students, it is inconsistent with the DOE opinion letter as applied to the individual transgender Plaintiffs, whose birth certificates do not align with their gender identity. As a result, Part I does not qualify for the regulatory exception - as interpreted by DOE - and therefore appears to violate Title IX when applied to the individual transgender Plaintiffs.

***14** Defendants raise a number of objections to the application of G.G. in this case, but none is sufficient at this time.

Defendants first argue that the Fourth Circuit's holding in G.G. is limited to bathrooms and does not extend to showers or other similar facilities. True, G.G. concluded that "the [DOE's] interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to Auer deference and is to be accorded controlling weight." 822 F.3d at 723. Further, the court noted that because G.G. did not seek access to other facilities, "[o]nly restroom use is at issue in this case." Id. at 715 n. 2. And as to the objections raised, the court commented, "We doubt that G.G.'s use of the communal restroom of his choice threatens the type of constitutional abuses present in the cases cited by the dissent." Id. at 723 n.10. Consequently, the district court only ordered the school board to allow G.G. to use boys' bathrooms. G.G., 2016 WL 3581852, at *1.

But the indispensable foundation of G.G.'s holding is that DOE's interpretation of "sex" in § 106.33, as outlined in the DOE opinion letter, is entitled to controlling weight. 822 F.3d at 723. As the dissent in G.G. aptly noted, "acceptance of [G.G's] argument would necessarily change the definition of 'sex' for purposes of assigning separate living facilities, locker rooms, and shower facilities as well. All are based on 'sex,' a term that must be construed uniformly throughout Title IX and its implementing regulations." Id. at 734 (Niemeyer, J., dissenting in part). In fact, the majority also agreed with this point. Id. at 723 ("In many respects, we are in agreement with the dissent. We agree that 'sex' should be construed uniformly throughout Title IX and its implementing regulations."). Moreover, the passage of the DOE opinion letter – which G.G. requires be accorded controlling weight – explicitly includes "locker rooms" and "shower facilities" among the "situations" in which students must be treated consistent with their gender identity. (Doc. 23-29 at 3.) [23]

23 Indeed, DOE has continued to issue expanded guidance well after the filing of this lawsuit and the 425 case against the State. DOE's newest guidance explicitly mandates transgender access to all facilities that are consistent with their gender identity. (E.g., Doc. 23-30 at 4 ("Restrooms and Locker Rooms. A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.").) This guidance does not include the qualifier "generally," which was included in the DOE opinion letter. (Id.) Plaintiffs contend that this document, which was not available at the time of G.G., is also entitled to Auer deference. (See Doc. 22 at 14.) The Texas court, which was not bound by G.G., concluded that this guidance is not entitled to Auer deference. 2016 WL 4426495, at *15.

To be sure, the G.G. court did note that the bathrooms at the Virginia school were separately partitioned. 822 F.3d at 716. But it is difficult to find any articulation of how that fact was important to the court's reasoning. Although showers and changing rooms clearly present obvious practical concerns that differ from bathrooms, both the logic and holding of G.G. make no distinction between facilities. The court made this point clear by noting that in applying its analytical framework it would not weigh "privacy interests or safety concerns – fundamentally questions of policy" which it said was "a task committed to the agency, not the courts." Id. at 723-24. [24]

24 Nor does it appear that the court or DOE considered the potentially significant costs associated with retrofitting some facilities to ensure privacy.

***15** While district courts are often said to be the "front line experimenters in the laboratories of difficult legal questions," Hively v. Ivy Tech Comm. Coll., South Bend, --- F.3d ---, 2016 WL 4039703, at *4 (7th Cir. 2016), they are bound to follow circuit precedent. To accept Defendants' argument – which is more an attack on G.G.'s reasoning than a legal distinction – would violate that obligation. Therefore, at this early stage on a motion for preliminary relief pending trial, it is enough to say that G.G. requires Title IX institutions in this circuit to generally treat transgender students consistent with their gender identity, including in showers and changing rooms. (Doc. 23-29 at 3.) Defendants do not deny that Part I bars Title IX institutions from attempting to accommodate such students in any fashion, except in the limited form of a separate facility that is optional in the State's discretion. See HB2 §§ 1.2–1.3. Thus, G.G. indicates that the individual transgender Plaintiffs are likely to succeed on the merits of their Title IX claim.

Even Plaintiffs accept that the State's interests are legitimate and seem to acknowledge that there may be practical limits to the application of DOE's guidance, especially where minors are involved. (See Doc. 103 at 15–21.) [25] At the hearing, counsel for the amici school administrators represented that public school showers and changing rooms - facilities in

which students are likely to be partially or fully nude – today often contain partitions, dividers, and other mechanisms to protect privacy similar to bathrooms. (See Doc. 103 at 137–38.) This suggests that, as in G.G., other forms of accommodation might be available to protect privacy and safety concerns. See G.G., 822 F.3d at 723 (agreeing that " 'an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts' are not involuntarily exposed" and concluding that "[i]t is not apparent to us, however, that the truth of these propositions undermines the conclusion we reach" to grant DOE's interpretation of its regulations controlling weight). [26] Ultimately, the question of determining the full scope of transgender users' rights to these more intimate facilities under DOE's interpretation – as to which the State has significant legitimate interests –is not before the court. For now, it suffices to say that Part I's blanket ban that forecloses any form of accommodation for transgender students other than separate facilities likely violates Title IX under G.G.

25 DOJ, however, argues that DOE's guidance makes no such allowance and that G.G.'s holding requires controlling weight across all facilities. (Doc. 103 at 54-57.)

26 For example, Part I excludes some transgender users from showers and changing rooms that match their gender identity even if such facilities are fully partitioned or otherwise unoccupied.

Defendants also note that the school board policy in G.G. did not include any criteria for determining the "biological gender" of particular students. See 822 F.3d at 721–22. By contrast, Part I includes a simple, objective criterion – the sex listed on the individual's birth certificate – for determining an individual's "biological sex." HB2 §§ 1.2–1.3. Defendants are correct on this point. But the holding of G.G. did not turn on any supposed ambiguity in the school board's policy. Instead, G.G. rested on the Fourth Circuit's determination that the DOE opinion letter is entitled to controlling weight under Auer. 822 F.3d at 723. The DOE opinion letter does not even remotely suggest that schools may treat students inconsistent with their gender identity so long as the school has clear criteria for determining an individual's "biological sex."

Defendants next argue that G.G. did not involve any constitutional challenges to DOE regulations or the DOE opinion letter. True, the Fourth Circuit noted the absence of such challenges in G.G., see id. at 723–24, whereas Defendants did raise such issues in their answer and counterclaims (see Doc. 54 ¶¶ 120–25). But Defendants have not raised any constitutional defenses in their responses to the individual transgender Plaintiffs' motion for preliminary injunction, and Plaintiffs therefore have not yet responded to these issues. [27] The court cannot ignore G.G. and simply assume that Defendants will prevail on constitutional defenses that they may or may not develop at some point in the future. See Native Ecosystems Council & All. for the Wild Rockies v. U.S. Forest Serv., No. 4:11-cv-212, 2011 WL 4015662, at *10 n.10 (D. Idaho Sept. 9, 2011) (declining to consider claims not raised in a party's brief for the purposes of a preliminary injunction but preserving those claims for the remainder of the case); see also Carter v. Lee, 283 F.3d 240, 252 n.11 (4th Cir. 2002) (contentions not raised in a party's opening brief are generally considered to be waived). Of course, Defendants may ultimately develop successful constitutional defenses at a later stage of the proceedings.

27 In fact, although Senator Berger and Representative Moore's brief incorporates some portions of their answer by reference, it does not incorporate the constitutional claims or defenses to the Title IX claim. (See Doc. 61 at 13 (referencing defenses to Plaintiffs' Equal Protection and Due Process claims).) At the hearing on Plaintiffs' motion, the legislators first raised the argument that enforcing DOE's interpretation of "sex" would constitute a Spending Clause violation under Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 15-16 (1981). (Doc. 103 at 81-85.) As Defendants have yet to develop this defense, it does not rise to the level of undermining the individual transgender Plaintiffs' showing of a likelihood of success on the merits.

***16** Finally, Defendants argue that this case differs from G.G. because that case involved no major complaints or safety concerns from students. Defendants are correct, though community members certainly raised these kinds of objections. See G.G., 822 F.3d at 715–16. But on this record, Defendants have not offered sufficient evidence to distinguish Plaintiffs' factual circumstances, or those pertaining to anyone else in North Carolina for that matter, from those in G.G. [28] To the contrary, the current record indicates that the individual transgender Plaintiffs used bathrooms and locker rooms

corresponding with their gender identity without complaint for far longer than G.G. used the boys' bathrooms at his school. (Compare Doc. 22-4 ¶¶ 15, 30 (approximately five months), and Doc. 22-8 ¶¶ 19, 25 (approximately eighteen months), and Doc. 22-9 ¶¶ 15, 19–20 (same), with G.G., 822 F.3d at 715–16 (seven weeks). Moreover, as noted above and like the situation in G.G., bathroom, shower, and other facilities are often separately partitioned to preserve privacy and safety concerns. (See Doc. 103 at 138; Doc. 22-19 ¶ 14.) Finally, the Fourth Circuit's analysis in G.G. did not rest on the specific circumstances of that case or the wisdom of DOE's position, but rather on the deference owed to the DOE opinion letter. Id. at 723-24 ("[T]he weighing of privacy interests or safety concerns — fundamentally questions of policy — is a task committed to the agency, not the courts. ... To the extent the dissent critiques the result we reach today on policy grounds, we reply that, our Auer analysis complete, we leave policy formulation to the political branches.").

28 Defendants did present two news articles describing men in Seattle and Virginia who entered women's bathrooms or showers. (Docs. 55-1, 55-52.) Neither man claimed to be transgender; one was apparently protesting a local ordinance, while the other was arrested for peeping. (See id.) North Carolina's peeping and indecent exposure statutes continue to protect the privacy of citizens regardless of Part I, and there is no indication that a sexual predator could successfully claim transgender status as a defense against prosecution under these statutes.

* * *

G.G. compels the conclusion that the individual transgender Plaintiffs are likely to succeed on the merits of their Title IX claim. Part I's wholesale ban on access to facilities is inconsistent with DOE's guidance on Title IX compliance under G.G. and precludes educational institutions from attempting to accommodate particular transgender individuals who wish such accommodation in bathrooms and other facilities. [29]

29 Plaintiffs argue in supplemental briefing that "broad relief" equivalent to a facial ban of HB2 is necessary to ensure protection of the individual transgender Plaintiffs' rights. (Doc. at 13.) But there is no class-wide claim presently pending, and ACLU-NC did not allege a Title IX claim. In light of UNC's insistence that it will not take any further action in response to Part I, broader relief is not necessary to ensure that the individual transgender Plaintiffs receive effective preliminary relief. Cf. Nat'l Org. for Reform of Marijuana Laws (NORML)v. Mullen, 608 F. Supp. 945, 964 (N.D. Cal. 1985) (ordering broad relief on individual claims where the individual plaintiffs were at "significant risk for repeated rights violations" because government actors could not effectively "distinguish the parties from the nonparties").

b. Constitutional Claims

In addition to their Title IX claim, Plaintiffs also seek access to sex-segregated facilities at public rest stops and other entities not covered by Title IX. As a result, despite granting relief under Title IX, the court must also consider Plaintiffs' constitutional claims. The constitutional claims in this case raise novel and difficult questions in a context underdeveloped in the law. As a practical matter, therefore, Plaintiffs' task of presenting the kind of "clear showing" necessary to justify preliminary relief, Winter, 555 U.S. at 22, is even more difficult in this case. Thus, this court is more cautious to act where the application of existing principles of law to new areas is uncertain and novel, particularly in the context of a preliminary injunction. See Capital Associated Indus. v. Cooper, 129 F. Supp. 3d 281, 288–89 (M.D.N.C. 2015) ("Where, as in this case, 'substantial issues of constitutional dimensions' are before the court, those issues 'should be fully developed at trial in order to [e]nsure a proper and just resolution.' " (quoting Wetzel v. Edwards, 635 F.2d 283, 291 (4th Cir. 1980))); see also Gantt v. Clemson Agr. Coll. of S.C., 208 F. Supp. 416, 418 (W.D.S.C. 1962) ("On an application for preliminary injunction, the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact.").

i. Equal Protection

***17** The Fourteenth Amendment provides that no State may "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. However, this broad principle "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." Romer v. Evans, 517 U.S. 620, 631 (1996). As a result, the Supreme Court has "attempted to reconcile the principle with the reality" by prescribing different levels of scrutiny depending on whether a law "targets a suspect class." Id. Laws that do not target a suspect class are subject to rational basis review, and courts should "uphold the legislative classification so long as it bears a rational relation to some legitimate end." Id. By contrast, laws that target a suspect class, such as race, are subject to strict scrutiny. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

It is well settled that classifications based on sex are subject to intermediate scrutiny. See United States v. Virginia, 518 U.S. 515, 532–33 (1996). Under intermediate scrutiny, the State must demonstrate that the challenged law serves " 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " Id. at 533 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). Unlike strict scrutiny, the government is not required to show that the law is the "least intrusive means of achieving the relevant government objective." United States v. Staten, 666 F.3d 154, 159 (4th Cir. 2011) (citations and internal quotation marks omitted). "In other words, the fit needs to be reasonable; a perfect fit is not required." Id. at 162. Nevertheless, "[t]he burden of justification is demanding and it rests entirely on the State." Virginia, 518 U.S. at 533. In addition, the justification must be "genuine, not hypothesized or invented post hoc in response to litigation." Id. Finally, the justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." Id.

Here, Part I classifies citizens on the basis of "biological sex" and requires that each sex use separate multiple occupancy bathrooms, showers, and other similar facilities. HB2 §§ 1.2–1.3. Because Part I facially classifies and discriminates among citizens on the basis of sex, intermediate scrutiny applies. [30] See Virginia, 518 U.S. at 532–33.

30 The parties have devoted substantial time and energy to arguments regarding (1) whether transgender individuals qualify as a suspect class for Equal Protection purposes, and (2) whether Plaintiffs have established a sex stereotyping claim under the line of cases beginning with Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (construing Title VII). As Plaintiffs acknowledge, however, success on either of these theories in the context of their Equal Protection claim would result in the court applying the same intermediate level of scrutiny applied to laws that facially classify citizens on the basis of sex. (Doc. 103 at 35–36.) Thus, the court declines to consider these issues at this stage because Part I facially classifies individuals on the basis of sex.

There is no question that the protection of bodily privacy is an important government interest and that the State may promote this interest by excluding members of the opposite sex from places in which individuals are likely to engage in intimate bodily functions. See, e.g., Faulkner v. Jones, 10 F.3d 226, 232 (4th Cir. 1993) ("The point is illustrated by society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different."); Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1989) ("Most people, however, have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating."); see also Doe v. Luzerne Cty., 660 F.3d 169, 176–77 (3d Cir. 2011) (observing that several circuits have recognized "a constitutionally protected privacy interest in [one's] partially clothed body"); Sepulveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir. 2012) (stating that "[t]he right to bodily privacy is fundamental" and noting that "common sense" and "decency" protect a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."). This interest is particularly strong with regard to minors. See, e.g., Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir. 2005) ("Students of course have a significant privacy interest in their unclothed bodies."); Doe v. Renfrow, 631 F.2d 91, 92–93 (7th Cir. 1980) (stating that it "does not take a constitutional scholar" to conclude that a strip search invades a student's privacy rights). At the hearing on this motion, Plaintiffs acknowledged that the practice of segregating bathrooms and other similar facilities on the basis of sex promotes this government interest. (See Doc. 103 at 15–19.)

***18** All parties agree that bodily privacy qualifies as an important State interest and that sex-segregated facilities are substantially related to that interest.[31] But the relevant authorities do not define "sex" or explicitly explain which differences between men and women give rise to the State's interest in separating the sexes for privacy purposes; generally, these cases simply observe that individuals of one sex have a privacy interest in being separated from "the other sex." See, e.g., Lee, 641 F.2d at 1119. Not surprisingly, then, the parties disagree about which definition of "sex" promotes the State's interest in bodily privacy. Defendants contend that bodily privacy interests arise from physiological differences between men and women, and that sex should therefore be defined in terms of physiology for the purposes of bathrooms, showers, and other similar facilities. Plaintiffs, by contrast, implicitly contend that bodily privacy interests arise from differences in gender identity, and that sex should therefore be defined in terms of gender identity for the purposes of these facilities.

31 Despite this concession, many of Plaintiffs' arguments in this case would, if accepted and taken to their logical conclusion, suggest that the time-honored practice of sex-segregated bathrooms and showers is unconstitutional. At the hearing on this motion, counsel speculated that sex-segregated bathrooms are justified, if at all, (1) by virtue of the long history of providing such facilities, (2) to express society's belief that "the two sexes, the two genders ... should be separated except in marriage," and (3) because no one has bothered to challenge the practice of providing sex-segregated facilities which, while separate, tend to be roughly equal in quality. (See id. at 16–21.)

To support their position, Plaintiffs submitted expert declarations stating that, from a "medical perspective," gender identity is the only "appropriate" characteristic for distinguishing between males and females. (See, e.g., Doc. 22-1 ¶ 23.) Defendants have indicated their strong disagreement with this position, though they have not yet offered any evidence on this point in this case.[32] But regardless of the characteristics that distinguish men and women for "medical" purposes, Supreme Court and Fourth Circuit precedent supports Defendants' position that physiological characteristics distinguish men and women for the purposes of bodily privacy.

32 As with legislative history, however, Defendants recently offered medical evidence in the 425 case. (See Docs. 149-9 through 149-12 in the 425 case.)

Although the Supreme Court has never had an occasion to explicitly explain which differences between men and women justify the decision to provide sex-segregated facilities, the Court has generally assumed that the sexes are primarily defined by their differing physiologies. In Virginia, for example, the Court rejected the notion that women were not suited for education at the Virginia Military Institute ("VMI"). See 518 U.S. at 540–46; see also id. at 533 (stating that laws "must not rely on overbroad generalizations about the different talent, capacities, or preferences of males and females."). Even while rejecting stereotypical assumptions about supposed "inherent differences" between men and women, the Court acknowledged, "Physical differences between men and women ... are enduring," adding that the "two sexes are not fungible." Id. The Court then linked these physiological differences to privacy considerations, adding, "Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." Id. at 550 n.19.

Virginia is not the only Equal Protection case to distinguish between the sexes on the basis of physiology. In Tuan Anh Nguyen v. Immigration and Naturalization Serv., 533 U.S. 53 (2001), the Court upheld an Immigration and Naturalization Service ("INS") policy that imposed "a set of requirements on the children of citizen fathers born abroad and out of wedlock to a noncitizen mother that are not imposed under like circumstances when the citizen parent is the mother." Id. 59–60. The Court held that the government's "use of gender specific terms" is constitutionally permissible when the relevant law "takes into account a biological difference" between men and women. Id. at 64. The Court rejected the argument that the INS policy reflected stereotypes about the roles and capacities of mothers and fathers, stating that "the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis." Id. at 68. Instead, the Court found, "There is nothing irrational or improper in the recognition that at the

moment of birth ... the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype." Id. Finally, the Court concluded:

> ***19** To fail to acknowledge even our most basic biological differences ... risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Id. at 73.

The Court's decisions in Virginia (1996) and Nguyen (2001) are not merely relics of an earlier, less enlightened time when courts did not have the benefit of modern medical science. Rather, as recently as January 2016, the Fourth Circuit cited Virginia approvingly while concluding that physiological differences justified treating men and women differently in some contexts. See Bauer v. Lynch, 812 F.3d 340, 350 (4th Cir. 2016). In Bauer, a male applicant "flunked out of the FBI Academy after falling a single push-up short of the thirty required of male Trainees." Id. at 342. The applicant sued, noting that his performance would have qualified him under the different physical fitness standards applied to female applicants. Id. The Fourth Circuit found that different standards for men and women arose from the FBI's efforts to "normalize testing standards between men and women in order to account for their innate physiological differences," such that an approximately equal number of men and women would pass the tests. Id. at 343. In light of this, the Fourth Circuit concluded that the FBI's policy was permissible because "equally fit men and women demonstrate their fitness differently." Id. at 351. In concluding that the FBI could distinguish between men and women on the basis of physiology, the court explained:

> Men and women simply are not physiologically the same for the purposes of physical fitness programs. ... The Court recognized [in Virginia] that, although Virginia's use of 'generalizations about women' could not be used to exclude them from VMI, some differences between the sexes were real, not perceived, and therefore could require accommodations.

Id. at 350. [33]

[33] Bauer involved Title VII rather than the Equal Protection Clause. Id. Nevertheless, the Fourth Circuit stated that the same principles "inform [its] analysis" of both types of claims. Id.

In light of the foregoing, it appears that the privacy interests that justify the State's provision of sex-segregated bathrooms, showers, and other similar facilities arise from physiological differences between men and women, rather than differences in gender identity. See Virginia, 518 U.S. at 533; Nguyen, 533 U.S. at 73; Bauer, 812 F.3d at 350. The Fourth Circuit has implicitly stated as much, albeit in dicta, noting:

> When ... a gender classification is justified by acknowledged differences [between men and women], identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender.
>
> The point is illustrated by society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each that is different. Therefore, any analysis of the nature of a specific facility provided in response to a justified purpose, must take into account the nature of the difference on which the separation is based ....

***20** Faulkner, 10 F.3d at 232. In fact, even Plaintiffs' counsel acknowledged the State's interest in, for example, ensuring that "12-year-old girls who are not familiar with male anatomy" are not exposed to male genitalia by "somebody older

who's showing that to them, a mature adult." (Doc. 103 at 24–25.) As a result, it appears that the constitutionality of Part I depends on whether the law's use of birth certificates as a proxy for sex is substantially related to the State's privacy interest in separating individuals with different physiologies.

There is little doubt that Part I is substantially related to the State's interest in segregating bathrooms, showers, and other similar facilities on the basis of physiology. By Plaintiffs' own allegations, "The gender marker on a birth certificate is designated at the time of birth generally based upon the appearance of external genitalia." (Doc. 9 ¶ 26; see also Doc. 22-1 ¶ 14.) Plaintiffs contend that birth certificates are an "inaccurate proxy for an individual's anatomy" because some transgender individuals have birth certificates that do not reflect their external physiology, either because (1) they were born in a State that permits them to change the sex on their birth certificates without undergoing sex reassignment surgery, or (2) they were born in a State that does not permit them to change the sex on their birth certificates, regardless of whether they undergo sex reassignment surgery. (Doc. 22 at 32-33.) But even if the court assumes (contrary to the evidence in the record) that no transgender person possesses a birth certificate that accurately reflects his or her external physiology, Part I would still be substantially related to the State's interest because, by Plaintiffs' own estimate, only 0.3% of the national population is transgender. (Doc. 23-37 at 2.) For the remaining 99.7% of the population, there is no evidence that the sex listed on an individual's birth certificate reflects anything other than that person's external genitalia. Without reducing the "reasonable fit" requirement to a numerical comparison, it seems unlikely that a law that classifies individuals with 99.7% accuracy is insufficient to survive intermediate scrutiny. See Staten, 666 F.3d at 162 ("In other words, the fit needs to be reasonable; a perfect fit is not required.").

Finally, the privacy interests discussed above do not appear to represent a post hoc rationalization for Part I. See Virginia, 518 U.S. at 533 (requiring that a justification be "genuine, not hypothesized or invented post hoc in response to litigation"). Plaintiffs contend that Part I "effectively seeks to define transgender individuals out of existence and shut them out from public life." [34] (Doc. 22 at 35.) As a preliminary matter, it is hard to infer legislative intent based on the current record which, as noted above, contains little information about the legislative process leading to HB2's passage. The preliminary record does contain a few examples of objectionable statements by some legislators in media outlets, though these statements generally express hostility toward "the liberal agenda" and the "homosexual community" rather than transgender individuals. (See, e.g., Doc. 23-7 at 2; Doc. 23-15 at 2.) But the record also contains many statements, some by these same legislators and others by legislative leaders and Governor McCrory, reflecting an apparently genuine concern for the privacy and safety of North Carolina's citizens. (See, e.g., Doc. 23–7 at 2 (stating that the Charlotte ordinance "has created a major public safety issue"); Doc. 23-15 at 2 ("The Charlotte ordinance just violates, to me, all basic human principles of privacy and it just has so many unintended consequences."); Doc. 23–16 at 2 ("While special sessions are costly, we cannot put a price tag on the safety of women and children."); id. at 3 ("We need to respect the privacy of women and children and men in a very private place, and that's our restrooms and locker rooms.").) In light of the many contemporaneous statements by State leaders regarding privacy and the substantial relationship between Part I and the State's privacy interests, Plaintiffs have not clearly shown that privacy was an afterthought or a pretext invented after the fact solely for litigation purposes. Nor does the court infer improper motive simply from the fact that Part I negatively impacts some transgender individuals. [35] See Romer, 517 U.S. at 631 ("[M]ost legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.").

34 It should go without saying that Part I, which regulates access to public bathrooms, showers, and other similar facilities, neither defines transgender individuals "out of existence" nor prevents them from participating in public life.

35 Of course, not all transgender individuals are negatively impacted by Part I because some may be able to change the sex on their birth certificates, with or without sex reassignment surgery, and others may choose to use bathrooms or other facilities that accord with their biological sex, whether or not they suffer dysphoria as a result.

***21** In sum, Supreme Court and Fourth Circuit precedent support the conclusion that physiological differences between men and women give rise to the privacy interests that justify segregating bathrooms, showers, and other similar facilities on the basis of sex. In addition, Plaintiffs admit that the vast majority of birth certificates accurately reflect an individual's

external genitalia. Although the correlation between genitalia and the sex listed on a person's birth certificate is not perfect in every case, there is certainly a reasonable fit between these characteristics, which is what the law requires. See Staten, 666 F.3d at 162 ("In other words, the fit needs to be reasonable; a perfect fit is not required."). At this preliminary stage, and in light of existing case law, Plaintiffs have not made a clear showing that they are likely to succeed on their Equal Protection claim.

ii. Due Process

The Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court has long held that, in addition to requiring the government to follow fair procedures when taking certain actions, the Due Process Clause also "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331 (1986). As a result, a law that burdens a fundamental right is subject to strict scrutiny and cannot be upheld unless the State demonstrates that it is narrowly tailored to serve a compelling interest. See Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977); Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990). By contrast a law that does not burden a fundamental right is subject only to rational basis review, and a court must uphold such a law "so long as it bears a rational relation to some legitimate end." Romer, 517 U.S. at 631.

For the reasons explained above, the court concludes that Part I is substantially related to an important government interest. Because Part I passes intermediate scrutiny, the law necessarily clears the lower hurdle of rational basis review. See Outdoor Media Grp., Inc. v. City of Beaumont, 506 F.3d 895, 907 (9th Cir. 2007); Contest Promotions, LLC v. City and Cty. of San Francisco, 100 F. Supp. 3d 835, 849 (N.D. Cal. 2015). As a result, in order to warrant preliminary relief, Plaintiffs must make a clear showing that Part I burdens a fundamental right and therefore triggers strict scrutiny.

Plaintiffs argue that Part I burdens two separate fundamental rights. First, they argue that Part I burdens a fundamental right to informational privacy by forcing transgender individuals to use bathrooms in which they will appear out of place, thereby disclosing their transgender status to third parties. Second, they argue that Part I violates a right to refuse unwanted medical treatment because many States, including North Carolina, require transgender individuals to undergo sex reassignment surgery before changing the sex on their birth certificates. Each argument will be addressed in turn.

(a) Informational Privacy

The constitutional right to privacy protects, among other things, an individual's "interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 599 (1977). "The right to privacy, however, is not absolute." Walls, 895 F.2d at 192. Instead, the constitutional right to privacy is only implicated when State action compels disclosure of information of a "fundamental" nature. Id. "The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." Id. The Fourth Circuit has held that, as a "first step" in determining whether a particular category of information is entitled to constitutional protection, courts should examine whether the information "is within an individual's reasonable expectations of confidentiality." Id.

***22** Plaintiffs contend that a person's transgender status constitutes sensitive medical information and that this type of information is subject to constitutional protection. They cite various cases in which courts held that information qualifies for constitutional protection when it is of a sexual, personal, or humiliating nature, or when the release of the information could subject the person to a risk of bodily harm. See Powell v. Schriver, 175 F.3d 107, 111 (2d Cir. 1999) ("[T]he right to confidentiality includes the right to protection regarding information about the state of one's health.") (quoting Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994)); Love v. Johnson, 146 F. Supp. 3d 848, 853 (E.D. Mich. 2015). These courts concluded that an individual's transgender status qualifies for constitutional protection

because such information is of a private, sexual nature and disclosure of this information could subject a transgender person to ridicule, harassment, or even bodily harm. See Powell, 175 F.3d at 111 ("Like HIV status ... transsexualism is the unusual condition that is likely to provoke both an intense desire to preserve one's medical confidentiality, as well as hostility and intolerance from others."); Love, 146 F. Supp. 3d at 856; see also K.L. v. Alaska, Dep't of Admin., Div. of Motor Vehicles, No. 3AN-11-05341, 2012 WL 2685183, at *6 (Alaska Super. Ct. Mar. 12, 2012) (concluding that an individual's transgender status qualifies for privacy protection under Alaska law). In Love, for example, the court considered a Michigan law that prevented individuals from changing the sex on their driver's license. [36] 146 F. Supp. 3d at 856–57. The court concluded that this policy burdened Due Process privacy interests because it forced transgender individuals to tacitly reveal their transgender status whenever they displayed their driver's licenses to others. Id.; see also K.L., 2012 WL 2685183 at *4–7 (same).

36 Notably, the policy in Love only applied to individuals who sought to change the sex on an existing driver's license; Michigan apparently did not require individuals to present a birth certificate to support their claimed sex when initially obtaining a license. Id. at 851–52 & n.2.

None of these cases applied Fourth Circuit law, however, and the Fourth Circuit's decision in Walls casts doubt on the validity of these cases in this circuit. In Walls, a public employee was fired after refusing to complete a background check that included questions about her prior marriages, divorces, debts, criminal history, and sexual relationships with same-sex partners. 895 F.2d at 190. The employee brought an action under 42 U.S.C. § 1983 against her employer, claiming that the questionnaire violated her right to privacy. Walls, 895 F.2d at 189–92. The Fourth Circuit explained that the "right to privacy protects only information with respect to which the individual has a reasonable expectation of privacy." Id. at 193. The court therefore concluded that the right to privacy did not protect the information sought in the agency's questionnaire, including questions about prior marriages, divorces, and children, "to the extent that this information is freely available in public records." Id.

Walls suggests that Part I does not burden a fundamental privacy interest, at least under current Fourth Circuit law. Plaintiffs argue that Part I discloses an individual's transgender status to third parties by revealing the sex on their birth certificates through their choice of bathroom; when a stereotypically-feminine appearing individual uses a men's bathroom, Plaintiffs argue, third parties will know that the individual has a male birth certificate and infer that the person is transgender. (See Doc. 9 at ¶¶ 223–24.) But pursuant to Walls, individuals have no constitutionally-protected privacy interest in information that is freely available in public records. 895 F.2d at 193. And although the parties have not addressed this issue, the sex listed on an individual's birth certificate appears to be freely available in public records, at least if the individual was born in North Carolina. See N.C. Gen. Stat. § 130A-93(b) (providing that all birth data collected by the State qualifies as public records except for the names, addresses, and social security numbers of children and parents); see also id. § 132-1(b) (providing that all public records "are the property of the people" and requiring that the public be given access to such information "free or at minimal cost unless otherwise specifically provided by law").

***23** As a result, regardless of whether the court finds the reasoning in Love and K.L. persuasive, the sex listed on a person's birth certificate does not appear to qualify for constitutional protection under Walls. Plaintiffs cite general statements about privacy from Walls, but they overlook the obvious question of why the rule the court actually applied in that case should not govern this case as well. (See Doc. 22 at 36–38; Doc. 73 at 36–37.) It is possible that, with further development, Plaintiffs may be able to sufficiently distinguish Walls and demonstrate that the rule from that case should not apply outside of the employment context. For example, the policies at issue in Love and K.L. arguably have more in common with Part I than Walls, which dealt with an employment background check – a situation in which a third party can reasonably be expected to know the individual's name, address, and other identifying information that would make a public records search more practicable. Walls, 895 F.2d at 193–95.

On the other hand, there are also significant distinctions between this case and the cases cited by Plaintiffs. Unlike Part I, most of Plaintiffs' cases involved State actors who intentionally revealed or threatened to reveal private information. See, e.g., Powell, 175 F.3d at 109–11 (prison guard openly discussed an inmate's transgender status in the presence of other

inmates); Sterling v. Borough of Minersville, 232 F.3d 190, 192, 196 (3d Cir. 2000) (police officer threatened to tell an arrestee's family that the arrestee was gay). Even Love and K.L., Plaintiffs' most factually-analogous cases, challenged policies governing the modification of State documents rather than the circumstances in which a State may rely on those documents. Love 146 F. Supp. 3d at 856; K.L., 2012 WL 2685183 at *4–8. Love held that Michigan must allow transgender individuals to change the sex on their driver's license so that they would not have to reveal their transgender status during traffic stops; plaintiffs did not argue, and the court did not hold, that the State should be enjoined from asking drivers for identification during traffic stops. See 146 F. Supp. 3d at 856; see also K.L., 2012 WL 2685183 at *4–8 (same).

Unlike the plaintiffs in Love and K.L., Plaintiffs challenge North Carolina's ability to use birth certificates as an identifying document in the context of bathrooms, showers, and other facilities, rather than its rules for altering the information contained in the birth certificate itself. This highlights a potential conceptual difficulty with Plaintiffs' Due Process theories. Even under Part I, an individual's choice of bathroom does not directly or necessarily disclose whether that person is transgender; it merely discloses the sex listed on the person's birth certificate. Part I does not disclose medical information about any persons whose gender identity aligns with their birth certificate, either because they are not transgender or because they have successfully changed their birth certificate to match their gender identity (with or without sex reassignment surgery). Nor does Part I disclose medical information about transgender individuals whose name, appearance, or other characteristics do not readily identify their gender identity. Part I could only disclose an individual's transgender status inasmuch as third parties are able to infer as much in light of the person's birth certificate and appearance. Thus, it is not readily apparent to what extent any Due Process concerns are attributable to Part I as opposed to the laws that govern the modification of birth certificates.

In light of the foregoing, Plaintiffs have not clearly shown that they are likely to succeed on the merits of their informational privacy claim. See Winter, 555 U.S. at 20–22 (stating that a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief" (emphasis added)). The law in this area is substantially underdeveloped, however, and the parties devoted relatively little attention to this claim both in their briefs and at the hearing on this matter. Although Plaintiffs have not demonstrated that they are entitled to preliminary relief on this claim, their arguments and authorities raise substantial questions that merit additional consideration. As a result, the court will reserve ruling on Plaintiffs' informational privacy claim at this time so that the parties may submit additional briefing according to the schedule outlined in Section III below.

(b) Unwanted Medical Treatment

***24** Plaintiffs also contend that Part I violates transgender individuals' constitutional right to refuse unwanted medical treatment because North Carolina and many other States require sex reassignment surgery before the sex on a person's birth certificate may be changed. (Doc. 9 ¶¶ 228–34; Doc. 22 at 39.)

The parties' arguments on this issue are even less developed than those pertaining to informational privacy, with just three paragraphs devoted to the issue in the parties' principal briefs combined. (See Doc. 22 at 38–39; Doc. 55 at 18.) Plaintiffs rely almost exclusively on United States v. Charters, 829 F.2d 479 (4th Cir. 1987). In Charters, the Fourth Circuit held that a mentally ill prisoner had a Due Process interest in refusing the State's efforts to medicate him with antipsychotic drugs against his will. Id. at 490–500. In reaching this decision, the court applied principles derived from the "rights to freedom from physical invasion and freedom of thought as well as the right to privacy protected by the Constitution and the common law." Id. at 490. From these principles, the court observed, "The right to refuse medical treatment has been specifically recognized as a subject of constitutional protection." Id. at 491.

Governments assuredly must meet heightened scrutiny before forcibly medicating prisoners, or any citizens for that matter, against their will. But Plaintiffs have not shown how this holding applies to Part I, which does not address

medical treatment at all. True, Part I may require some transgender individuals (who otherwise do not benefit from the court's injunction as to Title IX facilities) to undergo potentially unwanted medical treatment if they wish to access public bathrooms, showers, and other similar facilities that align with their gender identity. But they are free to use facilities that align with their biological sex, and they may have access to single-user facilities. As much as one sympathizes with the plight of these transgender individuals, this degree of "compulsion" is far removed from the situation in Charters, where a captive prisoner was strapped down and forced to submit to medication against his will. See Charters, 829 F.2d at 482–84. If the Due Process Clause were implicated any time an individual must undergo medical treatment in order to access a desired benefit or service, it would cast serious doubts on a wide variety of laws. See, e.g., N.C. Gen. Stat. § 130A-155 (requiring schools and child care facilities to ensure that children have received appropriate vaccines before accepting them as students); 19A N.C. Admin. Code § 3B.0201(a)(3) (requiring some individuals to wear corrective lenses in order to obtain a driver's license). [37]

37 Here, too, as with the informational privacy claim, Plaintiffs' real problem appears to be various States' inflexible rules for changing one's sex on a birth certificate, in so far as Part I permits transgender users who did not have any surgery to use facilities matching their gender identity as long as their birth certificate has been changed – an issue the parties have not adequately addressed.

At a minimum, further development of Plaintiffs' argument is necessary before the court can determine whether Charters prevents the State from enforcing Part I. As with Plaintiffs' informational privacy claim, the court will reserve ruling to give the parties an opportunity to submit additional briefing on this claim in accordance with the schedule outlined in Section III below.

2. Irreparable Harm

***25** A party seeking a preliminary injunction must also show that it is likely to suffer irreparable harm in the absence of preliminary relief. Winter, 555 U.S. at 20. Irreparable injury must be both imminent and likely; speculation about potential future injuries is insufficient. See id. at 22.

On the current record, the individual transgender Plaintiffs have clearly shown that they will suffer irreparable harm in the absence of preliminary relief. All three transgender Plaintiffs submitted declarations stating that single occupancy bathrooms and other similar facilities are generally unavailable at UNC and other public agencies. (See Doc. 22-4 ¶¶ 18–20; Doc. 22-8 ¶ 27; Doc. 22-9 ¶¶ 24–25.) In fact, two of the individual transgender Plaintiffs indicate that they are not aware of any single occupancy facilities in the buildings in which their classes are held. (Doc. 22-8 ¶ 27; Doc. 22-9 ¶¶ 24–25.) Part I therefore interferes with these individuals' ability to participate in their work and educational activities. (See Doc. 22-4 ¶ 21; Doc. 22-8 ¶ 27; Doc. 22-9 ¶ 24.) As a result, some of these Plaintiffs limit their fluid intake and resist the urge to use a bathroom whenever possible. (Doc. 22-4 ¶ 21; Doc. 22-8 ¶ 32.) Such behavior can lead to serious medical consequences, such as urinary tract infections, constipation, and kidney disease. (Doc. 22-16 at 3–4.) This concern is not merely speculative; there is evidence that one of the individual transgender Plaintiffs has already begun to suffer medical consequences from behavioral changes prompted by Part I. (Doc. 73-1 at 1–2.)

In their response to Plaintiffs' motion, Defendants suggest that the individual transgender Plaintiffs' claims of irreparable harm are speculative and exaggerated, but Defendants have not presented any evidence to contradict Plaintiffs' evidence. (See Doc. 61 at 22–26.) Therefore, on this record, the court has no basis for doubting Plaintiffs' assertions that they cannot use multiple occupancy facilities that match their birth certificates for fear of harassment and violence, that single occupancy facilities are not reasonably available to them, and that they are at a serious risk of suffering negative health consequences as a result.

Defendants also argue that Plaintiffs delayed in filing their motion for preliminary injunction seven weeks after the passage of HB2. (Doc. 61 at 23.) In some circumstances, a delay in requesting preliminary relief can be relevant to the irreparable harm inquiry. See, e.g., Static Control Components, Inc. v. Future Graphics, LLC, No. 1:06cv730, 2007 U.S. Dist. LEXIS 36474, at *7–9 (M.D.N.C. May 11, 2007) (finding that an employer's eight-week delay in seeking to prevent a former employee from working for a competitor weighed against a finding of irreparable harm); Fairbanks Capital Corp. v. Kenney, 303 F. Supp. 2d 583, 590–91 (D. Md. 2003) (finding an eleven-month delay in bringing a trademark infringement suit to be reasonable under the circumstances). Here, however, HB2 was passed on an expedited schedule, and Plaintiffs doubtlessly needed some time to compile the more than sixty documents they submitted to support their motion, including exhibits, declarations from fact witnesses, and the opinions of expert witnesses. In addition, the legal landscape regarding HB2's enforcement remained in flux immediately after the laws' passage. (See, e.g., Doc. 23-24; Doc. 23-28.) Under these circumstances, Plaintiffs' minimal delay in seeking preliminary relief does not undermine their claims regarding irreparable harm.

***26** Finally, the court notes that similar facts were deemed sufficient to support a finding of irreparable harm in G.G. See G.G., 2016 WL 3581852 at *1; G.G., 822 F.3d at 727–29 (Davis, J., concurring). The court therefore concludes that the individual transgender Plaintiffs have made a clear showing that they are likely to suffer irreparable harm in the absence of preliminary relief.

3. Balance of Equities and the Public Interest

In addition to likelihood of success on the merits and irreparable harm, those seeking preliminary relief must also demonstrate that the balance of equities tips in their favor and that an injunction is in the public interest. Winter, 555 U.S. at 20. On the current record, both favor entry of an injunction.

The balance of equities favors the entry of an injunction. One noteworthy feature of this case is that all parties claim that they want to preserve North Carolina law as it existed before the law was enacted; they simply disagree about the contours of that pre-HB2 legal regime. (See Doc. 103 at 6, 15–21, 65–71, 74–90, 96–102; Doc. 9 ¶¶ 166–68.) For the reasons discussed above, the court concludes that Part I does not accurately restore the status quo ante in North Carolina, at least as it existed in the years immediately preceding 2016. While Part I reiterates the male/female distinction for the vast majority of persons, it imposes a new restriction that effectively prohibits State agencies from providing flexible, case-by-case accommodations regarding the use of bathrooms, showers, and other similar facilities for transgender individuals where feasible. [38] See HB 2 §§ 1.2–1.3. Because Defendants do not claim to have had any problems with the pre-2016 regime (Doc. 103 at 65–71, 74–90, 96–102), the entry of an injunction should not work any hardship on them. By contrast, the failure to enjoin Part I would cause substantial hardship to the individual transgender Plaintiffs, disrupting their lives.

38 For this reason, the preliminary injunction in this case is a prohibitory injunction and is not subject to the heightened standard that applies to mandatory injunctions. See Pashby v. Delia, 709 F.3d 307, 319 (4th Cir. 2013) ("Prohibitory preliminary injunctions aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending.").

For similar reasons, the court concludes that an injunction is in the public interest. Of course, every individual has "a legitimate and important interest in [ensuring] that his or her nude or partially nude body, genitalia, and other private parts are not involuntarily exposed." G.G., 822 F.3d at 723 (citations and internal quotation marks omitted). The dispute in this case centers on facilities of the most intimate nature, and the State clearly has an important interest in protecting the privacy rights of all citizens in such facilities. See, e.g., Virginia, 518 U.S. at 550 n.19 (stating that separate facilities in coeducational institutions are "necessary to afford members of each sex privacy from the other sex"); Faulkner, 10 F.3d at 232 (noting "society's undisputed approval of separate public restrooms for men and women based on privacy concerns"). The privacy and safety concerns raised by Defendants are significant, and this is particularly so as they pertain to the protection of minors. See, e.g., Beard, 402 F.3d at 604 ("Students of course have a significant privacy

interest in their unclothed bodies."). At the hearing on the present motion, Plaintiffs acknowledged that the State has a legitimate interest in protecting the privacy of its citizens, particularly minors and students, and that sex-segregated bathrooms, showers, and other similar facilities serve this interest. (See Doc. 103 at 15–19.)

***27** But transgender individuals are not exempted from such privacy and safety rights. The current record indicates that many public agencies have become increasingly open to accommodating the interests of transgender individuals as society has evolved over time. (See, e.g., Doc. 22-19 ¶¶ 8–9.) This practice of case-by-case accommodation, while developing, appears to have gained acceptance in many places across North Carolina over the last few years. (See, e.g., Doc. 22-4 ¶ 15; Doc. 22-8 ¶ 19; Doc. 22-9 ¶¶ 15, 19–20.) And the preliminary record contains uncontested evidence that these practices allowed the individual transgender Plaintiffs to use bathrooms and other facilities consistent with their gender identity for an extended period of time without causing any known infringement on the privacy rights of others. (See Doc. 22-4 ¶ 30; Doc. 22-8 ¶ 25; Doc. 22-9 ¶ 20.)

In fact, rather than protect privacy, it appears at least equally likely that denying an injunction will create privacy problems, as it would require the individual transgender Plaintiffs, who outwardly appear as the sex with which they identify, to enter facilities designated for the opposite sex (e.g., requiring stereotypically-masculine appearing transgender individuals to use women's bathrooms), thus prompting unnecessary alarm and suspicion. (See, e.g., Doc. 22-9 ¶ 28 (describing one student's experiences being "screamed at, shoved, slapped, and told to get out" when using bathrooms that did not match the student's gender identity.) As counsel for Governor McCrory candidly acknowledged, even if Part I remains in effect, "some transgender individuals will continue to use the bathroom that they always used and nobody will know." (Doc. 103 at 70.)

Finally, the argument for safety and privacy concerns proffered by the State as to transgender users are somewhat undermined here by the structure of Part I itself. Unlike the policy in G.G., which contained no exceptions, Part I permits some transgender individuals to use bathrooms, showers, and other facilities that do not correspond with their external genitalia. This is so because some States do not permit transgender individuals to change their birth certificates even after having sex reassignment surgery, see, e.g., Tenn. Code Ann. § 68-3-203(d), while others allow modification of birth certificates without such surgery, see, e.g., Md. Code, Health-Gen § 4-211. In this regard, Part I's emphasis on birth certificates elevates form over substance to some degree as to some transgender users.

As for safety, Defendants argue that separating facility users by biological sex serves prophylactically to avoid the opportunity for sexual predators to prey on persons in vulnerable places. However, the individual transgender Plaintiffs have used facilities corresponding with their gender identity for over a year without posing a safety threat to anyone. (See Doc. 22-4 ¶¶ 15, 30; Doc. 22-8 ¶¶ 19, 25; Doc. 22-9 ¶¶ 15, 19–20.) Moreover, on the current record, there is no evidence that transgender individuals overall are any more likely to engage in predatory behaviors than other segments of the population. In light of this, there is little reason to believe that allowing the individual transgender Plaintiffs to use partitioned, multiple occupancy bathrooms corresponding with their gender identities, as well as UNC to seek to accommodate use of similar showers and changing facilities, will pose any threat to public safety, which will continue to be protected by the sustained validity of peeping, indecent exposure, and trespass laws. And although Defendants argue that a preliminary injunction will thwart enforcement of such safety laws by allowing non-transgender predators to exploit the opportunity to cross-dress and prey on others (Doc. 55 at 4–5), the unrefuted evidence in the current record suggests that jurisdictions that have adopted accommodating bathroom access policies have not observed subsequent increases in crime, (see Doc. 22-10 at 6–10; Doc. 22-13).

***28** Finally, the court acknowledges that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). In this case, however, this concern lessened by the continued validity of Parts II and III of HB2, which serve the State's ostensible goal of preempting the Charlotte ordinance and

maintaining the law as it existed before March 2016. The State acknowledges that it had no problems with that pre-2016 legal regime. (Doc. 103 at 65–71, 74–90, 96–102.)

In sum, the court has no reason to believe that an injunction returning to the state of affairs as it existed before March 2016 would pose a privacy or safety risk for North Carolinians, transgender or otherwise. It is in the public interest to enforce federal anti-discrimination laws in a fashion that also maintains long-standing State laws designed to protect privacy and safety. On this record, allowing UNC to permit the transgender Plaintiffs to use multiple occupancy, partitioned restrooms corresponding to their gender identity, and to seek flexible accommodation for changing rooms and other facilities, therefore serves the public interest.

III. CONCLUSION

Plaintiffs' motion seeks to preliminarily enjoin Defendants "from enforcing Part I of House Bill 2." (Doc. 21 at 3; see also Doc. 22 at 44–45.) As a result, the issue currently before the court is whether Title IX or the Constitution prohibits Defendants from enforcing HB2's exclusion of transgender individuals from multiple-occupancy bathrooms, showers, and other similar facilities under all circumstances based solely on the designation of "male" or "female" on their birth certificate.

For the reasons stated, applicable Fourth Circuit law requires that DOE's guidance defining "sex" to mean gender identity be accorded controlling weight when interpreting DOE's Title IX regulations. Because Part I of HB2 prevents transgender individuals from using multiple-occupancy bathrooms and similar facilities based solely on the gender listed on their birth certificate, it necessarily violates DOE's guidance and cannot be enforced. As for Plaintiffs' constitutional claims, Plaintiffs have not made a clear showing they are likely to succeed on their Equal Protection claim, and the court reserves ruling on the Due Process claims pending further briefing from the parties.

The Title IX claim currently before the court is brought by the individual transgender Plaintiffs on their own behalf; the current complaint asserts no claim for class relief or any Title IX claim by ACLU-NC on behalf of its members. (Doc. 9 ¶¶ 235–243.) [39] Consequently, the relief granted now is as to the individual transgender Plaintiffs.

39 Although Plaintiffs moved to amend their complaint after the hearing on the present motion (Doc. 116), the motion to amend has not been resolved.

The individual transgender Plaintiffs have not sought an order guaranteeing them access to any specific facility. The court's order will return the parties to the status quo ante existing immediately before the passage of Part I of HB2, wherein public agencies accommodated the individual transgender Plaintiffs on a case-by-case basis, rather than applying a blanket rule to all people in all facilities under all circumstances. Plaintiffs have no complaint with UNC's pre-HB2 policy; Defendants, in turn, do not contend that it caused any significant privacy or safety concerns. Such an order is also consistent with the DOE opinion letter, which states that schools "generally" must treat students consistent with their gender identity. (Doc. 23-29 at 3.) As a result, the court does not decide how Defendants should apply DOE's guidance in all situations and circumstances. Suffice it to say that for the time being, UNC is not constrained from accommodating the individual transgender Plaintiffs through appropriate means that accord with DOE guidance and recognize the unique circumstances of each case, just as it apparently did for several years prior to HB2. In doing so, UNC should be mindful of North Carolina's trespass, peeping, and indecent exposure laws, which protect the privacy and safety of all citizens, regardless of gender identity. In short, UNC may not apply HB2's one-size-fits-all approach to what must be a case-by-case inquiry. [40]

40 To the extent the individual transgender Plaintiffs assert an unqualified right to use all multiple occupancy bathrooms, showers, and changing rooms under all circumstances (see Doc. 9 at 56), that issue is not currently before the court. Whether

it will be at a later stage in this case, or as part of the United States' motion for preliminary injunction in the 425 case, remains for later determination.

***29** IT IS THEREFORE ORDERED that Plaintiffs' motion for preliminary injunction (Doc. 21) is GRANTED IN PART and DENIED IN PART, as follows:

(1) The individual transgender Plaintiffs' motion for preliminary injunction on their Title IX claim is GRANTED. The University of North Carolina, its officers, agents, servants, employees, and attorneys, and all other persons acting in concert or participation with them are hereby ENJOINED from enforcing Part I of HB2 against the individual transgender Plaintiffs until further order of the court.

(2) Plaintiffs' motion for preliminary injunction on their Equal Protection claim is DENIED without prejudice to a final determination on the merits.

(3) The court reserves ruling on Plaintiffs' motion for preliminary injunction on their Due Process claims. If Plaintiffs wish to submit additional briefing on these claims, they must do so no later than September 9, 2016. Any response briefs must be filed no later than September 23, 2016, and any reply briefs must be filed no later than October 7, 2016. Although the parties may address any matter relevant to the Due Process claims in their briefs, the court is particularly interested in the following questions: (1) whether the sex on an individual's birth certificate is freely available in public records in North Carolina and other States and, if so, whether individuals have a Due Process privacy interest in such information; and (2) the degree to which a law in general, and Part I in particular, must burden a fundamental right in order to warrant strict scrutiny. Plaintiffs' initial brief and any response briefs may not exceed twenty pages per side, and Plaintiffs' reply may not exceed ten pages. If the parties desire additional oral argument regarding Plaintiffs' Due Process claims, any hearing will be combined with the consolidated preliminary injunction hearing and trial on the merits in the 425 case.

All Citations

--- F.Supp.3d ----, 2016 WL 4508192

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EXHIBIT B

***Kastl v. Maricopa Cty. Cmty. Coll. Dist.*,**

2004 WL 2008954 (D. Ariz. 2004)

2004 WL 2008954
Only the Westlaw citation is currently available.
United States District Court,
D. Arizona.

Rebecca E. KASTL, Plaintiff,
v.
MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT, Defendant.

No. Civ.02–1531PHX–SRB.
|
June 3, 2004.

Attorneys and Law Firms

Randi A. Barnabee, Deborah A Smith & Co. LPA, Northfield Ctr, OH, for Plaintiff.

Joseph T. Clees, Esq., Pavneet Singh Uppal, Leah S. Smith, Bryan Cave LLP, Phoenix, AZ, for Defendant.

ORDER

BOLTON, J.

***1** This matter arises out of the termination of the employment of Plaintiff Rebecca E. Kastl ("Ms.Kastl") by Defendant Maricopa County Community College District ("MCCCD"). Plaintiff, who has been diagnosed with Gender Identity Disorder (GID), alleges that she is a biological female incorrectly assigned to the male sex at birth. She [1] claims that Defendant required her to use the men's restroom facilities and subsequently terminated her when she refused to comply. She alleges that this policy and her discharge constituted unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.,* and Title IX of the Civil Rights Act of 1991, 20 U.S.C. §§ 1681 *et seq* . She also alleges that these actions by Defendant demonstrate a failure to reasonably accommodate her disability, GID, and therefore violate the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.* Finally, Plaintiff contends that the actions of Defendant occurred under color of law and in violation of 42 U.S.C. section 1983 (Section 1983).

1 In conformity with Plaintiff's factual allegation that she is biologically female, the Court will refer to her by feminine pronouns.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant moves to dismiss Plaintiff's Second Amended Complaint in its entirety, arguing that Plaintiff cannot state a claim for relief under Title VII or Title IX because the designation of restroom use on the basis of possession of male or female genitalia is not unlawful sex discrimination. Defendant further contends that Plaintiff has failed to state sufficient factual and/or legal bases for her claims under the ADA and Section 1983. For the reasons that follow, Defendant's Motion to Dismiss (Doc. 30) is granted in part and denied in part.

I. BACKGROUND

Plaintiff Kastl was employed by Defendant MCCCD as an adjunct faculty member at Estrella Mountain Community College and she was also enrolled as a student of MCCCD. From birth, when Plaintiff was designated male following a neonatal genital examination, through the beginning of her employment by Defendant, Plaintiff lived and presented herself as a man. In or about July 2000, two psychologists diagnosed Plaintiffs with GID. [2] Since January 2001, Plaintiff

has lived and presented herself as a woman, and in February 2001, Plaintiff's personal physician determined her to be biologically female. Plaintiff then legally changed her traditionally masculine name to a traditionally feminine name and legally obtained a new Arizona driver's license indicating her sex as female.

2 Gender Identity Disorder, sometimes referred to as gender dysphoria, is defined as "the desire to be, or the insistence that one is, of the other sex," combined with "persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* § 302.9 (2000).

Plaintiff continued to work and attend class at MCCCD during her transition from a male to a female presentation. Following the receipt of objections to Plaintiff's use of the women's restroom made by some minor students attending classes at MCCCD, Defendant issued a new restroom policy on October 5, 2001 that required Plaintiff and another transsexual [3] faculty member to use the men's restroom facilities until each provided proof that she had completed genital correction surgery, also known as sex reassignment surgery (SRS). [4] Defendant rejected Plaintiff's state-issued driver's license as proof of her female sex, pronouncing it "inconclusive and irrelevant." Plaintiff expressed to Defendant several other objections to the policy, including her fear of serious bodily harm as a result of usage of the men's restroom, invasion of privacy concerns, and selective enforcement of the policy's proof requirement. When Defendant discounted each concern despite Plaintiff's protestations, she refused to abide by the new policy. Defendant then terminated Plaintiff's employment on December 5, 2001.

3 Transsexualism, as defined by Plaintiff, is a general term referring to the desire to change sex and gender. "[S]ince transsexualism is a condition which results from GID's more acute manifestations, *a fortiori* all transsexuals must be presumed to suffer seriously from GID." (Pl.'s Second Amended Compl. at 10.)

4 Plaintiff has not pled facts which indicate whether or not she has had SRS.

***2** Plaintiff filed suit in this Court on August 12, 2002 following the receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC). In the wake of several amendments to Plaintiff's initial complaint and Plaintiff's response to this Court's Order for a More Definite Statement, Defendant filed its pending Motion to Dismiss Plaintiff's Second Amended Complaint on October 24, 2003.

II. LEGAL STANDARDS AND ANALYSIS

Defendant moves to dismiss Plaintiff's Second Amended Complaint in its entirety pursuant to Fed.R.Civ.P. 12(b)(6). Dismissal for insufficiency of a complaint is proper if, on its face, the complaint fails to state a claim. *Lucas v. Bechtel Corp.,* 633 F.2d 757, 759 (9th Cir.1980). A Rule 12(b)(6) dismissal for failure to state a claim can be based on either: (1) the lack of a cognizable legal theory; or (2) insufficient facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir.1990); *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 534 (9th Cir.1984).

In determining whether a complaint states a valid claim, all allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754 (9th Cir.1994). The complaint should not be dismissed unless it appears beyond doubt that there is "no set of facts" which would entitle the plaintiff to relief under the asserted claim. *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *see also Balistreri,* 901 F.2d at 701.

A. Title VII

Defendant allegedly violated Title VII's prohibition of sex discrimination when it required Plaintiff, a biological female, to use the men's restroom until such time as she provided proof that she did not have male genitalia, and subsequently terminated Plaintiff upon her refusal to comply with this directive. Rather than operating from the set of facts offered by Plaintiff in her complaint, particularly the allegation that she is biologically female, Defendant focuses its arguments on the reasons why a biological male presenting as a female legitimately may be required to use a men's restroom. Such arguments are inapposite where the Court must take the allegations of material fact in Plaintiff's Second Amended Complaint as true. *Clegg,* 18 F.3d at 754. For the purposes of this 12(b)(6) motion to dismiss, Plaintiff is a biological female. [5] The pertinent inquiry therefore asks not whether Defendant must allow biological males to use the women's restroom, but whether Title VII permits an employer to require a biologically female employee believed to possess stereotypically male traits to provide proof of her genitalia or face consignment to the men's restroom. The Court finds that these allegations state a claim under Title VII's prohibition on sex discrimination.

5 Defendant is careful not to admit that Plaintiff is biologically female. It contends that statements that Plaintiff was born with male genitalia and that Plaintiff is biologically female conflict such that no factfinder could render a verdict in favor of Plaintiff. Plaintiff argues, however, that designation as a biological female and possession of male genitalia are not mutually exclusive states. The Court cannot say that there is no set of facts which might support this conclusion. Medical evidence suggests that the appearance of genitals at birth is not always consistent with other indicators of sex, such as chromosomes. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology,* 41 Ariz. L.Rev. 265, 271–74 (1999); *see also* Phyllis Randolph Frye, *The International Bill of Gender Rights vs. the Cider House Rules: Transgenders Struggle with the Courts over What Clothing They Are Allowed to Wear on the Job, Which Restrooms They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex,* 7 Wm. & Mary J. Women & L. 133, 167–69 (2000) (discussing Androgen Insensitivity Syndrome, which results in the pairing of female genitals and an XY chromosome pattern, and citing medical evidence of at least seven chromosome patterns other than XX and XY); Jenifer M. Ross–Amato, *Transgender Employees & Restroom Designation—*Goins v. West Group, Inc., 29 Wm. Mitchell L.Rev. 569, 593 n.147 (2002).

It is well settled that Title VII's prohibition on sex discrimination encompasses discrimination against an individual for failure to conform to sex stereotypes. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 251, 109 S.Ct. 1775, 1791, 104 L.Ed.2d 268 (1989), *Nichols v. Azteca Restaurant Enterprises, Inc.,* 256 F.3d 864, 874 (9th Cir.2001) (holding that harassment for failure to conform to a male stereotype violates Title VII), *Schwenk v. Hartford,* 204 F.3d 1187, 1201 (9th Cir.2000) ("Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.") "We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group," *Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. at 1791, whether that stereotype relates to an individual's behavior, appearance, or anatomical features. The presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision unless the possession of that anatomy (as distinct from the person's sex) is a bona fide occupational qualification (BFOQ). [6] Therefore, neither a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait.

6 The BFOQ defense permits an employer to discriminate on the basis of sex where sex is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-(2)(e)(1). Defendant does not contend that Plaintiff's sex is a BFOQ, nor does it claim that possession of particular genitals is necessary to the performance of her job.

***3** Application of this rule may not be avoided merely because restroom availability is the benefit at issue. *See Baker v. John Morrell & Co.,* 220 F.Supp.2d 1000, 1011, 1014 (N.D.Iowa 2002) (holding that denial of equal access to bathroom facilities alters the terms and conditions of employment); *cf. DeClue v. Central Illinois Light Co.,* 223 F.3d 434, 436 (7th Cir.2000) (discussing absence of restrooms, which deters women from employment, as potential violation of Title VII). As Defendant notes, courts have recognized the legitimacy of restrooms segregated on the basis of sex. *Cf. Goins v. West Group,* 635 N.W.2d 717, 723 (Minn.2001) (noting that designation of restroom use according to "biological gender" is a traditional and accepted practice); *Norwood v. Dale Maint. Sys., Inc.,* 590 F.Supp. 1410, 1421 (N.D.Ill.1984) (acknowledging fundamental nature of concerns about bodily privacy with respect to the opposite sex); *Brooks v. ACF Indus., Inc.,* 537 F.Supp. 1122, 1128–32 (S.D.W.Va.1982) (recognizing privacy interests of employees in maintaining single-sex restrooms). However, to create restrooms for each sex but to require a woman to use the men's restroom if she fails to conform to the employer's expectations regarding a woman's behavior or anatomy, or to require her to prove her conformity with those expectations, violates Title VII. Thus, Plaintiff has alleged a set of facts sufficient to create an issue for trial.

Defendant argues that Plaintiff fails to state a claim for sex discrimination because Defendant's restroom policy segregates restroom use by genitalia, not by sex. Segregating restroom use by genitalia is permissible, it maintains, and in its view the simple enforcement of such a legitimate *genitalia*-based policy cannot constitute *sex* discrimination. Regardless of the merits of this argument, [7] Defendant has merely created a factual dispute regarding the nature of its restroom policy. Plaintiff's pleadings describe a policy which mandated her use of the "men's restroom," not the "restroom for individuals with male genitalia." Plaintiff contends that she was prevented from using the restroom designated for the female sex. Whether Defendant's policy actually segregated restroom use by sex or by genitalia is not for the Court to decide at this stage; neither party has presented evidence of the policy itself, and any such evidence properly would be considered by a finder of fact. Defendant's Motion to Dismiss must be denied with respect to Plaintiff's Title VII claim. [8]

7 The Court notes that Defendant exclusively cites cases legitimizing sex-based segregation of restrooms in support of its genitalia-based policy, despite its attempts to distinguish the two types of policies from each other.

8 Defendant has also argued that Plaintiff failed to state a claim for constructive discharge under Title VII. Despite Plaintiff's limited use of the phrase "constructive discharge" in her Second Amended Complaint, the majority of her references to the cessation of her employment unambiguously state that Defendant "terminated" her employment. (Pl.'s Second Amended Compl. ¶¶ 1, 24, 32.) A constructive discharge occurs when a person *resigns* his or her job under circumstances in which a reasonable person would feel that the conditions of employment have become intolerable. *Draper v. Couer Rochester, Inc.,* 147 F.3d 1104, 1110 (9th Cir.1998); *MacLean v. State Dept. of Educ.,* 195 Ariz. 235, 986 P.2d 903, 912 (Ariz.Ct.App.1999). Plaintiff has failed to establish that she was not fired but that she resigned her employment, a crucial element of a constructive discharge claim. Therefore, to the extent that she intended to pursue a claim of sex discrimination via constructive discharge, not termination, her claim is dismissed.

B. Title IX

Defendant's arguments in favor of dismissal of Plaintiff's Title IX sex discrimination claim mirror those offered with respect to Plaintiff's Title VII claims. By Defendant's own admission, the same standards apply to discrimination claims brought under Titles VII and IX. *See Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 75, 112 S.Ct. 1028, 1037, 117 L.Ed.2d 208 (1992); *see also Weinstock v. Columbia University,* 224 F.3d 33, 42 (2d Cir.2002). Therefore, the reasons

previously cited by the Court for the denial of Defendant's Motion to Dismiss with respect to Plaintiff's Title VII claims apply with equal vigor to the denial of the Motion to Dismiss with respect to Plaintiff's Title IX claims.

C. ADA

***4** Plaintiff's claims under the ADA center on Defendant's alleged failure to accommodate her disability (whether established or merely perceived) during her employment and Defendant's alleged termination of her employment on the basis of that disability. Defendant urges dismissal of the ADA claim on three grounds. First, Defendant argues that Plaintiff's ADA claim must be dismissed to the extent that Plaintiff seeks to recover for Defendant's failure to accommodate any perceived disability, rather than an established disability, because the ADA requires employers to accommodate only employees who are in fact disabled. Second, Defendant maintains that its failure to accommodate Plaintiff's actual disability, GID, does not violate the ADA since gender identity disorders not resulting from physical impairments are specifically excluded from the coverage of the Act. Lastly, should the Court find that Plaintiff's GID falls within the impairments covered by the Act, Defendant suggests that Plaintiff's allegations still must fail to state a claim, for failure to accommodate an impairment is only unlawful where the impairment substantially limits a major life activity, and no such limitation has been alleged. The Court will address each argument in turn.

The ADA prohibits employer discrimination against employees on the basis of disability. 42 U.S.C. §§ 12101 *et seq.* According to the ADA, an employee is disabled if he has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," has "a record of such an impairment," or is "regarded as having such an impairment." 42 U.S.C. §§ 12102(A)-(C). While employers are subject to legal action for discriminating against both employees who are impaired and those whom the employer merely regards as impaired, 42 U.S.C. § 12112, employers are only required to *accommodate* the disabilities of employees falling into the former category. *Kaplan v. City of North Las Vegas,* 323 F.3d 1226, 1232 (9th Cir.2003); *see also Webber v. Strippit,* 186 F.3d 907, 916–17 (8th Cir.1999). Although employers might do well to assist employees whose impairments don't meet the "substantial limitation" test, the Ninth Circuit has recognized that an employer's limited resources might not support the accommodation of every employee. *Kaplan,* 323 F.3d at 1232. Thus, Plaintiff's claim arising out of Defendant's alleged failure to accommodate her as a "regarded as" employee must be dismissed for failure to state a claim, although her claim of discriminatory termination could survive Defendant's Motion to Dismiss as a matter of law even if Defendant only regarded her as disabled. [9]

9 In order for Plaintiff's claim for discriminatory termination as a "regarded as" employee to survive, Plaintiff must allege that Defendant not only regarded her as impaired, but impaired in a way which substantially limited a major life activity. *Sutton v. United Airlines, Inc.,* 527 U.S. 471, 489, 119 S.Ct. 2139, 2149–50, 144 L.Ed.2d 450 (1999). Plaintiff's ADA claim appears to be limited to a failure to accommodate her; however, to the extent that she also intends to assert an ADA claim for her termination, she has not alleged that Defendant regarded her as an employee substantially limited in her ability to work. She argues that Defendant believed her to be a transsexual, *a fortiori* regarding her as disabled. Contrary to Plaintiff's assertion, the leap from recognizing an individual as a transsexual to believing that individual to be disabled is by no means automatic. *Cf. Gorbitz v. Corvilla, Inc.,* 196 F.3d 870, 882 (7th Cir.1999) (finding that employer's knowledge of auto accident and resulting medical appointments was insufficient to show that employer regarded employee as disabled). Plaintiff has failed to allege that Defendant believed her transsexualism rendered her substantially limited in her ability to work. She states only that Defendant's perception of her as disabled led to a substantial limitation of her ability to work (Pl.'s Second Amended Compl. ¶ 38). Therefore, any claim pled by Plaintiff with respect to Defendant's termination of her as a "regarded as" employee must be dismissed for insufficient factual allegations.

Plaintiff alleges not only that Defendant regarded her as impaired, but also, in the alternative, that she meets the definition of disability under section 12102(A). Her GID, she argues, is a physical impairment which substantially limits her ability to maintain employment. Under this theory, Defendant acted unlawfully when it failed to accommodate her actual disability and terminated her on the basis of that disability. As Defendant points out, transsexualism and "gender identity disorders not resulting from physical impairments" are specifically excluded from the definition of disability by statute. 42 U.S.C. § 12211(b)(1). Assuming *arguendo* that Plaintiff's GID is the result of a physical impairment, and would therefore fall within the ADA's coverage, Plaintiff still must allege that her GID substantially limits at least one major life activity. *Toyota Motor Mfg., Kentucky, Inc. v. Williams,* 534 U.S. 184, 195, 122 S.Ct. 681, 690, 151 L.Ed.2d 615 (2002), *Holihan v. Lucky Stores, Inc.,* 87 F.3d 362, 365–66 (9th Cir.1996). Plaintiff concedes that she "made no claim to have had any disability which would substantially limit her ability to earn a living wage until such time as Defendant regarded her as having a gender identity-related disability and terminated her employment," (Pl.'s Mem. in Opp. to Def.'s Mot. to Dismiss Pl.'s Second Amended Compl. at 16) yet attempts to conjure a substantial limitation out of Defendant's actions, rather than her own condition. Defendant's act of termination created Plaintiff's limitation, she argues, implying that her inability to retain her position with Defendant equates to a substantial limitation upon her ability to maintain any employment whatsoever.

***5** The Court must reject this argument as a matter of law. In order for an individual to be substantially limited in the major life activity of working, her impairment must prevent her from working a class of jobs or a range of jobs in different classes. *Toyota Motor Mfg.,* 534 U.S. at 200, 122 S.Ct. at 693, *citing Sutton,* 527 U.S. at 492, 119 S.Ct. at 2139; *Holihan,* 87 F.3d at 366, *citing* 29 C.F.R. § 1620.3(j)(3); *see also Dutcher v. Ingalls Shipbuilding,* 53 F.3d 723, 727 (5th Cir.1995). Plaintiff neglects to explain how Defendant's refusal to accommodate her or retain her as an employee bars her from other similar work, and the Court fails to see how a single employer's reaction to a physical impairment could alter the nature or severity of the impairment itself. Since Plaintiff has not alleged substantial limitation in her ability to work, [10] her ADA claim based upon actual disability must be dismissed.

10 Despite the parties' extensive briefing on the issue, the Court finds it unnecessary to reach whether Plaintiff's GID constitutes a physical impairment within the coverage of the ADA, or whether it would be excluded as transsexualism under 42 U.S.C. section 12211(b)(1).

D. Section 1983

To state a claim under 42 U.S.C. section 1983, a plaintiff must assert (1) that a right secured by the Constitution or laws of the United States was violated and (2) that the alleged violation was committed by a person acting under color of state law. *Jones v. Williams,* 297 F.3d 930, 934 (9th Cir.2002); *Balistreri,* 901 F.2d at 699. Plaintiff alleges that her rights to substantive and procedural due process, privacy, freedom from unreasonable search and seizure, security, equal protection, and freedom of speech and self-expression have been violated. The parties do not dispute that the acts in question were committed under color of law. Thus, so long as Plaintiff has adequately alleged the violation of constitutionally-protected rights, her claims survive under Rule 12(b)(6).

1. Substantive Due Process and the Right to Privacy

By requiring Plaintiff to provide proof of sex reassignment surgery before granting permission for her to use the women's restroom, Defendants allegedly violated Plaintiff's fundamental right to privacy. The right to privacy is derivative of the Fourteenth Amendment's guarantee of substantive due process, among other constitutional provisions, although it is not expressly guaranteed by the Constitution. *See Whalen v. Roe,* 429 U.S. 589, 598–99 n. 23–25, 97 S.Ct. 869, 876 n. 23–25, 51 L.Ed.2d 64 (1977). It has been held to encompass information about one's medical conditions, *Yin v. California,* 95 F.3d 864, 870, 870 n. 11 (9th Cir.1996), *Doe v. City of New York,* 15 F.3d 264, 267 (2d Cir.1994), including transsexualism, *Powell v. Schriver,* 175 F.3d 107, 111–12 (2d Cir.1999), information about sexual preference and orientation, *Hirschfeld v. Stone,* 193 F.R.D. 175, 186 (S.D.N.Y.2000), and one's body itself, *York v. Story,* 324 F.2d 450, 455 (9th Cir.1963) ("We

cannot conceive of a more basic subject of privacy than the naked body."). More specifically, it includes the right to privacy with respect to one's genitalia. *See Granger v. Klein,* 197 F.Supp.2d 851, 871 (E.D.Mich.2002) (recognizing "the private nature of the genital region" in finding that allegations of publication by the government of a photo displaying a high school student's genitals state a claim for constitutional invasion of privacy). Defendant, in demanding details about Plaintiff's genitalia, has implicated Plaintiff's Fourteenth Amendment right to privacy in personal information. *Whalen v. Roe,* 429 U.S. at 599–600, 97 S.Ct. at 869 (describing two kinds of privacy interests: informational privacy and decisional privacy); *see also Doe v. City of New York,* 15 F.3d at 267.

***6** As a matter of law, however, Plaintiff's right to privacy may be legitimately restricted if the government has a compelling state interest in doing so. *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 929, 112 S.Ct. 2791, 2847, 120 L.Ed.2d 674 (1992) (plurality). Defendant argues that it has a compelling interest in enforcing sex-segregated use of its restrooms in order to preserve the safety and privacy of all users. While Defendant may have an interest in maintaining its restroom designations, *see, e.g., Norwood,* 590 F.Supp. at 1421; *Brooks,* 537 F.Supp. at 1128–32, Defendant's demand for information regarding the state of Plaintiff's genitalia is neither necessary nor narrowly tailored to maintaining these sex-based designations. *Casey,* 505 U.S. at 929, 112 S.Ct. at 2847 (requiring that restriction be both necessary and narrowly tailored to the achievement of the compelling interest). Plaintiff has stated that she is a biological woman. She lives and presents herself as a woman, and offered her state-issued driver's license to Defendant as proof of her biological sex, yet Defendant allegedly refused her access to the women's restroom until she provided further proof that she did not possess male genitalia. Defendant is alleged to have required such proof only of Plaintiff and one other individual, also a transsexual. Were this information truly necessary to preserve the single-sex nature of Defendant's restrooms and the safety and privacy of their users, surely it would be sought from each person prior to granting restroom access.

In addition, Defendant's chosen method of ensuring compliance with its sex-based policy is not narrowly tailored. As discussed earlier, genitalia is not the sole indicator of sex. *See infra* note 5. While information concerning an individual's genitalia may assist Defendant in assigning that person to the restroom of a particular sex, reliance on that information to the exclusion of other offers of proof might lead to inaccurate determinations of sex. Obtaining information about Plaintiff's genitalia when her sex has otherwise been established therefore cannot be said to be narrowly tailored to the Defendant's interest in determining sex for restroom use purposes. Since the Court cannot say that no set of facts exists which would state a claim for violation of Plaintiff's fundamental right to privacy, Defendant's Motion to Dismiss is denied with respect to Plaintiff's Section 1983 privacy claim.

2. Fourth Amendment Search and Seizure

Plaintiff has conceded that her claim under the Fourth Amendment is without merit; accordingly, the Court will grant Defendant's Motion to Dismiss with respect to this claim. Despite the Court's admonition in its order of September 19, 2003 (Doc. 24) that Plaintiff would have "one last chance" to amend her complaint, Plaintiff seeks to amend her complaint yet again to include a claim for retaliation in violation of Title VII, but does so via a single sentence buried on page fourteen of her response to Defendant's Motion to Dismiss. Absent appropriate briefing on the issue of amendment, the Court denies Plaintiff's request. Should Plaintiff desire to amend her complaint, she must move to do so in accordance with the rules of civil procedure and the local rules of this District, including Local Rule 1.10(b), so that Defendant may have the opportunity to respond to Plaintiff's points and authorities and Plaintiff may have the opportunity to reply.

3. Procedural Due Process and the Right to Be Secure

***7** Plaintiff's Second Amended Complaint lists deprivation of administrative process by Defendant's restroom policy among the bases for her Section 1983 claims. The Court intreprets this as claim for violation of her procedural due process rights. In order to establish such a claim, Plaintiff must allege a deprivation of a life, liberty, or property interest protected by the Constitution. *Wedges/Ledges of California, Inc., v. City of Phoenix, Arizona,* 24 F.3d 56 (9th Cir.1994). According to Defendant, Plaintiff has failed to make any such allegation. Plaintiff has neglected altogether to respond to

Defendant's arguments regarding procedural due process, leaving the Court to speculate whether her cursory allegations were intended to state a claim for deprivation of her right to continued employment, a right to use the restroom assigned to her sex, or some other undefined right. Unable to determine the nature of any alleged deprivation suffered by Plaintiff, the Court must dismiss her procedural due process claims.

Equally obtusely, Plaintiff alleges that Defendant's policy infringed on her "right to be secure in her person" by implementing a policy which subjected her to risk of bodily harm. The Court is unable to discern the constitutional basis for such a claim, nor has Plaintiff seen fit to explain the origins of such a right. To the extent that Plaintiff seeks to assert her right to be secure against unreasonable search and seizure as created by the Fourth Amendment, the Court dismisses such a claim, for Plaintiff has already conceded that any Fourth Amendment claim is misstated. To the extent that Plaintiff intends to claim the violation of another ambiguous right, it is dismissed for failure to state a claim.

4. Equal Protection

Plaintiff alleges that Defendant's restroom policy violated her right to equal protection of the laws guaranteed by the Fourteenth Amendment, construing Defendant's decision to require proof of biological sex only from its transsexual employees as a violation of this right. Discrimination on the basis of failure to conform with sex or gender stereotypes not only constitutes a violation of Title VII under *Price Waterhouse* and its progeny, she argues, but also rises to the level of deprivation of the equal protection of the laws. Under Plaintiff's theory, Defendant's actions in response to her perceived nonconformity with their expectations of a woman's anatomy must be taken as discriminatory acts on the basis of her sex.

Rather than directly disputing the validity of this theory, Defendant argues that Plaintiff has alleged neither that similarly situated individuals were treated differently, nor that she is a member of a protected class. Defendant maintains that absent membership in a protected class or infringement of a fundamental right, Plaintiff's claims are subject to rational basis scrutiny. Furthermore, these claims cannot survive the Motion to Dismiss, according to Defendant, as Plaintiff has not alleged facts sufficient to overcome the presumption that the government's classifications are rational.

***8** The Court first addresses Defendant's contention that Plaintiff fails to allege treatment different than that of similarly situated individuals. Plaintiff alleges that only individuals who do not meet Defendant's expectations of sex and gender are subjected to demands of proof of their biological sex before receiving permission to use the restrooms designated for their sex; employees who conform to Defendant's sex stereotypes are not required to submit such proof. Subject to Defendant's restroom policy and therefore similarly situated are all those individuals who use Defendant's restroom facilities; contrary to Defendant's assertion, the universe of similarly-situated individuals is not limited to transsexuals who patronize Defendant's restrooms.

Defendant also suggests that Plaintiff has not alleged membership in a protected class. Plaintiff does not suggest that her status as a transsexual places her within such a class. [11] Instead, she seeks relief from discrimination as a biological woman who does not conform with Defendant's sex stereotypes. Classifications on the basis of sex are closely scrutinized. *United States v. Virginia,* 518 U.S. 515, 531, 116 S.Ct. 2264, 2274, 135 L.Ed.2d 735 (1996). Whether discrimination on the basis of nonconformity with sex stereotypes constitutes discrimination on the basis of sex for the purposes of equal protection claims, however, is an open question. [12]

11 Previous cases have held that transsexuals are not a protected class. *See Holloway v. Arthur Andersen & Co.,* 566 F.2d 659, 663 (9th Cir.1977). However, more recent jurisprudence recognizes that science may now support a finding that transsexuality, or gender identity disorder, is an "immutable characteristic determined solely by the accident of birth," and that classifications on that basis are suspect. *Brown v. Zavaras,* 63 F.3d 967, 971 (10th Cir.1995), *quoting Frontiero*

v. Richardson, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973). The Court declines to make any such finding in this case, in the absence of appropriate briefing on the issue.

12 The Supreme Court has held that discrimination against those who fail to conform with sex stereotypes constitutes discrimination on the basis of sex and gender for the purposes of Title VII, *Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. at 1791, but there is little indication of whether this form of discrimination also violates the equal protection clause.

For now, it will remain an open question, as this Court finds its answer unnecessary to the resolution of this motion; regardless of whether Defendant has discriminated against Plaintiff on the basis of her sex, its actions have created a classification which must be rationally related to a legitimate state interest in order to survive judicial scrutiny. *Romer v. Evans,* 517 U.S. 620, 631–32, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996); *Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 446, 105 S.Ct. 3249, 3257–58, 87 L.Ed.2d 313 (1985). Defendant argues that its policy protects the privacy and safety interests of its restroom users. Although the Court agrees that Defendant possesses a legitimate interest in protecting the privacy and safety of its patrons, see *Norwood,* 590 F.Supp. at 1421; *Brooks,* 537 F.Supp. at 1128–32, the Court fails to see, and Defendant fails to indicate, how the implementation of that policy in a manner which singles out nonconforming individuals, including transsexuals, for a greater intrusion upon their privacy is rationally related to such an interest.

Though government action may be upheld if its connection to a legitimate interest is tenuous or the action is unwise, where "the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." *Romer,* 517 U.S. at 632–33, 116 S.Ct. at 1627–28, *quoting Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 181, 101 S.Ct. 453, 462, 66 L.Ed.2d 368 (Stevens, J., concurring); *see also Cleburne,* 473 U.S. at 447, 105 S.Ct. at 3258. Plaintiff has alleged that the policy was created specifically in response to complaints about transsexuals, that only she and another transsexual were required to provide proof of biological sex in order to use the women's restrooms, that she was instructed to use the men's restroom if she could not or would not provide evidence that she lacked male genitalia, and that her proffer of her state-issued identification as evidence of her biological sex was rejected. Contrary to Defendant's suggestion that the justification for the policy is "readily apparent," the only justification of which the Court can conceive is one predicated on one or more of the following baseless assumptions: 1) transsexuals pose a greater risk to minors' and others' safety than any other group; 2) a biological woman can never have lived or presented herself as a man; and 3) the presence of a biological woman with male genitalia invades the privacy and/or threatens the safety of other women. Plaintiff has stated facts which overcome the presumption of rationality applied to government classifications and her Section 1983 equal protection claim therefore survives Defendant's Motion to Dismiss. *Wroblewski v. City of Washburn,* 965 F.2d 452, 460 (7th Cir.1992) (stating that a plaintiff must allege facts sufficient to overcome the presumption that the government's classifications are rational in order to survive a motion to dismiss).

5. First Amendment Freedom of Speech

***9** Defendant's policy, Plaintiff argues, violated her First Amendment right to freedom of speech by preventing her from using the women's restroom in response to her expression of her gender and change of gender. To state a prima facie claim against Defendant for violation of the First Amendment, Plaintiff must show: (1) that she engaged in protected speech; (2) that Defendant took adverse employment action; and 3) that her speech wholly or substantially motivated the adverse employment action. *Roe v. City of San Diego,* 356 F.3d 1108, 1112 (9th Cir.2004). Defendant disputes only the first element, contending that no protected speech is at issue, because Plaintiff's conduct relates to an entirely personal matter (gender or change of gender), and government employees are only entitled to protection of speech addressing a matter of public concern. The Court agrees that a public employee's speech must relate to a matter of public concern in order to enjoy the protections of the First Amendment in federal court, *Connick v. Myers,* 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). [13] *Cochran v. City of Los Angeles,* 222 F.3d 1195, 1200, 1201 (9th Cir.2000).

13 Before delving into these issues, however, the Court feels it necessary to address the threshold question of whether Plaintiff's alleged conduct qualifies as speech. Defendant does not challenge Plaintiff's classification of her conduct, which includes dressing in a typically female manner, as speech for the purposes of the First Amendment, nor does the Court place it outside the scope of First Amendment protection. At least one circuit has noted that the donning of traditionally female clothes by a male student at school constitutes protected expression of that student's female gender identity. *Zalewska v. County of Sullivan, New York,* 316 F.3d 314, 320 (2d Cir.2003) (citing with approval the case of *Doe ex rel. Doe v. Yunits,* 2000 WL 33162199 (Mass.Super.Ct. Oct. 11, 2000)). While the instant case differs to the extent that Plaintiff is a biological female wearing traditionally female clothes, her attire may be understood as an expression of her change in gender identity, as it is clearly understood as such by her employer and the restroom patrons who complained of her use of the women's restroom.

The Court, however, does not agree with Defendant's unsupported argument that expression of gender or change of gender is an issue of purely personal concern. In this circuit and others, public concern speech includes "almost *any* matter other than speech that relates to internal power struggles within the workplace." *Tucker v. State of California Dep't of Educ.,* 97 F.3d 1204, 1210 (9th Cir.1996) (emphasis in original). When determining whether speech deals with public or personal matters, Courts look to the content, context, and form of the speech to determine its nature. *Connick,* 461 U.S. at 147–48, 103 S.Ct. at 1690. Plaintiff's expression of her gender, unlike employee complaints about dress codes, scheduling, or other personnel issues, has its genesis not in the minutiae of workplace life, but in her everyday existence. For the last few years, Plaintiff has "lived continuously and without interruption as a person of the female gender in all aspects of daily life." (Pl.'s Second Amended Compl. at ¶ 13.) Expression of her gender and change of gender occurs both on and off the job, is directed to the public at large as well as her co-workers, and cannot be said to be "about" her employment. Therefore, Plaintiff has alleged sufficient facts for the Court to consider her expression public concern speech, and sufficient facts to state a claim for violation of the First Amendment. Defendant's Motion to Dismiss is denied with respect to Plaintiff's freedom of speech claim under Section 1983.

IT IS ORDERED denying Defendant's Motion to Dismiss (Doc. 30) with respect to Plaintiff's Title VII claim (Count I of Pl.'s Second Amended Compl.) and Plaintiff's Title IX claim (Count III of Pl.'s Second Amended Compl.).

IT IS FURTHER ORDERED granting Defendant's Motion to Dismiss with respect to Plaintiff's ADA claim (Count II of Pl.'s Second Amended Compl.).

***10** IT IS FURTHER ORDERED denying Defendant's Motion to Dismiss with respect to Plaintiff's Section 1983 claims (Count IV of Pl.'s Second Amended Compl.) for violation of her right to privacy, equal protection, and freedom of speech and granting Defendant's Motion to Dismiss with respect to Plaintiff's Section 1983 claims for violation of her Fourth Amendment right to freedom from unreasonable search and seizure, deprivation of administrative process (a procedural due process claim), and violation of Plaintiff's right to be secure.

IT IS FURTHER ORDERED that Defendant file its Answer within ten (10) days of the date of this order.

All Citations

Not Reported in F.Supp.2d, 2004 WL 2008954

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EXHIBIT C

Shorewood School District, Nondiscrimination Guidelines Related to Students who are Transgender and Students Nonconforming to Gender Role Stereotypes

SCHOOL DISTRICT OF SHOREWOOD

411 Guideline (2)

NONDISCRIMINATION GUIDELINES RELATED TO STUDENTS WHO ARE TRANSGENDER AND STUDENTS NONCONFORMING TO GENDER ROLE STEREOTYPES

The following guidelines relate to students who are transgender and students who do not conform to gender role stereotypes. This guideline serves two important purposes. First, significant portions of the guidelines facilitate compliance with the District's legal obligations. Under many circumstances, an individual's transgender or gender nonconforming status serves as a basis for legal rights and protections. Second, even where specific actions may not be required by applicable law, these guidelines are intended to further the District's local goals concerning the creation and maintenance of positive and supportive environments that appropriately provide for the education, safety, and welfare of all students.

While the guidelines established in this rule provide important direction to District employees, students, school families, and other persons, the guidelines do not anticipate every situation that might occur with respect to students who are transgender or gender nonconforming. When an issue or concern arises that is not adequately addressed by these guidelines, the needs and concerns of each student will be assessed on an individualized basis with consultation with parents/guardians where appropriate.

1. **Definitions**

   The definitions below are not intended to label students but rather to assist in understanding these guidelines and the expectations of staff in complying with District policies and legal requirements. Students might or might not use these terms to describe themselves.

   a. "**Transgender**" describes people whose gender identity is different than their biological sex assigned at birth.

   b. "**Gender identity**" is a person's deeply held sense or psychological knowledge of their own gender,

regardless of the biological sex they were assigned at birth. Everyone has a gender identity.

c. **"Gender nonconforming"** describes people whose gender expression differs from stereotypical or prevailing social expectations, such as "feminine" boys or "masculine" girls, or those who are perceived as androgynous.

d. **"Gender expression"** refers to the way a person expresses gender, such as clothing, hairstyles, activities or mannerisms.

2. **Discrimination, Harassment and Bullying**

The District prohibits all forms of discrimination against any transgender student or any student who does not conform to gender role stereotypes. Further, existing District policies that prohibit the harassment and bullying of students apply to any such actions that are based on a student's actual or perceived transgender status or gender nonconformity. This includes ensuring that any incident or complaint of discrimination, harassment, or bullying is given prompt attention, including taking appropriate corrective and/or disciplinary action. Complaints alleging discrimination, harassment or bullying based on a person's actual or perceived transgender status or gender nonconformity are to be handled in the same manner as other discrimination, harassment, and bullying complaints.

3. **Student Privacy, Names and Pronouns, and Official School Records**

Certain records and personally-identifiable information related to the student's gender status or biological sex may be protected not only as an education record, but also as a confidential medical or patient health care record. The District further recognizes that a student may have a strong individual interest in maintaining the privacy of his/her transgender status or his/her gender nonconforming presentation at school. Accordingly, in addition to adhering to all legal standards of confidentiality, school personnel with knowledge of any student's transgender status or gender nonconforming presentation are expected to treat that information as being particularly sensitive, even internally among

school staff and school officials. District employees are expected to refer any questions they may have about student privacy and possible disclosures of a student's transgender or gender nonconforming status to the Executive Director of Curriculum, Instruction and Pupil Services or designee. The District strongly encourages transgender and gender nonconforming students and their families to maintain ongoing communication with the school employees who are working directly with the student in order to address, among other issues, relevant privacy concerns and privacy preferences.

When referring to students at school and in connection with school activities, school personnel will normally use the student's legal name and the pronouns that correspond to the student's biological sex assigned at birth. However, an adult student or the parent/guardian of a minor student may determine the name and gender pronouns that school employees will use to address the student at school and in connection with school-related activities. A court-ordered name change or medical treatment or medical procedure is not required to initiate such a request. Upon being informed that a student intends to regularly use a particular name and/or prefers to be addressed using particular pronouns that correspond to the student's gender identity, school personnel are expected to respect that decision.

The District's approach of respecting a student's decision to regularly use a name and the pronouns that correspond to the student's gender identity is not a commitment to change all existing school records in order to reflect those preferences. Further, there may be situations where the District is required to use or report the legal name or biological sex of the student as that data is reflected in the District's official records. The extent to which official records of the District are modified will depend on a case-by-case evaluation of the information that the District receives and the type(s) of school records affected by the information that is received. For example, when a student changes his/her legal name and that change is sufficiently substantiated, the District will issue a high school transcript under the student's new legal name.

4. **Restroom and Locker Room Accessibility**

In most cases, a student who is transgender will be permitted to access the men's/women's segregated restrooms that correspond to the gender identity that the student consistently asserts at school and in other social environments. Any student who has a need or desire for increased privacy, regardless of the underlying reason, may be provided with access to a single-access restroom where such a facility is reasonably available, but no student shall be required to use such a restroom because of the student's transgender or gender nonconforming status.

If a transgender student makes any request regarding the use of locker rooms or any similar type of changing area, the request shall be assessed on a case-by-case basis with the goals of: (a) facilitating the transgender student's access to the District's physical education curriculum and other relevant programs; (b) ensuring adequate student privacy and safety; and (c) minimizing stigmatization of the transgender student. The physical layout of the facility and the degree of undress required when changing for the applicable activity are examples of factors that will be considered in making the arrangements. There is no absolute rule that, in all cases, will require a transgender student to access and use only the locker rooms and other changing areas that correspond to the biological sex that the student was assigned at birth.

Any student who has a need or desire for increased privacy, regardless of the underlying reason, may be provided (to the extent reasonably available) with a reasonable alternative changing area (for example, a nearby restroom stall with a door, an area separated by a curtain, a physical education teacher's office in the locker room, or a nearby single-access restroom) or provided with an alternative changing schedule. Any alternative arrangement should be provided in a way that gives adequate consideration to relevant privacy concerns.

These guidelines related to restrooms and changing areas generally assume that a student has a special concern or

is in some way uncomfortable with consistently using the facilities that correspond to the biological sex that the student was assigned at birth. However, all students have the option of consistently accessing the facilities that correspond to the biological sex that the student was assigned at birth. Accordingly, the District's willingness to address individualized concerns and requests that relate to restroom and changing area access does not mean that any student is required to establish an individualized arrangement or plan with the school.

5. **Participation in Physical Education Classes and Sports Activities**

A student who is transgender shall be permitted to participate in physical education classes and intramural sports in a manner consistent with the gender identity that the student regularly asserts at school and in other social environments.

Students who are transgender shall be permitted to participate in interscholastic athletics in a manner consistent with the requirements and policies of the Wisconsin Interscholastic Athletics Association (WIAA).

6. **Dress Codes**

Within the constraints of the District's dress code policy and dress codes adopted by the school, students may dress in accordance with their gender identity. School personnel shall not enforce a dress code more strictly against transgender and gender nonconforming students than other students.

CROSS REF.: 341.31, Human Growth and Development Instruction
347 Guideline, Guidelines and Confidentiality of Student Records
411.1, Student Harassment
443.1, Student Dress
443.71, Bullying
WIAA Transgender Athlete Policy

REVIEWED: February 25, 2014

EXHIBIT D

Monona Grove School District, Nondiscrimination Guidelines Related to Students Who Are Transgender and Students Nonconforming to Gender Role Stereotypes

MONONA GROVE SCHOOL DISTRICT

Administrative Rule 411 (2)

Nondiscrimination Guidelines Related to Students Who Are Transgender and Students Nonconforming to Gender Role Stereotypes

The following guidelines relate to students who are transgender and students who do not conform to gender role stereotypes, and they serve two important purposes. First, significant portions of the guidelines facilitate compliance with the District's legal obligations. Under many circumstances, an individual's transgender or gender nonconforming status serves as a basis for legal rights and protections. Second, even where specific actions may not be required by applicable law, these guidelines are intended to further the District's local goals concerning the creation and maintenance of positive and supportive environments that appropriately provide for the education, safety, and welfare of all students.

While the guidelines established in this rule provide important direction to District employees, students, school families, and other persons, the guidelines do not anticipate every situation that might occur with respect to students who are transgender or gender nonconforming. When an issue or concern arises that is not adequately addressed by these guidelines, the needs and concerns of each student should be assessed on an individual basis.

1. **Definitions**
   The definitions below are not intended to label students but rather to assist in understanding these guidelines and the expectations of staff in complying with District policies and legal requirements. Students might or might not use these terms to describe themselves.

   a. ***Transgender*** describes people whose gender identity is different than their biological sex assigned at birth.
   b. ***Gender Identity*** is a person's deeply held sense or psychological knowledge of their own gender, regardless of the biological sex they were assigned at birth. Everyone has gender identity.
   c. ***Gender nonconforming*** describes people whose gender expression differs from stereotypical or prevailing social expectations, such as "feminine" boys or "masculine" girls, or those who are perceived as androgynous.
   d. ***Gender expression*** refers to the way a person expresses gender, such as clothing, hairstyles, activities, or mannerisms.

2. **Discrimination, Harassment and Bullying**
   Discrimination, bullying, and harassment on the basis of sex, sexual orientation, transgender status, gender identity, or gender expression shall be prohibited within the Monona Grove School District. It is the responsibility of each school, the District, and all staff to ensure a safe school environment for all students, including transgender and gender nonconforming students. The scope of this responsibility includes ensuring that any incident of discrimination, harassment, or bullying is given immediate attention, including investigating the incident, taking age- and developmentally-appropriate corrective action, and providing students and staff with appropriate resources. Complaints alleging discrimination or harassment based on a person's actual or perceived transgender status, gender identity, or gender expression are to be taken seriously and handled in the same manner as other discrimination, bullying, or harassment complaints.

3. **Student Privacy, Names and Pronouns, and Official School Records**

Certain records and personally-identifiable information related to the student's gender status or biological sex may be protected not only as an education record, but also as a confidential medical or patient healthcare record. The District further recognizes that a student may have a strong individual interest in maintaining the privacy of the student's transgender status or the student's gender nonconforming presentation at school. Accordingly, in addition to adhering to all legal standards of confidentiality, school personnel are expected to treat that information as being particularly sensitive, even internally among school staff and school officials. School staff shall not disclose information that may reveal a student's transgender or gender nonconforming status to others, including parents and other school staff, unless legally required to do so or unless the student has expressly authorized such disclosure. District employees are expected to refer any questions they may have about student privacy and possible disclosures of a student's transgender or gender nonconforming status to the Director of Student Services. The District strongly encourages transgender and gender nonconforming students and their families to create a "School Plan for Transgender/Gender Nonconforming Students" with the school, and to maintain ongoing communications with school employees who are working directly with the student in order to address, among other issues, relevant privacy concerns and privacy preferences.

When referring to students at school and in connection with school activities, school personnel will normally use the student's legal name and the pronouns that correspond to the student's biological sex assigned at birth. However, students should be referred to by their preferred names and pronouns whenever possible in school and in connection with school-related activities. A court-ordered name or gender change is not required, nor does there need to be a change made to the student's official records. Upon being informed that a student intends to regularly use a particular name and/or prefers to be addressed using particular pronouns, school personnel are expected to respect that decision.

The District's approach of respecting a student's decision to regularly use a name and the pronouns that correspond to the student's gender identity is not a commitment to change all existing school records in order to reflect those preferences. Further, there may be situations where the District is required to use or report the legal name or biological sex of the student as that data is reflected in in the District's official records. The extent to which official records of the District are modified will depend on a case-by-case evaluation of the information that the District receives and the type(s) of school records affected by the information that is received. For example, when a student's legal name is changed and the change is sufficiently substantiated, the District will issue a high school transcript under the student's new legal name.

4. **Restroom and Locker Room Accessibility**

In most cases, students shall have access to the restroom or locker room that corresponds to the gender identity that the student consistently asserts at school and in other social environments. The following guidelines related to restroom and changing areas generally assume that the student has a special concern or is in some way uncomfortable with consistently using the facilities that correspond to the biological sex that the student was assigned at birth. The District highly recommends, but does not require, transgender students and/or their parents/guardians create a "School Plan for Transgender/Gender Nonconforming Students" with a school counselor or other student services staff member, with the support of a school administrator, to address restroom/locker room choices. In any gender-segregated facility, any student who is uncomfortable using a shared facility, regardless of the reason, shall, upon the student's request, be provided with a safe and non-stigmatizing alternative. This may include, for example, addition of a privacy partition or curtain, provision to use a nearby private restroom or office, or a separate

changing schedule. However, requiring a transgender or gender nonconforming student to use a separate, nonintegrated space threatens to publicly identify and marginalize the student as transgender and should not be done unless requested by a student. Under no circumstances may students be required to use sex segregated facilities that are inconsistent with their gender identity. Where available, schools are encouraged to designate facilities designed for use by one person at a time as accessible to all students regardless of gender, and to incorporate such single-user facilities into new construction or renovation. However, under no circumstances may a student be required to use such facilities because they are transgender or gender nonconforming.

If a transgender student makes any request regarding the use of locker rooms or any similar type of changing area, the request shall be assessed on a case-by-case basis with the goals of: (a) facilitating the transgender student's access to the district's physical education curriculum and other relevant programs; (b) ensuring adequate student privacy and safety; and (c) minimizing stigmatization of the transgender student. The physical layout of the facility and the degree of undress required when changing for the applicable activity are examples of factors that will be considered in making the arrangements. There is no absolute rule that, in all cases, will require a transgender student to access and use only the locker rooms and other changing areas that correspond to the biological sex that the student was assigned at birth.

5. **Physical Education/Athletics/Clubs**

Students who are transgender shall be permitted to participate in physical education classes and intramural sports in a manner consistent with the gender identity that students regularly assert at school and in other social environments.

Students who are transgender shall be permitted to participate in interscholastic athletics in a manner consistent with the requirements and policies of the Wisconsin Interscholastic Athletics Association (WIAA).

6. **Overnight Field Trips**

Students will be boarded in accordance with their gender identity. It is the responsibility of the adult in charge of the trip to provide for the safety of all students. This may include checking in advance for gender non-specific facilities and room assignments. In any gender-segregated environment, any student who is uncomfortable using a shared facility, regardless of the reason, shall, upon the student's request, be provided with a safe and non-stigmatizing alternative.

7. **Dress Codes**

Within the constraints of the District's dress code policy and dress codes adopted by each school, students may dress in accordance with their gender identity. School personnel shall not enforce a dress code more strictly against transgender and gender nonconforming students than other students.

ADOPTED: August 26, 2015

EXHIBIT E

Middleton-Cross Plains Area School District, Nondiscrimination Guidelines

MIDDLETON-CROSS PLAINS AREA SCHOOL DISTRICT

Administrative Policy and Procedure Manual

411.2

NONDISCRIMINATION GUIDELINES RELATED TO STUDENTS WHO ARE TRANSGENDER AND STUDENTS NONCONFORMING TO GENDER ROLE STEREOTYPES

Policy

The following guidelines relate to students who are transgender and students who do not conform to gender role stereotypes. This guideline serves two important purposes. First, significant portions of the guidelines facilitate compliance with the District's legal obligations. Under many circumstances, an individual's transgender or gender nonconforming status serves as a basis for legal rights and protections. Second, even where specific actions may not be required by applicable law, these guidelines are intended to further the District's local goals concerning the creation and maintenance of positive and supportive environments that appropriately provide for the education, safety, and welfare of all students.

While the guidelines established in this rule provide important direction to District employees, students, school families, and other persons, the guidelines do not anticipate every situation that might occur with respect to students who are transgender or gender nonconforming. When an issue or concern arises that is not adequately addressed by these guidelines, the needs and concerns of each student will be assessed on an individualized basis with consultation with parents/guardians where appropriate.

1. Definitions
   The definitions below are not intended to label students but rather to assist in understanding these guidelines and the expectations of staff in complying with District policies and legal requirements. Students might or might not use these terms to describe themselves.

   a. "Transgender" describes people whose gender identity is different than their biological sex assigned at birth.

   b. "Gender identity" is a person's deeply held sense or psychological knowledge of their own gender, regardless of the biological sex they were assigned at birth. Everyone has a gender identity.

   c. "Gender nonconforming" describes people whose gender expression differs from stereotypical or prevailing social expectations, such as "feminine" boys or "masculine" girls, or those who are perceived as androgynous.

   d. "Gender expression" refers to the way a person expresses gender, such as clothing, hairstyles, activities or mannerisms.

2. Discrimination, Harassment and Bullying
   The District prohibits all forms of discrimination against any transgender student or any student who does not conform to gender role stereotypes. Further, existing District policies that prohibit the harassment and bullying of students apply to any such actions that are based on a student's actual or perceived transgender status or gender nonconformity. This includes ensuring that any incident or complaint of discrimination, harassment, or bullying is given prompt attention, including taking appropriate corrective and/or disciplinary action. Complaints alleging discrimination, harassment or

bullying based on a person's actual or perceived transgender status or gender nonconformity are to be handled in the same manner as other discrimination, harassment, and bullying complaints.

3. Student Privacy, Names and Pronouns, and Official School Records
Certain records and personally-identifiable information related to the student's gender status or biological sex may be protected not only as an education record, but also as a confidential medical or patient health care record. The District further recognizes that a student may have a strong individual interest in maintaining the privacy of his/her transgender status or his/her gender nonconforming presentation at school. Accordingly, in addition to adhering to all legal standards of confidentiality, school personnel with knowledge of any student's transgender status or gender nonconforming presentation are expected to treat that information as being particularly sensitive, even internally among school staff and school officials. District employees are expected to refer any questions they may have about student privacy and possible disclosures of a student's transgender or gender nonconforming status to the Director of Student Services or designee. The District strongly encourages transgender and gender nonconforming students and their families to maintain ongoing communication with the school employees who are working directly with the student in order to address, among other issues, relevant privacy concerns and privacy preferences.

   When referring to students at school and in connection with school activities, school personnel will normally use the student's legal name and the pronouns that correspond to the student's biological sex assigned at birth. However, an adult student or the parent/guardian of a minor student may determine the name and gender pronouns that school employees will use to address the student at school and in connection with school-related activities. A court-ordered name change or medical treatment or medical procedure is not required to initiate such a request. Upon being informed that a student intends to regularly use a particular name and/or prefers to be addressed using particular pronouns that correspond to the student's gender identity, school personnel are expected to respect that decision (which will be noted in the student's electronic record.)

   The District's approach of respecting a student's decision to regularly use a name and the pronouns that correspond to the student's gender identity is not a commitment to change all existing school records in order to reflect those preferences. Further, there may be situations where the District is required to use or report the legal name or biological sex of the student as that data is reflected in the District's official records. The extent to which official records of the District are modified will depend on a case-by-case evaluation of the information that the District receives and the type(s) of school records affected by the information that is received. For example, when a student changes his/her legal name and that change is sufficiently substantiated, the District will issue a high school transcript under the student's new legal name.

4. Restroom and Locker Room Accessibility
Generally a student who is transgender and has held the belief deeply, followed the belief consistently over a period of time, is supported by the student's parent or guardian, and for which the student has sought guidance or counseling in coming to the decision, will be permitted to access the segregated restrooms that correspond to the gender identity that the student consistently asserts at school and elsewhere. Any student who does not wish to use the segregated restrooms may be given access to unisex restrooms if such a facility is reasonably available. No student shall be required to use a unisex restroom solely because of the student's transgender or gender nonconforming status.

If a transgender student makes any request regarding the use of segregated restrooms, the use of segregated locker rooms, or any similar type of changing area, the request shall be assessed on a case-by-case basis, taking into account all relevant interests of the student, the school district, and other students affected by the request. The school district will consider, in addition to all other relevant factors, such things as the ability of the transgender student to access the District's physical education curriculum and extra-curricular programs and the need to respect the privacy and safety of all students. The district will consider the physical layout of the facility, the availability of single access showers and changing areas, and the degree of undress required when changing for the applicable activity. There is no absolute rule that, in all cases, will require a transgender student to access and use only the restrooms, locker rooms, and other changing areas that correspond to the biological sex that the student was assigned at birth.

Any student who has a need or desire for increased privacy, regardless of the underlying reason, may be provided (to the extent reasonably available) with a reasonable alternative changing area (for example, a nearby restroom stall with a door, an area separated by a curtain, a physical education teacher's office in the locker room, or a nearby unisex restroom) or provided with an alternative changing schedule. Any alternative arrangement should be provided in a way that gives adequate consideration to relevant privacy concerns.

These guidelines related to restrooms and changing areas generally assume that a student has a concern or is in some way uncomfortable with consistently using the facilities that correspond to the biological sex that the student was assigned at birth. However, all students have the option of consistently accessing the facilities that correspond to the biological sex that the student was assigned at birth.

If the District, in its sole discretion, determines that transgender student's request regarding the use of a segregated locker room cannot be accommodated, the transgender students will be provided with a private changing area to accommodate physical education classes, athletics, or other activities that require a comparable changing area. Transgender students will not have access to open locker rooms or changing areas under such circumstances unless governing courts/governing agencies mandate that this access must be granted. This does not preclude the District's creation of locker rooms that provide private changing areas that must be used by all students. The District shall solely determine whether to create such locker rooms or changing areas.

5. Participation in Physical Education Classes and Sports Activities
   A student who is transgender shall be permitted to participate in physical education classes and intramural sports in a manner consistent with the gender identity that the student regularly asserts at school and in other social environments.

   Students who are transgender shall be permitted to participate in interscholastic athletics in a manner consistent with the requirements and policies of the Wisconsin Interscholastic Athletics Association (WIAA).

6. Dress Codes
   Within the constraints of the District's dress code policy and dress codes adopted by the school, students may dress in accordance with their gender identity. School personnel shall not enforce a dress code more strictly against transgender and gender nonconforming students than other students.

LEGAL REF:

CROSS REF: 342.8, Human Growth and Development Curriculum
347, Student Records
411, Equal Educational Opportunities
411.1, Bullying of Students and Staff
440, Student Rights and Responsibilities
443.1, Dress Code
District Non-Discrimination Policy
WIAA Transgender Athlete Policy

MIDDLETON-CROSS PLAINS AREA SCHOOL DISTRICT

GUIDANCE FOR ADMINISTRATORS

ENSURING EQUAL OPPORTUNITY AND FREEDOM FROM HARASSMENT FOR TRANSGENDER AND GENDER NON-CONFORMING STUDENTS AND STAFF

The purpose of this guidance sheet is to assist administrators in providing a safe, secure and dignified educational and work atmosphere for the students and staff under their supervision. Please review this guidance in preparation for situations that may arise involving transgender and gender non-conforming students and staff and refer back to it when needed. If issues arise that are not addressed within this guidance sheet or more information and support is desired, please contact the Director of Student Services.

Topic	Guidance[1]
Safety and Bullying: Transgender and gender non-conforming students and staff are disproportionately targeted for teasing, bullying, harassment, and physical violence.[2]	Confront and report bullying and name calling consistently. This includes name calling and bullying based on gender stereotypes, gender identity and gender expression. *See Administrative Policy 411.1 Bullying of Students and Staff*
Names and Pronouns: Frequently transgender and gender non-conforming people are not addressed by appropriate pronouns or names.[3] Having one's gender identity recognized and validated is important.	Refer to all students by their preferred name and gender pronouns whenever possible. Have conversations regarding preferences with the student in private. *See Administrative Policy 347 Student Records*
Bathrooms: Transgender and gender non-conforming people often struggle to find restroom facilities that are safe and that correspond with their gender identity. Having safe and respectful access to restroom facilities is important to the health and well-being of transgender and gender non-conforming people.	Students and staff shall have access to the restroom that corresponds to their gender identity consistently asserted at school. Any student or staff who has a need or desire for increased privacy, regardless of underlying reasons, should be provided access to a single stall restroom, but no student or staff shall be required to use such a restroom.
Privacy: All persons have a right to privacy, which includes the right to keep one's transgender status private at school. Information about a student's transgender status, legal name, or gender assigned at birth may constitute confidential medical information. Disclosing this information to other staff, students, their parents or other third parties may violate privacy laws and policies.	Students have a right to keep their personal information private. Staff members should not disclose information about a student's gender identity or gender expression to others unless legally obligated or expressly given permission by the student. Transgender and gender non-conforming students have the right to discuss and express their gender identity and expression openly. The fact that a student chooses to disclose his or her transgender status to others does not authorize school staff to disclose information. *See Administrative Policy 347 Student Records*
Physical Education/Athletics/Clubs: Transgender and gender non-conforming students may find it difficult to participate in extra-curricular activities. There may also be barriers of access and comfort for transgender and gender non-conforming youth regarding physical education.	Using gender to separate and/or identify students in physical education classes is discouraged. In circumstances where gender is used, students should be permitted to participate consistent with their gender identity. Students shall also be permitted to participate in intramural sports and club activities in a manner consistent with their gender identity. Furthermore, unless precluded by state interscholastic association policies[4], students shall be permitted to participate in interscholastic athletics in a manner consistent with their gender identity.

[1]MCPASD – Administrative Policies 411 Equal Educational Opportunities, 411.1 Bullying of Students and Staff, 511 Equal Opportunity Employment, 512 Harassment – These policies protect all students and staff from discrimination or harassment based on gender, gender identity, gender expression, and sexual orientation. The Federal Family Educational Rights and Privacy Act (FERPA) also may pertain.
[2]Greytak, E.A., Kosciw, J.G. & Diaz, E.M. (2009) Harsh Realities: The experiences of transgender youth in our nation's schools. New York: GLSEN.
[3]American Psychological Association (APA). (2006). Answers to your questions about transgender individuals and gender identity. Retrieved Aug 9, 2010, from http://www.apa.org/topics/transgender.html
[4]WIAA's last articulated position is to leave it to each District to address the issue of transgender student participation.

EXHIBIT F

Menasha Joint School District, Policy 2260 – Nondiscrimination and Access to Equal Educational Opportunity

Menasha Joint School District
Bylaws & Policies

2260 - NONDISCRIMINATION AND ACCESS TO EQUAL EDUCATIONAL OPPORTUNITY

The Board of Education is committed to providing an equal educational opportunity for all students in the District.

The Board does not discriminate on the basis of race, color, religion, national origin, ancestry, creed, pregnancy, marital status, parental status, sexual orientation, sex, (including transgender status, change of sex or gender identity), or physical, mental, emotional, or learning disability ("Protected Classes") in any of its student program and activities.

Nondiscrimination Guidelines Related to Students Who Are Transgender and Students Nonconforming to Gender Role Stereotypes

The following guidelines relate to students who are transgender and students who do not conform to gender role stereotypes. This guideline serves two important purposes. First, significant portions of the guidelines facilitate compliance with the District's legal obligations. Under many circumstances, an individual's transgender or gender nonconforming status serves as a basis for legal rights and protections. Second, even where specific actions may not be required by applicable law, these guidelines are intended to further the District's local goals concerning the creation and maintenance of positive and supportive environments that appropriately provide for the education, safety, and welfare of all students.

While the guidelines established in this rule provide important direction to District employees, students, school families, and other persons, the guidelines do not anticipate every situation that might occur with respect to students who are transgender or gender nonconforming. When an issue or concern arises that is not adequately addressed by these guidelines, the needs and concerns of each student will be assessed on an individualized basis with consultation with parents/guardians where appropriate.

Definitions

The definitions below are not intended to label students but rather to assist in understanding these guidelines and the expectations of staff in complying with District policies and legal requirements. Students might or might not use these terms to describe themselves.

A. "Transgender" describes people whose gender identity is different than their biological sex assigned at birth.

B. "Gender identity" is a person's deeply held sense or psychological knowledge of their own gender, regardless of the biological sex they were assigned at birth. Everyone has a gender identity.

C. "Gender nonconforming" describes people whose gender expression differs from stereotypical or prevailing social expectations, such as "feminine" boys or "masculine" girls, or those who are perceived as androgynous.

D. "Gender expression" refers to the way a person expresses gender, such as clothing, hairstyles, activities or mannerisms.

Discrimination, Harassment and Bullying

The District prohibits all forms of discrimination against any transgender student or any student who does not conform to gender role stereotypes. Further, existing District policies that prohibit the harassment and bullying of students apply to any such actions that are based on a student's actual or perceived transgender status or gender nonconformity. This includes ensuring that any incident or complaint of discrimination, harassment, or bullying is given prompt attention, including taking appropriate corrective and/or disciplinary action. Complaints alleging discrimination, harassment or bullying based on a person's actual or perceived transgender status or gender nonconformity are to be handled in the same manner as other discrimination, harassment, and bullying complaints.

Student Privacy, Names and Pronouns, and Official School Records

Certain records and personally-identifiable information related to the student's gender status or biological sex may be protected not only as an education record, but also as a confidential medical or patient health care record. The District further recognizes that a student may have a strong individual interest in maintaining the privacy of his/her transgender status or his/her gender nonconforming presentation at school. Accordingly, in addition to adhering to all legal standards of confidentiality, school personnel with knowledge of any student's transgender status or gender nonconforming presentation are expected to treat that information as being particularly sensitive, even internally among school staff and school officials. District employees are expected to refer any questions they may have about student privacy and possible disclosures of a student's transgender or gender nonconforming status to the Director of Student Services or designee. The District strongly encourages transgender and gender nonconforming students and their families to maintain ongoing communication with the school employees who are working directly with the student in order to address, among other issues, relevant privacy concerns and privacy preferences.

When referring to students at school and in connection with school activities, school personnel will normally use the student's legal name and the pronouns that correspond to the student's biological sex assigned at birth. However, an adult student or the parent/guardian of a minor student may determine the name and gender pronouns that school employees will use to address the student at school and in connection with school-related activities. A court-ordered name change or medical treatment or medical procedure is not required to initiate such a request. Upon being informed that a student intends to regularly use a particular name and/or prefers to be addressed using particular pronouns that correspond to the student's gender identity, school personnel are expected to respect that decision.

The District's approach of respecting a student's decision to regularly use a name and the pronouns that correspond to the student's gender identity is not a commitment to change all existing school records in order to reflect those preferences. Further, there may be situations where the District is required to use or report the legal name or biological sex of the student as that data is reflected in the District's official records. The extent to which official records of the District are modified will depend on a case-by-case evaluation of the information that the District receives and the type(s) of school records affected by the information that is received. For example, when a student changes his/her legal name and that change is sufficiently substantiated, the District will issue a high school transcript under the student's new legal name.

Restroom and Locker Room Accessibility

Generally a student who is transgender and has held the belief deeply, followed the belief consistently over a period of time, is supported by the student's parent or guardian, and for which the student has sought guidance or counseling in coming to the decision, will be permitted to access the segregated restrooms that correspond to the gender identity that the student consistently asserts at school and elsewhere. Any student who does not wish to use the segregated restrooms may be given access to unisex restrooms if such a facility is reasonably available. No student shall be required to use a unisex restroom solely because of the student's transgender or gender nonconforming status.

If a transgender student makes any request regarding the use of segregated restrooms, the use of segregated locker rooms, or any similar type of changing area, the request shall be assessed on a case-by-case basis, taking into account all relevant interests of the student, the School District, and other students affected by the request. The School District will consider, in addition to all other relevant factors, such things as the ability of the transgender student to access the District's physical education curriculum and extra-curricular programs and the need to respect the privacy and safety of all students. The District will consider the physical layout of the facility, the availability of single access showers and changing areas, and the degree of undress required when changing for the applicable activity. There is no absolute rule that, in all cases, will require a transgender student to access and use only the restrooms, locker rooms, and other changing areas that correspond to the biological sex that the student was assigned at birth.

Any student who has a need or desire for increased privacy, regardless of the underlying reason, may be provided (to the extent reasonably available) with a reasonable alternative changing area (for example, a nearby restroom stall with a door, an area separated by a curtain, a physical education teacher's office in the locker room, or a nearby unisex restroom) or provided with an alternative changing schedule. Any alternative arrangement should be provided in a way that gives adequate consideration to relevant privacy concerns.

These guidelines related to restrooms and changing areas generally assume that a student has a special concern or is in some way uncomfortable with consistently using the facilities that correspond to the biological sex that the student was assigned at birth. However, all students have the option of consistently accessing the facilities that correspond to the biological sex that the student was assigned at birth.

Participation in Physical Education Classes and Sports Activities

A student who is transgender shall be permitted to participate in physical education classes and intramural sports in a manner consistent with the gender identity that the student regularly asserts at school and in other social environments.

Students who are transgender shall be permitted to participate in interscholastic athletics in a manner consistent with the requirements and policies of the Wisconsin Interscholastic Athletics Association (WIAA).

Dress Codes

Within the constraints of the District's dress code policy and dress codes adopted by the school, students may dress in accordance with their gender identity. School personnel shall not enforce a dress code more strictly against transgender and gender nonconforming students than other students.

The Board is also committed to equal employment opportunity in its employment policies and practices as they relate to students. The Board's policies pertaining to employment practices can be found in Policy 1422, Policy 3122, and Policy 4122 – Nondiscrimination and Equal Employment Opportunity.

In order to achieve the aforesaid goal, the District Administrator shall:

A. Curriculum Content

review current and proposed courses of study and textbooks to detect any bias based upon the Protected Classes ascertaining whether or not supplemental materials, singly or taken as a whole, fairly depict the contribution of both sexes various races, ethnic groups, etc. toward the development of human society;

provide that necessary programs are available for students with limited use of the English language;

B. Staff Training

develop an ongoing program of staff training and in-service training for school personnel designed to identify and solve problems of bias based upon the protected classes in all aspects of the program;

C. Student Access

1. review current and proposed programs, activities, facilities, and practices to ensure that all students have equal access thereto and are not segregated on the basis of the Protected Classes in any duty, work, play, classroom, or school practice, except as may be permitted under State regulations;

2. verify that facilities are made available in a non-discriminatory fashion, in accordance with Board Policy 7510 - Use of District Facilities, for non-curricular student activities that are initiated by parents or other members of the community, including but not limited to any group officially affiliated with the Boy Scouts of America or any other youth group listed in Title 36 of the United States Code as a patriotic society;

D. District Support

require that like aspects of the District program receive like support as to staff size and compensation, purchase and maintenance of facilities and equipment, access to such facilities and equipment, and related matters;

E. Student Evaluation

verify that tests, procedures, or guidance and counseling materials, which is/are designed to evaluate student progress, rate aptitudes, analyze personality, or in any manner establish or tend to establish a category by which a student may be judged, are not differentiated or stereotyped on the basis of the Protected Classes.

The District Administrator shall appoint and publicize the name of the compliance officer(s) who is/are responsible for coordinating the District's efforts to comply with the applicable Federal and State laws and regulations, including the District's duty to address in a prompt and equitable manner any inquiries or complaints regarding discrimination or equal access. The Compliance Officer(s) also verify that proper notice of nondiscrimination for Title II of the Americans with Disabilities Act (as amended), Title VI and VII of the Civil Rights Act of 1964, Title IX of the Education Amendment Act of 1972, Section 504 of the Rehabilitation Act of 1973 (as amended), is provided to students, their parents, staff members, and the general public.

The District Administrator shall attempt annually to identify children with disabilities, ages 3 - 21, who reside in the District but do not receive public education. In addition, s/he shall establish procedures to identify students who are Limited English Proficient, including immigrant children and youth, to assess their ability to participate in District programs, and develop and administer a program that meets the English language and academic needs of these students. This program shall include procedures for student placement, services, evaluation, and exit guidelines and shall be designed to provide students with effective instruction that leads to academic achievement and timely acquisition of proficiency in English. As a part of this program, the District will evaluate the progress of students in achieving English language proficiency in the areas of listening, speaking, reading and writing, on an annual basis (see AG 2260F).

Reporting Procedures

Students, parents and all other members of the School District community are encouraged to promptly report suspected violations of this policy to a teacher or administrator. Any teacher or administrator who receives such a complaint shall file it with the District's Compliance Officer at his/her first opportunity.

Students who believe they have been denied equal access to District educational opportunities, in a manner inconsistent with this policy may initiate a complaint and the investigation process that is set forth below. Initiating a complaint will not adversely affect the complaining individual's participation in educational or extra-curricular programs unless the complaining individual makes the complaint maliciously or with knowledge that it is false.

District Compliance Officers

The Board designates the following individuals to serve as the District's "Compliance Officers" (hereinafter referred to as the "COs").

Peter Pfundtner	Marci Thiry
Director of HR	Director of Special Services
920-967-1414	920-967-1429
P.O. Box 360, Menasha WI 54952	P.O. Box 360, Menasha WI 54952
pfundtnerp@mjsd.k12.wi.us	thirym@mjsd.k12.wi.us

The names, titles, and contact information of these individuals will be published annually in the staff handbooks and on the School District's web site.

A CO will be available during regular school/work hours to discuss concerns related to student discrimination in educational opportunities under this policy.

Investigation and Complaint Procedure

The CO shall investigate any complaints brought under this policy. Throughout the course of the process as described herein, the CO should keep the parties informed of the status of the investigation and the decision making process.

All complaints must include the following information to the extent it is available: a description of the alleged violation, the identity of the individual(s) believed to have engaged in, or to be actively engaging in, conduct in violation of this policy, if any; a detailed description of the facts upon which the complaint is based; and a list of potential witnesses.

If the complainant is unwilling or unable to provide a written statement including the information set forth above, the CO shall ask for such details in an oral interview. Thereafter the CO will prepare a written summary of the oral interview, and the complainant will be asked to verify the accuracy of the report by signing the document.

Upon receiving a complaint, the CO will consider whether any action should be taken during the investigatory phase to protect the Complainant from further loss of educational opportunity, including but not limited to a change of class schedule for the complainant, tentative enrollment in a program, or other appropriate action. In making such a determination, the CO should consult the District Administrator prior to any action being taken. The Complainant should be notified of any proposed action prior to such action being taken.

As soon as appropriate in the investigation process, the CO will inform any individual named by the Complainant in connection with an alleged violation of this policy, that a complaint has been received. The person(s) must also be provided an opportunity to respond to the complaint.

Within five (5) business days of receiving the complaint, the CO will initiate an investigation.

Although certain cases may require additional time, the CO will attempt to complete an investigation into the allegations of harassment within fifteen (15) calendar days of receiving the formal complaint. The investigation will include:

A. interviews with the complainant;

B. interviews with any persons named in the complaint;

C. interviews with any other witnesses who may reasonably be expected to have any information relevant to the allegations;

D. consideration of any documentation or other evidence presented by the complainant, respondent, or any other witness which is reasonably believed to be relevant to the allegations.

At the conclusion of the investigation, the CO shall prepare and deliver a written report to the District Administrator which summarizes the evidence gathered during the investigation and provides recommendations based on the evidence and the definitions in this Policy, as well as in State and Federal law as to whether the complainant has been denied access to educational opportunities on the basis of one of the protected classifications, based on a preponderance of evidence standard. The CO's recommendations must be based upon the totality of the circumstances, including the ages and maturity levels of those involved. The CO may consult with the Board Attorney before finalizing the report to the District Administrator.

Absent extenuating circumstances, within ten (10) business days of receiving the report of the CO, the District Administrator must either issue a final decision regarding or request the complaint further investigation. A copy of the District Administrator's final decision will be delivered to the complainant.

If the District Administrator requests additional investigation, the District Administrator must specify the additional information that is to be gathered, and such additional investigation must be completed within ten (10) business days. At the conclusion of the additional investigation, the District Administrator must issue a final written decision as described above. The decision of the District Administrator shall be final.

If the complainant feels that the decision does not adequately address the complaint s/he may appeal the decision to the State Superintendent of Public Instruction.

The Board reserves the right to investigate and resolve a complaint or report of regardless of whether the member of the School District community or third party chooses to pursues the complaint. The Board also reserves the right to have the complaint investigation conducted by an external person in accordance with this policy or in such other manner as deemed appropriate by the Board.

Additional School District Action

If the evidence suggests that any conduct at issue violates any other policies of the Board, is a crime, or requires mandatory reporting under the Children's Code (Sec. 48.981, Wis. Stat.), the CO or District Administrator shall take such additional actions as necessary and appropriate under the circumstances, which may include a report to the appropriate social service and/or law enforcement agency charged with responsibility for handling such investigations.

Confidentiality

The District will make reasonable efforts to protect the privacy of any individuals involved in the investigation process. Confidentiality cannot be guaranteed however. All complainants proceeding through the investigation process should be advised that as a result of the investigation, allegations against individuals may become known to those individuals, including the complainant's identity.

During the course of an investigation, the CO will instruct all members of the School District community and third parties who are interviewed about the importance of maintaining confidentiality. Any individual who is interviewed as part of an investigation is expected not to disclose any information that s/he learns or that s/he provides during the course of the investigation.

All public records created as a part of an investigation will be maintained by the CO in accordance with the Board's records retention policy. Any records which are considered student records in accordance with the state or Federal law will be maintained in a manner consistent with the provisions of the law.

118.13 Wis. Stats.
P.I. 9, 41, Wis. Adm. Code
Fourteenth Amendment, U.S. Constitution
20 U.S.C. Section 1681, Title IX of Education Amendments Act
20 U.S.C. Section 1701 et seq., Equal Educational Opportunities Act of 1974
20 U.S.C. Section 7905, Boy Scouts of America Equal Access Act
29 U.S.C. Section 794, Rehabilitation Act of 1973, as amended
42 U.S.C. Section 2000 et seq., Civil Rights Act of 1964
42 U.S.C. Section 2000ff et seq., The Genetic Information Nondiscrimination Act
42 U.S.C. 6101 et seq., Age Discrimination Act of 1975
42 U.S.C. 12101 et seq., The Americans with Disabilities Act of 1990, as amended
Vocational Education Program Guidelines for Eliminating Discrimination and Denial of Services, Department of Education, Office of Civil Rights, 1979

Revised 8/25/14
Revised 4/13/15

EXHIBIT G

KUSD, Registration Information

Home | Staff Directory | Lunch Menus | Employment

Kenosha Unified School District

Mission: Provide excellent, challenging learning opportunities and experiences that prepare each student for success.

- SCHOOL WEBSITES

ABOUT | BOARD OF EDUCATION | EVENTS | DEPARTMENTS | REGISTRATION | SCHOOLS | LIBRARY

REGISTRATION

Current Family? Register within Infinite Campus. »
For families who already have a child attending a KUSD school.

New to the District? Register here. »
For families who do not have an existing child in KUSD.

After you register online - your enrollment is not complete until you do the following:
In order for your enrollment to be complete, you must now visit the school your student will be attending and provide the following:

- Proof of residency *One or more items may be requested by your school to verify proof of residency
  - CURRENT WE Energies Bill
  - CURRENT Title/Mortgage Information
  - CURRENT Lease Agreement
- Birth Certificate or Passport
- Immunization Records.
- Health, Dental, and/or Kindergarten Screening Forms

You can download and print these forms by scrolling down on this page. ↓

Important Links

- **2016-17 Building Registration Dates**
- Online Enrollment Information for 2016-17
- Fees
- Payment Center - pay fees online
- Summer School
- Open Enrollment
- WI Home-based Education Program (Homeschool)

All Students

Form	English	Spanish
Affidavit of Residency	residency-affidavit.pdf	
Enrollment/Emergency Form	enrollment-emergency.pdf	enrollment-emergency-sp.pdf
Medication Authorization Form	ma.pdf	ma_sp.pdf
Parent Permission to Obtain or Release Information	obtain_release_info.pdf	
Parent Request for Transportation Change	transportation_change.pdf	
Release of Pupil Records - Elementary & Middle	records-request-el-ms.pdf	
Release of Pupil Records - High School	records-request-hs.pdf	
School Supply List - Early Education through Middle School	supply-list.pdf	supply-list-sp.pdf
Regular Ed - Transportation Change Request	transportation-change.pdf	
Special Ed - Transportation Change Request	special-ed-transportation-change.pdf	

Early Education

Form	English	Spanish
4K & Kindergarten Registration 2016-17	4K Kin Registration.pdf	4K Kin Registration-sp.pdf
Certification Attesting To Age of Child	certification-age-child.pdf	certification-age-child-sp.pdf
Dental Examination Record	dental-exam-record.pdf	
Health Examination Record	health-exam-record.pdf	
Student Immunization Record	immunization-record.pdf	immunization-record-spanish.pdf

Kindergarten

Form	English	Spanish
4K & Kindergarten Registration 2016-17	4K Kin Registration.pdf	4K Kin Registration-sp.pdf
Dental Examination Record	dental-exam-record.pdf	
Health Examination Record	health-exam-record.pdf	
Certification Attesting To Age of Child	certification-age-child.pdf	certification-age-child-sp.pdf
Kindergarten Screening Letter	kindergarten-screening-letter.pdf	kindergarten-screening-letter-sp.pdf
Kindergarten Screening Information Form	kindergarten-screening-form.pdf	kindergarten-screening-form-sp.pdf

Middle

Form	English	Spanish
6th Grade Course Requests - 2016-17	6th-grade-course-request.pdf	6th-grade-course-request-spanish.pdf

High

Form	English
High School Course Catalog	hs-course-catalog.pdf

Immunizations

Form	English	Spanish
Meningococcal Disease: Protect Your Child	meningococcal.pdf	meningococcal-sp.pdf
New Vaccination Guidelines - VFC Eligibility	vfc.pdf	vfc-spanish.pdf
Kenosha County Division of Health Clinic Schedule	kcdh-schedule.pdf	kcdh-schedule-sp.pdf
Student Immunization Record	immunization-record.pdf	immunization-record-spanish.pdf
Student Immunization Law - Age/Grade Requirements	immunization-age-grade.pdf	immunization-age-grade-sp.pdf
Tdap Requirements for 6-12 Grades - Parent Fact Sheet	tdap-fact-sheet.pdf	tdap-fact-sheet-sp.pdf

Contact Us
Payment Center
Building Rental Permits

KENOSHA UNIFIED SCHOOL DISTRICT Educational Support Center 3600 52nd Street, Kenosha, WI 53144 P: 262-359-6300 E:info@kusd.edu

EXHIBIT H

KUSD, Student Enrollment Form

Office Use Only

KUSD ID#:
Entered by:

Student Enrollment Form - Kenosha Unified School District

PLEASE PRINT

Student Last Name | First Name | Middle Name | Suffix (Jr., II) | Nickname

/ /
Birth Date | Gender (M/F)

Must select one:
- ☐ Hispanic or Latino
- ☐ Not Hispanic or Latino

Must select one or more:
- ☐ Asian
- ☐ Black or African American
- ☐ Native Hawaiian or Other Pacific Islander
- ☐ White
- ☐ American Indian or Alaska Native

Student Primary Language _____

Parent/Guardian Primary Language _____

☐ Foreign Exchange Student

Home Phone ☐Private | Student Cell Phone | Home Address | Lot/Apt | City | State | Zip Code

Mailing Address (if different) | Lot/Apt. | City | State | Zip Code

Birth City (e.g. Kenosha) | Birth County (e.g. Kenosha) | Birth State (e.g. WI) | Birth Country (e.g. USA) | Enrolling in Grade

Legal Guardian 1

Relationship to Student (Father, Mother, Guardian) | Date of Birth | Student lives with this guardian ☐ Yes ☐ No

Last Name | First Name | Middle Name | Gender (M/F)

Mailing Address | Lot/Apt. | City | State | Zip Code

Home Phone | Cell Phone | Work Phone

Email Address | Workplace

Legal Guardian 2

Relationship to Student (Father, Mother, Guardian) | Date of Birth | Student lives with this guardian ☐ Yes ☐ No

Last Name | First Name | Middle Name | Gender (M/F)

Mailing Address | Lot/Apt. | City | State | Zip Code

Home Phone | Cell Phone | Work Phone

Email Address | Workplace

Date first enrolled in ***United States*** school:_____/_____/_____ Date first enrolled in ***Wisconsin*** school:_____/_____/_____

Has your child ever attended Kenosha Unified schools (including Head Start)? ☐ Yes ☐ No

Last School Attended	City/State	Last Date Attended	Last Grade Completed
		/ /	

Have you moved in the last three years for the purpose of obtaining temporary/seasonal employment in an agricultural/fishing or food processing activity? ☐ Yes ☐ No

***ALL STATEMENTS BELOW ARE REQUIRED**

***NOTICE CONCERNING DISCLOSURE OF STUDENT DATA**

Notice is hereby given to all parents and guardians of students age 17 or under and students themselves age 18 or older that the following have been designated Directory Data that may be released to the public including military recruiters and higher education institutions:
The student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous school attended by the student, and the student's photograph.

☐ **Yes, I agree that my student's Directory Data may be released.** ☐ **No, I do not agree to release my student's Directory Data.**

***NOTICE AND MEDIA RELEASE – STUDENT & STUDENT WORK**

Our students have many exciting opportunities to display and publish their talents and schoolwork. Video, pictures, and other recordings of our students are often on the district's website, Channel 20, social media sites, and other media sources. These opportunities create excitement and joy for our students and help us strengthen and develop our students. In order for our students to participate in and enjoy these opportunities the district must have consent below from parents/guardians. Student photos, voice and likeness may be used in: artwork displays, social media posts, videos, classroom, school or district promotional materials.

☐ **Yes, I consent** ☐ **No, I do not consent**

***YEARBOOK**

Each year our schools may produce an annual yearbook that includes the names and photos of all the students that attended that year. If you would like your child's name and photo to be excluded from the yearbook please check the appropriate box below. Please note that if your child participates in public activities during the school year such as Athletics, Theater, etc. it is possible that they may appear in the yearbook.

☐ **Yes, My child's photo and name may be included in the annual yearbook** ☐ **No, My child's photo and name may not be included in the annual yearbook**

***BEHAVIOR**

Laws concerning pupil records and their confidentiality govern the maintenance and destruction of such records. Wisconsin Statute 118.125 Section 3 requires that "behavioral" records be destroyed one year after the student ceases to be enrolled in the school, unless permission is grated in writing to maintain them for a longer period.

"Behavioral records mean those pupil records which include psychological tests; personality evaluations; records of conversations; any written statement relating specifically to an individual pupil's behavior; tests relating specifically to achievement or measurement of ability; the pupil's physical health records other than immunization records or lead screening records required under s.254.162, law enforcement officers; records obtained under s.48396(1)(b)2,(c)3, and any other pupil records that are not progress records, " Wis. Stat. sec. 118.125(1)(a).

Please note that if a student leaves the Kenosha Unified School District and the receiving school requests records, all records are mailed as required by law, even though this form is in the student cumulative records. Nevertheless, it is highly recommended that the "permission to retain behavior records" is on file for each student. This will insure that records not requested will be retained up to five years after leaving KUSD and be available in the event the student returns to KUSD. If the form is not on file, records will be destroyed one year after leaving KUSD.

☐ **I hereby request and authorize KUSD to retain behavior records for one year** ☐ **I hereby request and authorize KUSD to retain behavior records for five years**

Emergency/Health Information

Student Last Name	Student First Name	Student Date of Birth	Doctor Name	Doctor Phone

Emergency Contacts

Name	Date of Birth	Address	Home Phone	Cell Phone	Work Phone	Relationship to Student
Name	Date of Birth	Address	Home Phone	Cell Phone	Work Phone	Relationship to Student
Name	Date of Birth	Address	Home Phone	Cell Phone	Work Phone	Relationship to Student

Confidential Health Information

☐ My child has no known health problems

☐ My child has the following health problems

CONDITION (Name)	COMMENTS AND INSTRUCTIONS
1.	
2.	
3.	
4.	

MEDICATION (List names of all medications child takes, doses and times given):
Each medication given at school requires written parental consent. Each prescription medication requires a physician's written order and written parental consent. Additional medications can be added on a separate piece of paper. Medication forms may be obtained from the school office.

***Please Print Clearly**

MEDICATION (Name)	DOSAGE	WHERE ADMINISTERED (Home, School, Both)	TYPE OF MEDICATION (Daily, Emergency, As needed)	COMMENTS
1.				
2.				
3.				
4.				

☐ I do ☐ I do not give permission for the principal or his/her designee to contact any of the emergency contacts I have provided if my child becomes ill at school and you cannot reach me by phone.

☐ I do ☐ I do not give permission to contact the Student's Physician for consultation if needed.

☐ I do ☐ I do not give permission to share my child's current immunization records and as they are updated in the future with the Wisconsin Immunization Registry (WIR). I understand that I may revoke this consent at any time by sending written notification to the school district. Following the date of revocation, the school district will provide no new records or updates to the WIR.

If a serious illness or accident occurs at school, I understand that my child will be sent by rescue squad to the emergency room. (All expenses charged by the hospital are the responsibility of the Parent/Guardian.)

I certify to the best of my knowledge that all information on this form is correct and that I have read the above notices.

Signature: _____ **Date:** ____/____/____

Print Name: _____

EXHIBIT I

U.S. Department of Justice & U.S. Department of Education, Dear Colleague Letter: School Enrollment Procedures

U.S. Department of Justice
Civil Rights Division

U.S. Department of Education
Office for Civil Rights
Office of the General Counsel

May 8, 2014

Dear Colleague:

Under Federal law, State and local educational agencies (hereinafter "districts") are required to provide all children with equal access to public education at the elementary and secondary level. Recently, we have become aware of student enrollment practices that may chill or discourage the participation, or lead to the exclusion, of students based on their or their parents' or guardians' actual or perceived citizenship or immigration status. These practices contravene Federal law. Both the United States Department of Justice and the United States Department of Education (Departments) write to remind you of the Federal obligation to provide equal educational opportunities to all children residing within your district and to offer our assistance in ensuring that you comply with the law. We are writing to update the previous Dear Colleague Letter on this subject that was issued on May 6, 2011, and to respond to inquiries the Departments received about the May 6 Letter. This letter replaces the May 6 Letter.

The Departments enforce numerous statutes that prohibit discrimination, including Titles IV and VI of the Civil Rights Act of 1964. Title IV prohibits discrimination on the basis of race, color, or national origin, among other factors, by public elementary and secondary schools. 42 U.S.C. § 2000c-6. Title VI prohibits discrimination by recipients of Federal financial assistance on the basis of race, color, or national origin. 42 U.S.C. § 2000d. Title VI regulations, moreover, prohibit districts from unjustifiably utilizing criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of a program for individuals of a particular race, color, or national origin. *See* 28 C.F.R. § 42.104(b)(2) and 34 C.F.R. § 100.3(b)(2).

Additionally, the United States Supreme Court held in the case of *Plyler v. Doe*, 457 U.S. 202 (1982), that a State may not deny access to a basic public education to any child residing in the State, whether present in the United States legally or otherwise. Denying "innocent children" access to a public education, the Court explained, "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. . . . By denying these children a basic education, we deny

them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." *Plyler*, 457 U.S. at 223. As *Plyler* makes clear, the undocumented or non-citizen status of a student (or his or her parent or guardian) is irrelevant to that student's entitlement to an elementary and secondary public education.

To comply with these Federal civil rights laws, as well as the mandates of the Supreme Court, you must ensure that you do not discriminate on the basis of race, color, or national origin, and that students are not barred from enrolling in public schools at the elementary and secondary level on the basis of their own citizenship or immigration status or that of their parents or guardians. Moreover, districts may not request information with the purpose or result of denying access to public schools on the basis of race, color, or national origin. To assist you in meeting these obligations, we provide below some examples of permissible enrollment practices, as well as examples of the types of information that may not be used as a basis for denying a student entrance to school.

In order to ensure that its educational services are enjoyed only by residents of the district, a district may require students or their parents to provide proof of residency within the district. *See*, *e.g.*, *Martinez v. Bynum*, 461 U.S. 321, 328 (1983).[1] For example, a district may require copies of phone and water bills or lease agreements to establish residency. While a district may restrict attendance to district residents, inquiring into students' citizenship or immigration status, or that of their parents or guardians would not be relevant to establishing residency within the district. A district should review the list of documents that can be used to establish residency and ensure that any required documents would not unlawfully bar or discourage a student who is undocumented or whose parents are undocumented from enrolling in or attending school.

As with residency requirements, rules vary among States and districts as to what documents students may use to show they fall within State- or district-mandated minimum and maximum age requirements, and jurisdictions typically accept a variety of documents for this purpose. A school district may not bar a student from enrolling in its schools because he or she lacks a birth certificate or has records that indicate a foreign place of birth, such as a foreign birth certificate.

[1] Homeless children and youth often do not have the documents ordinarily required for school enrollment such as proof of residency or birth certificates. A school selected for a homeless child must immediately enroll the homeless child, even if the child or the child's parent or guardian is unable to produce the records normally required for enrollment. *See* 42 U.S.C. § 11432(g)(3)(C)(1).

Moreover, we recognize that districts have Federal obligations, and in some instances State obligations, to report certain data such as the race and ethnicity of their student population. While the Department of Education requires districts to collect and report such information, districts cannot use the acquired data to discriminate against students; nor should a parent's or guardian's refusal to respond to a request for this data lead to a denial of his or her child's enrollment.

Similarly, we are aware that many districts request a student's social security number at enrollment for use as a student identification number. A district may not deny enrollment to a student if he or she (or his or her parent or guardian) chooses not to provide a social security number. *See* 5 U.S.C. §552a (note).[2] If a district chooses to request a social security number, it shall inform the individual that the disclosure is voluntary, provide the statutory or other basis upon which it is seeking the number, and explain what uses will be made of it. *Id.* In all instances of information collection and review, it is essential that any request be uniformly applied to all students and not applied in a selective manner to specific groups of students.

As the Supreme Court noted in the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954), "it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education." *Id.* at 493. Both Departments are committed to vigorously enforcing the Federal civil rights laws outlined above and to providing any technical assistance that may be helpful to you so that all students are afforded equal educational opportunities. As immediate steps, you first may wish to review the documents your district requires for school enrollment to ensure that the requested documents do not have a chilling effect on a student's enrollment in school. Second, in the process of assessing your compliance with the law, you might review State and district level enrollment data. Precipitous drops in the enrollment of any group of students in a district or school may signal that there are barriers to their attendance that you should further investigate.

We are also attaching frequently asked questions and answers and a fact sheet that should be helpful to you. Please contact us if you have additional questions or if we can provide you with assistance in ensuring that your programs comply with Federal law. You may contact the Department of Justice, Civil Rights Division, Educational Opportunities Section, at (877) 292-3804 or education@usdoj.gov, the Department of Education Office for Civil Rights (OCR) at (800) 421-3481 or ocr@ed.gov or the Department of Education Office of the General Counsel at (202) 401-6000. You may also visit http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm for the OCR enforcement office that serves

[2] Federal law provides for certain limited exceptions to this requirement. *See* Pub. L. No. 93-579, § 7(a)(2).

your area. For general information about equal access to public education, please visit our websites at http://www.justice.gov/crt/edo and http://www2.ed.gov/ocr/index.html.

We look forward to working with you. Thank you for your attention to this matter and for taking the necessary steps to ensure that no child is denied a public education.

Sincerely,

/s/

Catherine E. Lhamon
Assistant Secretary
Office for Civil Rights
U.S. Department of Education

/s/

Philip H. Rosenfelt
Deputy General Counsel
Delegated the Authority to
Perform the Functions and
Duties of the General Counsel
U.S. Department of Education

/s/

Jocelyn Samuels
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice

Attachments